



[2014] JMSCCiv. 30

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 01024

BETWEEN	RODERICK CUNNINGHAM	CLAIMANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	1st DEFENDANT
	SUPERINTENDENT CLINTON LAING	2nd DEFENDANT
	CORPORAL HORACE FITZGERALD	3rd DEFENDANT

Mr. Charles R. Campbell for the Claimant.

Ms. Deidre Pinnock Instructed by the Director of State Proceedings for the Defendants.

Heard: July 23, 2013 and February 28, 2014.

ASSESSMENT OF DAMAGES – MALICIOUS PROSECUTION – AGGRAVATED DAMAGES – EXEMPLARY DAMAGES – WHETHER EXEMPLARY DAMAGES APPLICABLE TO THE TORT OF MALICIOUS PROSECUTION

Edwards, J.

THE FACTS

[1] On the 16th of May 2000, a visit by the Claimant, Mr. Roderick Cunningham, to his girlfriend's home was to change his life forever, and not for the better. On leaving her home, the unthinkable happened. Whilst walking in a lane off Jacques Road in the Mountain View Avenue area of Kingston, Jamaica, at about 8.30 pm, under cover of darkness, he encountered heavy gun fire. A bullet ripped into his leg and he fell to the ground. He managed to crawl into a yard and was assisted inside the house by a "Good Samaritan". His leg was shattered with the bones exposed. Whilst he lay bleeding inside

the house, the “Good Samaritan” could only pray. He fell into unconsciousness and came awake to see the 3rd Defendant and other soldiers over him.

[2] He was pulled from the house into the lane and placed into the trunk of a police car along with another man who appeared to be dead. Locked in the trunk of the car he was transported to the Kingston Public Hospital where he was removed to the emergency area bleeding and in pain. He was placed on a ward where the 2nd Defendant came to see him. Thereafter, another group of policemen came and his hands were swabbed for gun powder residue. No gun powder residue was found.

[3] On the morning of the 17th May 2000, he was taken into surgery and as a result of the damage done by the gun shot injury, his right leg was amputated. He was subsequently arrested and charged by the 2nd Defendant for illegal possession of firearm and ammunition, shooting with intent and wounding with intent. He spent five days in hospital under police guard. During that time he was handcuffed to a bed rail. After being discharged he was taken into custody at the Elleston Road Police Station in Kingston then onto Port Royal Police Station where he was locked up for two weeks without facing the court. He was taken to Gun Court on the 12th June 2000.

[4] He was taken to court without crutches and had to hop into court whilst holding onto the walls. He was humiliated and embarrassed as he was stared at by civilians and police. One police officer offered his shoulder to assist him in getting into court. He was offered bail on the urging of Queens Counsel with condition that he report to the police station every day. He attended court thereafter for a period of four years and ten months, where the case was called up numerous times. The trial itself lasted six days. The prosecution’s witnesses were soldiers and police officers including the 2nd and 3rd Defendants. The prosecution presented evidence that he had been in possession of a rifle and ammunitions which was exhibited in court and claimed he fired at the police and soldiers. The swab results however, were negative for gun powder residue. On the 16th March 2005 he was dismissed on a no case submission which was upheld by the learned judge. Although he was dismissed he was placed back into custody and fingerprinted.

THE CLAIM

[5] The Claimant, a mechanic filed this claim against The Attorney General for Jamaica, Superintendent Clinton Laing and Corporal Horace Fitzgerald for damages for malicious prosecution whilst acting either maliciously or without reasonable and probable cause in the execution or purported execution of their duties as servants and or agents of the Crown.

[6] The Claimant also claimed exemplary damages and aggravated damages in consequence of acts committed by the 2nd and 3rd Defendants in pursuance of this malicious prosecution. The 1st Defendant was made a party to these proceedings by virtue of the Crown Proceedings Act.

[7] The Claimant alleged that on the 16th day of May 2000, the 2nd Defendant and or the 3rd Defendant and or other servants or agent of the Crown laid or caused to be laid charges of Shooting with Intent, Wounding with Intent, Illegal Possession of Firearm and Illegal Possession of Ammunition against him maliciously and without reasonable or probable cause. On the 16th day of March, 2005 at his trial all the charges, were dismissed. As a result of the acts committed by the Defendants, the Claimant suffered humiliation, embarrassment, loss and expense.

