



[2023] JMSC Civ. 110

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2020CV04818

BETWEEN

KURT MITCHELL

CLAIMANT

AND

ATTORNEY GENERAL OF JAMAICA

DEFENDANT

IN OPEN COURT

Mr. Leonard S. Green instructed by Chen, Green & Co. appearing for the Claimant

Miss Kristina Whyte instructed by Director of State Proceedings appearing for the Defendant

Heard: April 12, 2023 and June 19, 2023.

Claim brought by way of Claim Form - Detinue - False Imprisonment - Constitutional Damages – Exemplary Damages - Aggravated Damages

PETTIGREW-COLLINS, J

BACKGROUND

[1] The claimant, Mr. Kurt Mitchell, is a businessman residing in the parish of Saint James. He averred that approximately 6 am on July 1, 2020, he was awakened by his wife and realised that there were police personnel inside his home. His home was searched but nothing illegal was found. The claimant was taken into custody.

[2] Certain items belonging to the claimant, to include a Samsung Note 8 and 1 Apple iPhone cell phones, were taken from his residence. A BMW X6 Motorcar that was in the custody of the claimant was also taken from his home. The motorcar was searched and nothing illegal found inside of it. His licensed firearm and 44 rounds

of ammunition were also taken. He claimed that up to the time of the filing of his witness statement, none of those items had been returned to him. He was kept in custody for some twenty days and later released without ever being charged.

THE CLAIM

- [3]** Consequently, he filed this claim on December 8, 2020, alleging that the police acted maliciously, unlawfully and without reasonable or probable cause.
- [4]** The claimant seeks to recover the sum of one million five hundred thousand dollars (\$1,500,000.00) for security services, having been kept out of possession of his firearm and ammunition, as well as the sum of one million eight hundred thousand dollars (\$1,800,000.00) for loss of earnings. He also claims to recover damages for false imprisonment, detainee and for constitutional breach arising by virtue of the unlawful and illegal detention of his person and the illegal and unlawful detention of his property and the property in which he had a proprietary interest. He also claims exemplary and aggravated damages.

DEFENCE

- [5]** On the occasion of the trial, the defendant's witness, Inspector Marvin Brooks, did not appear. The effect of that non-attendance is that the court can only rely on the evidence of the claimant. This evidence is contained in his witness statement filed on May 20, 2022 as well as the evidence emanating from the brief cross-examination.
- [6]** It is not denied that the claimant was taken and kept in custody for the stated period, but it was alleged that the police had reasonable and/or probable cause to arrest the claimant. It was also averred that the police acted pursuant to Regulation 27 of the Emergency Powers Regulations in carrying out the search of the claimant's premises and motor car.

[7] The defence as filed initially was that the arrest and detention was lawful since it was done pursuant to Regulation 30 of the Emergency Powers Regulations. That position is clearly not now being maintained based on the decision in the case of **Roshaine Clarke v The Attorney General of Jamaica** [2022] JMSC Full 3. The defendant conceded at the trial that there is no defence to the claim for false imprisonment but maintained his defence in relation to all other aspects of the claim. Counsel for the defendant did not concede that there was a breach of the claimant's constitutional rights.

THE ISSUES

[8] I shall consider the claimant's claim under the various heads of damages to determine if the claim has been made out and if made out, what is the quantum of damages to which he is entitled. Given the defendant's concession in relation to the claim of false imprisonment, I do not find it necessary to set out in detail the elements of the tort but will focus on the question of quantum of damages to be awarded to the claimant.

LIABILITY

DETINUE

[9] In the Jamaican Court of Appeal case of **George and Brandy Ltd v Lee** (1964) 7 WIR 275, Waddington JA, at page 278 paragraphs D-E, of the judgment, defined detinue in the following way:

"The gist of the cause of action in detinue is the wrongful detention, and in order to establish that, it is necessary to prove a demand for the return of the property detained and a refusal, after a reasonable time, to comply with such demand. The authorities establish that a demand must be unconditional and specific..."

- [10] Having regard to the definition above and the elements to be established, the claimant must prove not only that the goods were wrongfully detained but that he had made an unconditional demand for the return of the goods and that that demand was not complied with.
- [11] The claimant's evidence is to the effect that the items were taken and that such taking was unlawful, malicious and unconstitutional. It is also his evidence that the items were never returned, however, in response to a question put by the court during the trial, the claimant indicated that the BMW X6 motor car was returned to him about a year after it was taken. There is no question that the items were wrongfully detained. There is, however, no evidence that a demand was ever made for the return of the items or of any of them, and that there was a refusal to release the items to the claimant after the demand had been made. This aspect of the claim fails for want of evidence.

FALSE IMPRISONMENT

- [12] In **John Crossfield v Attorney General of Jamaica and Corporal Ethel Hamilton**, Claim No. CL E 219 of 2001, Morrison, J (Ag.), as he then was, stated that:

“For the tort of false imprisonment to triumph it must be shown that the Claimant was detained against his will without legal justification. The legal justification may be pursuant to a valid warrant of arrest or where by statutory powers a police officer is given a power of arrest in circumstances where he honestly and on reasonable grounds believes a crime has been committed.”

- [13] This court is satisfied that the defendant correctly conceded that a claim for false imprisonment has been made out based on the elements of the tort. The claimant has demonstrated that he was detained against his will without there being any legal justification.

CONSTITUTIONAL DAMAGES

[14] At paragraph 131 of **Roshaine Clarke v The Attorney General of Jamaica** (supra), the full court relied on the following passage from **Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)** [1979] AC 385 Lord Diplock considered the effect of provisions in the former Trinidad and Tobago constitution which substantially reflects the provisions of section 19 of the Jamaican Constitution. There the issue of redress for deprivation of liberty was addressed:

“What then was the nature of the ‘redress’ to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as: ‘Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this’. At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened; but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation. ...”

[15] It is the defendant’s submission that the claimant has failed to particularise which constitutional rights he alleges were breached and that the failure to do so is fatal to the claim for constitutional relief. The defendant further submitted that in order to invoke section 19(1) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011** the claimant was required to indicate which provisions of the **Charter** were contravened. It was also the defendant’s submission that the interests of justice and fairness dictate that the