[8] The Claimant claimed exemplary damages and aggravated damages and relied on the following facts:-

- (a) That in consequence of the false charges laid the Defendants pursued the case for an inordinate period of 4 $\frac{3}{4}$ years and upon his trial the Claimant was dismissed of all charges without being called to answer the charges.
- (b) That as a consequence of false charges laid by the 2nd and 3rd Defendants and applications made by the servants and or agents of the Crown in relation to the condition of bail, the Claimant a disabled person had to report to the Vineyard Town Police Station everyday over a period of approximately three (3) years and thereafter every other day at the Duhaney Park Police Station.

- (c) That as a consequence of the charges laid by the servants and or agents of the Crown, the Claimant reported to the Vineyard Town and Duhaney Park Police Stations in excess of one thousand times.
- (d) That the 2nd Defendant and or the 3rd Defendant by laying the aforesaid charges caused the Claimant to be imprisoned at the Kingston Public Hospital and thereafter at the Port Royal Police lock up in circumstances of great pain and suffering pursuant to the shooting of the Claimant by the 3rd Defendant and or other servant or agent of the Crown resulting in the amputation of his right leg.
- (e) That the Claimant a citizen without any criminal convictions was put to ridicule distress and anguish over a period of 4 ³/₄ years of Court attendance as a consequence of the false charges laid against him by the Second Defendant and or the Third Defendants.

[9] The 1st Defendant admitted liability and filed an amended defence limited to quantum of damages.

SPECIAL DAMAGES

[10] The Claimant is entitled to the cost of defending himself against this malicious prosecution. He provided proof in the sum of eighty two thousand dollars (\$82,000.00) for legal fees and this sum was agreed by the parties. He asked to be awarded a great deal more on his mere say so. I find that there is no acceptable excuse for not having or presenting receipts or other proof of the payment for legal fees.

[11] He also claimed for transportation occasioned by his reporting to the Vineyard Town and Duhaney Park police station for over four years. His mother, who provided transportation, gave evidence that the cost of petrol was \$130 per gallon at the time and that the distance to Vineyard Town was over 30 miles and required more than a gallon of petrol each trip. The distance to Duhaney Park was given as 22 miles round trip costing \$120 per trip. In cross examination she told the court that her daughter went to school in Duhaney Park, so, in any event, she would have had to take her to school and back at the same time she took the Claimant to report. The Claimant also claimed travel by taxi for 216 days at a cost of \$450 dollars per day.

[12] Counsel for the defendant submitted that no award should be made for these expenses. She submitted that the issue of bail is at the discretion of the court and the terms of the bail bond are imposed solely at the discretion of the learned judge. She submitted further that, the costs associated with carrying out the conditions of the bail are too remote and is not a direct loss arising from the tort. It was submitted that these losses by their very nature would be included in general damages.

[13] Without citing any authority, it would appear to me on principle that if a Claimant is unable to recover damages for the period of imprisonment under a judicial remand, then he can no more recover the expenses associated with travelling under a judicial order to report to a police station as a condition of his bail. I agree with council for the Defendants that such damages (in the form of a moderate award) are more indirectly recoverable under the head of general damages for inconvenience and discomfort resulting from the malicious prosecution. There is no basis for any further award under this head.

GENERAL DAMAGES

Malicious Prosecution

[14] Damages for malicious prosecution are usually awarded where a Claimant proves that he was charged for a criminal offence, the law being put in motion against him by the defendant; that the case was determined in his favour by virtue of being acquitted or otherwise and that the prosecutor in setting the law in motion had been actuated by malice or had acted without reasonable or probable cause. The Claimant must also prove that he suffered damage as a result. Section 33 of the Constabulary Force Act reads;

Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.

[15] In this case the 1st Defendant admitted that there was no reasonable and probable cause to prosecute the Claimant for gun and ammunition and wounding charges for which he was tried and acquitted. The charges against the Claimant were serious. He was shot and injured and ultimately lost a leg as a result. He was in custody from 16th May, 2000 to 16th March 2005 and attended court numerous times. He was granted bail and ordered to report to the police station every day, which was later varied to every other day.

[16] The factors affecting an award in this category are; the seriousness of the offence charged, length of time the prosecution lasted, number of times he attended court, any damage to reputation or credit, mental distress or anxiety, humiliation and or disgrace and any inconvenience, indignity and discomfort caused from the fact of the charge against him. Any anxiety felt from the arrest or imprisonment up to the hearing of the case is also included and is the same as would have been recoverable for false imprisonment, the prosecution having created a risk of conviction and loss of liberty and resulting injury to feeling. See McGregor on Damages 17th ed para 38-004.

[17] The authorities cited for the guidance of the court were;

1. **Allan Currie v The Attorney General of Jamaica** No. CL 1989/ C-315 delivered 10th August 2006 where the Claimant was awarded two hundred thousand dollars for malicious prosecution and aggravated damages, for prosecution which lasted 17 months.
2. **Keith Nelson v The Attorney General of Jamaica et al**, claim no. CL 1998/N120 decided April 20, 2007 where, after being shot by a licensed firearm holder the Claimant was charged for assault and the prosecution lasted three months before no evidence was offered by the crown. There was no evidence of any deleterious effects arising from the prosecution and he was awarded four hundred thousand dollars (\$400,000.00) for malicious prosecution. This updates to seven hundred and sixty thousand dollars (\$760,000.00).
3. **Maxwell Russell v The Attorney General et al** claim No. 2006 HCV 4024 where he was awarded two hundred and fifty thousand dollars (\$250,000.00) for nearly one year of prosecution. This award now updates to four hundred and eight dollars (\$408,000.00).

[18] In considering damages for malicious prosecution the court starts with basic damages before any aggravating feature or pecuniary loss is added. In this case, the Claimant attended court for four years and ten months. There were four serious charges against him all carrying possible prison terms of upwards of fifteen years. He attended the Gun Court upwards over forty times. The Claimant was prosecuted despite the fact that a forensic swab of his hand showed that he did not fire a gun that night. He was prosecuted after being shot and having lost a leg in the same incident.

[19] According to counsel for the Defendants, though the prosecution continued for almost five years, the adjournment of the case was not always at the instance of the crown. She noted that adjournments were at the instance of the Claimant nine out of forty times. The crown was ready on five occasions prior to the start of the trial when the case could not proceed on those occasions. Counsel asked the court not to penalize the Defendants for the prolonged period as it was not entirely the fault of the crown. The Claimant suggested an award of one million, six hundred thousand dollars (\$1,600,000.00) and the Defendant suggested an award of eight hundred thousand dollars (\$800,000.00) as appropriate in this case.

[20] Bearing in mind the circumstances in **Keith Nelson**, where there was no deleterious effect arising from the prosecution and that in **Maxwell Russell** and the award made in that case for a prosecution lasting a year and comparing it with the instant case of almost five years, I believe an award of One million, six hundred thousand dollars (\$1,600, 000.00) is appropriate.

Aggravated Damages

[21] The manner in which the Defendant's carried out their malicious acts may lead to aggravation of the damages. Aggravating features which may exist include the humiliation and embarrassment the Claimant was forced to suffer; any high handed, insulting, malicious and oppressive conduct by the Defendants in conducting the trial. It takes into account what the Claimant suffered as a result of "wounded feelings". See Luckoo J A in **Douglas v Bowen** 22 WIR 333 at pg 339.

[22] In the instant case, the Claimant had to report to the police daily, then every other day, for four years and ten months. He was an amputee. The process of reporting sometimes involved attending court and hospital for treatment on the same day. He travelled in excess of 1000 times to report, which is arduous enough for the able bodied but more so for an amputee. He was doing so even before his wounds were fully healed. There were times when he was the object of curiosity and the subject of adverse comments and humiliation by members of the general public and his community.

[23] He was charged whilst in hospital and handcuffed to a bed. He was placed in a lock up after his amputation which was not fully healed and did not face the court for over two weeks. During This time his leg was not properly dressed and was very painful. Even after his discharge from the charges he was not immediately released and was confined whilst being finger printed. As a result he was humiliated and made to still feel a criminal.

[24] The Claimant relied on **Openiah Shaw v the Attorney General for Jamaica** HVC 05443 of 2005 delivered 13 March, 2007, where the court considered the circumstances of hurt feeling and injury to the dignity of a 47 year old higgler being subjected to the description of being a drug dealer and imprisoned. Because of her imprisonment she was unable to attend her son's wedding abroad. A sum of six hundred thousand dollars (\$600,000.00) was awarded for aggravated damages. A sum of eight hundred dollars (\$800,000.00) was suggested by Counsel for the Claimant as adequate for aggravated damages in the instant case. On the other hand counsel for the defendants suggested a sum of two hundred thousand dollars (\$200,000.00).

[25] In the instant case the Claimant was a mechanic. He did not say how, if at all the prosecution affected his vocation. It is clear the loss of his leg would hamper his progress, but it was also clear that he was viewed as a one legged gun man by members of his community. I believe an award of six hundred thousand dollars (\$600,000) is appropriate in this case.

Exemplary Damages

[26] Counsel for the Defendants have argued that no exemplary damages should be awarded in this case, as no award is usually made in the tort of malicious prosecution. She noted that there is no claim for false imprisonment and no such award is usually made in a claim for malicious prosecution alone. She also argued alternatively, that the conduct of the Defendants did not fall within either of the categories in which such an award should be made and that the present case failed the “but only if” test laid out in Lord Devlin’s speech in **Rookes v Barnard** [1964] A.C. 1129 at pg 1228. In commenting on the award of exemplary damages Lord Devlin said that in cases where the making of the award was appropriate, the jury should be directed that if, and only if, the sum they awarded by way of compensation, was inadequate to punish for outrageous behavior and mark their disapproval of such conduct and to act as a deterrence, then they may award a larger sum.

[27] The House of Lords in **Rookes v Barnard** at pages 1226 – 1227 laid down three categories of cases where exemplary damages may be awarded. There it was said that:

“...there are certain categories of cases in which an award of exemplary damages can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into the civil law a principle which ought logically to belong to the criminal...The first category is oppressive, arbitrary or unconstitutional action by the servants of the government...Cases in the second category are those in which the defendant’s conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff...To these two categories which are established as part of the common law there must of course be added any category in which exemplary damages are expressly authorised by statute.”

[28] In **Cassell & Co Ltd v Broome** [1972] AC 1027, Lord Diplock, at page 1131 stated that:

“Rookes v Barnard was not intended to extend the power to award exemplary or aggravated damages to particular torts for which they had not previously been awarded... Its express

purpose was to restrict, not to expand, the anomaly of exemplary damages.”

There is no precedent for the award of exemplary damages for malicious prosecution prior to 1964 (See McGregor on Damages, 16th ed (1997), para 1869, p 1211). The award was, however, well established in claims for false imprisonment, defamation, and trespass to property and assault. In **Cassell & Co v Broome** the court expressed doubt as to whether the category was closed or whether it should be expanded.

[29] The restrictive approach taken in these two House of Lords decisions were never totally accepted throughout the commonwealth legal systems despite the Lords' plea for uniformity throughout the common law. Although accepting in principle that the award of damages for civil breaches is a common law remedy in England and the rest of the Commonwealth which received or inherited such laws, the Court of Appeals in Canada in **Vorvis v Insurance Corp of British Columbia** (1989) 1 SCR 1085 at 1104-1106; in New Zealand in **Taylor v Beare** 1982 1 NZLR 81 and **Donselaar v Donselaar** [1982] 1 NZLR 97 CA, in Australia in **Uren v John Fairfax and sons Pty Ltd** [1966] 117 CLR 118 all affirmed the rejection of the closed categories of cases in which exemplary damages are available. All these cases indicate that the award should be controlled not by restricting the categories but by rationally determining the circumstances that warrant it being made. Those common law countries preferred a broader approach than that taken in the House of Lords in 1964. The approach in Australia was affirmed by the Privy Council in **Australian Consolidated Press Ltd v Uren** [1969] 1 AC 590 PC. In New Zealand in **Taylor v Beare**, the Court of Appeal declined to follow **Cassells v Broome** in holding that the award should be limited to torts for which it was awarded pre 1964.

[30] The House of Lords has since had an epiphany and has now come closer to the position long held in Canada, New Zealand and Australia. In their decision in **Kuddus v Chief Constable of Leicestershire Constabulary** [2001] UKHL 29; [2002] 2 AC 122, they appear to have opened the way for exemplary damages to be awarded in a cause of action for malicious prosecution when it overruled **A.B. v South West Water Services Ltd.** [1993] Q. B. 507 decided in the Court of Appeals. In **AB v South West Water Services Ltd**, it was said, at p 517, that there is the proposition that:

*“The combined effect of **Rookes v. Barnard and Broome v. Cassell & Co. Ltd.** is that such a claim must pass two tests. First, it must be in respect of a cause of action for which prior to 1964 such an award had been made and secondly, that it must fall within one of the two categories identified by Lord Devlin in **Rookes v. Barnard**”.*

[31] However, in **Kuddus**, the House of Lords held that whether exemplary damages could be awarded on the ground of oppressive, arbitrary or unconstitutional action by a public officer depended on the features of the officer's behaviour rather than on the precise cause of action sued on. They held that the fact that a cause of action had not been accepted before 1964 as justifying an award of exemplary damages did not preclude the plaintiff's claim. Lord Slynn of Hadley at para 1 and 21 stated:

*“It seems to me that there is nothing in Lord Devlin's analysis which requires that in addition to a claim falling within one of the two categories it should also constitute a cause of action which had before 1964 been accepted as grounding a claim for exemplary damages ... I do not consider that the House is bound by a clear or unequivocal decision in **Cassell & Co Ltd v Broome** to hold that the power to award exemplary damages is limited to cases where it can be shown that the cause of action had been recognized before 1964 as justifying an award of exemplary damages.”*

[32] The only question is whether the House of Lords decision in **Kuddus** is persuasive authority in this jurisdiction and should be followed. The position as to whether exemplary damages can be awarded for a cause of action for malicious prosecution in Jamaica seems to lie as a starting point in the judgment delivered by Luckhoo, P (Ag.), in **Douglas v Bowen** [1974] 22 W.I.R. 333 at page 344 where he stated that:

*“...the categorization decided in **Rookes v Barnard** as explained in **Cassell & Co. Ltd. v Broome** ought to be adopted and applied in Jamaica...”*

[33] Though the majority in **Douglas v Bowen** accepted the restrictive approach in **Rookes v Barnard** to the three categories of cases, the Court of Appeal said nothing about accepting **Cassells & Co. Ltd. v Broome's** restrictive approach to applying

those categories to pre 1964 causes of action. The case of **Douglas v Bowen** itself was a trespass to property in a private tenancy situation, where although the court at first instance found the actions of the landlord to be a “most outrageous trespass” which was high-handed, oppressive and vindictive, the Court of Appeal took the view that it did not fall into any of the three categories in **Rookes v Barnard**. The Court of Appeal took the view that the common law in Jamaica developed in tandem with that in England. They noted that the first known case of an award for exemplary damages in the jurisdiction was in the unreported case of **Granville Scott v Winfield** decided October 15, 1970. That case, the court stated, fell within Lord Devlin’s first category.

[34] There has been no example before **Rookes v Barnard** of a single award for exemplary damages for the tort of malicious prosecution in English Law and after **A.B. v South West Water Services** in 1993 none was, theoretically at least, possible. I say theoretically because the Court of Appeal in **Thompson v Commissioner of Police of the Metropolis** [1997] 3 WLR 403; [1998] Q.B. 498 CA, in defiance of **A.B. v South West Waters** gave an award of exemplary damages for malicious prosecution brought against the police for conduct in the first category established by **Rookes v Bernard**. Although in that case there was also a concurrent claim for false imprisonment on which the award for exemplary damages is usually made, a separate award for exemplary damages was made for the tort of malicious prosecution. Since **Thompson v Commisioner of Police of the Metropolis** in 1997 and **Kuddus** in 2002, the way is now clearly open for exemplary awards in malicious prosecution in English common Law.

[35] In the cases decided in this jurisdiction involving malicious prosecution where an award has been made for exemplary damages, there was always also (at least in the cases I have examined) a claim for false imprisonment and or trespass to the person or property. Judges have declined to state on which tort the award was based. However, there has been clear indication in all the cases that the award was being made on the basis of the first category in **Rookes v Barnard**. This suggests to me a determination of

the circumstances of the conduct of the agents of the states which would warrant such an award rather than on the nominal head of tort under which it is being claimed.

[36] In my view, the combined effect of **Rookes v Barnard**, **Cassells v Broome**, **Douglas v Bowen** and the interpretation placed on and application of the former two cases in **Kuddus**, is that the award of exemplary damages in Jamaica is restricted to the three categories laid down in **Rookes v Barnard** but there is no restriction on the award to torts for which exemplary damages had been awarded prior to that decision in 1964. The award of exemplary damages may be given for malicious prosecution and may be awarded across a whole range of torts containing a willful element. It is the law in Jamaica and has always been so, that it was the features of the Defendant's behavior rather than the cause of action which was relevant to whether an award would be made or not. It is true that the award is usually made in cases claiming both false imprisonment and malicious prosecution but no court has ever said it can only be awarded for one or the other. The award is made wherever and whenever there is found unacceptable behavior on the part of the Defendant with features exhibiting malice, cruelty, insolence high-handedness, fraud, oppression and arbitrariness. It matters not whether these features appear in the false imprisonment or malicious prosecution.

[37] The purpose of exemplary damages is to punish wrongdoers for conduct, which, in some cases, is referred to as a contumelious or highhanded disregard of a claimant's rights or behavior described as arrogant, flagrant, oppressive or outrageous. It is also made to act as deterrence against potential offenders. The Privy Council in **A v Bottrill** [2003] 1 A.C. 449, on appeal from the New Zealand Court of Appeal in a negligence suit (which was not concerned with the existence of the jurisdiction to make the award but rather with its outer limits), approved the test of outrageousness as the applicable test in New Zealand. The majority noted that cases satisfying that test would usually involve intentional wrongdoing, with an additional element of flagrancy, cynicism and oppression. (Note the case of **Bottrill** was reconsidered and overruled in 2009 by the Supreme Court of New Zealand which replaced the Privy Council as final Court of

Appeal on a point of law irrelevant to this argument). The case accepted that moderate awards were appropriate in cases of “truly outrageous conduct”. I take the view that the same test of outrageousness is applicable to Jamaica. It captures the elements of oppression and arbitrariness, (in the sense of arbitrary and oppressive behavior) as well as unconstitutional actions, in the sense of high handed cynicism and the flagrant disregard for people’s rights. Such a test would limit the award to the most appropriate cases where there is truly outrageous conduct. Otherwise aggravated damages may be sufficient.

[38] Oppressive, arbitrary and unconstitutional conduct by government servants is the first common law category of the award outlined by Lord Devlin in **Rookes v Barnard**. Though awards in this category can legitimately be made, it is not mandatory but is made at the discretion of the court. For exemplary awards, moderation and conservatism is the order of the day, though the award should not be too low, as otherwise it would not be necessary to make one. In **Thompson v Commissioner of Police of the Metropolis**, the English Court of Appeal set out guidelines for making the award in terms of monetary limits; 5000 pounds, being the lower limit and 50,000 pounds being the upper limit in the case of conduct involving a police officer at the rank of superintendent and above. No such guidelines exist here. We are however, guided by similar awards in similar cases. Of course I take the notion that the more outrageous the behavior the higher should be the award. There is also a place for the notion that the award should also vary based on the rank or position of the wrongdoer. The higher the rank or greater the position of the wrongdoer the higher should be the award. This is so for many reasons, the first and simplest of which is that they should know better than their subordinates. Secondly, the public has a greater expectation of proper behaviour from persons who hold high office and supervisory positions, which is tantamount to a fiduciary responsibility. In this case the defendants are a superintendent of police and a corporal in the Jamaica Defence Force.

[39] The factors relied on by the Claimant to support this award is that he was charged and imprisoned whilst in hospital; that having been shot by the 3rd Defendant and or other agents of the state, he was locked up at the police station in great pain

having had a leg amputated which had not yet healed. He also contended that the charges were falsely laid as a result of which he was prosecuted for almost five years.

[40] He was charged with shooting with intent but the evidence of the 3rd Defendant was that when he was shown the Claimant on the night of the incident he identified him as the man who came back for the weapon which had dropped in the lane. He did not say he saw him with a gun shooting at any one. No evidence was given by him of how the Claimant came to be shot resulting in the amputation of his shattered leg. Between 16th May and 12th June he was kept in lock-up with his amputated leg without facing court on his charges.

[41] The agents of the state acted not only with malice but also without reasonable and probable cause in prosecuting the Claimant. There was no evidence that he shot and wounded anyone. Taken at its highest, the evidence of the 3rd Defendant is that after the shooting and the Claimant was found suffering from wounds to the leg in a house, he was identified by him as the man who opened the gate and the man who came for the weapon. The shooting took place at night in a lane and the 3rd Defendant did not purport to identify any of the shooters down the lane. The Claimant was found hours after the shooting in a house. No evidence was given by the 3rdnd Defendant that the Claimant was found in the house clutching a gun. There was no gun powder residue found on his hand.

[42] Their actions in handcuffing the amputee to his bed after amputation under police guard was oppressive and cruel, their imposition of charges of shooting with intent and wounding with intent, the continued prosecution of said charges in the face of negative swab results was arbitrary and high handed. The failure to take the Claimant to court within a reasonable time to be considered for bail was unconstitutional and callous. Their actions taken as a whole might be considered to be outrageous in the extreme.

[43] In **Keith Bent v The Attorney General**, Brooks J took the view that the unlawful pointing of a firearm at a member of the public by the police was outrageous and

arrogant conduct deserving of an award of exemplary damages. An award of one hundred thousand dollars (\$100,000.00) was made. In **Maxwell Russell** the Claimant was shot in the back by the police. An award of four hundred thousand dollars (\$400,000.00) was made in that case. In the instant case I am of the view that an award of one million dollars (\$1,000,000.00) is appropriate.

CONCLUSION

[44] The Claimant is entitled to special damages as proved. He as proved he suffered damage and loss sufficient for the award of general damages, aggravated damages and exemplary damages. I have concluded that there is no basis in law for not awarding exemplary damages in cases of malicious prosecution. I conclude with a quote from S. Daniels and J. Martin, *Civil Juries and the Politics of Reform* (North Western University Press, 1995) pp 2002-4 and cited in *Tort Law Text and Materials* 3rd edition pp 862-863, where they provide a principled justification for punitive damages. They state inter alia that;

“The underlying ethical principle here is that all people are of equal moral value and that it is wrong to treat them otherwise. From this perspective, a wrongdoer has explicitly or implicitly asserted a kind of undeserved mastery and superiority over the victim. In other words, the wrongdoer has expressed a falsehood about the world of value. The purpose of punishment is to reassert the truth of the relative value of wrongdoer and victim by inflicting a publicly visible defeat on the wrongdoer- what we shall term an “expressive defeat”. The magnitude of punishment must reflect the magnitude and, if possible, the nature of the asserted inequality between wrongdoer and victim. The more heinous the wrong- because it expresses more contempt for the victim- the more decisive must be the defeat for the wrongdoer. In this way the victim’s worth can be reasserted. In publicly punishing the wrongdoer, society also is acting to deter others from committing similar egregious wrongs in the future and to express commitment to the value of persons”.

[45] Although this egregious wrong was committed against the Claimant by agents of the state, and the state is only vicariously liable, the onus is on the state to put systems, schemes and operational mechanisms in place to prevent their employees from acting

in this manner. This may include contributions to damages to be deducted from salary or pension but is not exclusively confined to such a system.

[46] I therefore make the following awards:

1. Special damages in the sum of eighty two thousand dollars (\$82,000.00);
2. General Damages in the sum of one million, six hundred thousand dollars (\$1,600,000.00);
3. Aggravated damages in the sum of six hundred thousand dollar (\$600,000.00); with interest at 3% from March 7, 2011 to February 28, 2014.
4. Exemplary damages in the sum of one million dollars (\$1,000,000.00)
5. Costs to the Claimant to be agreed or taxed.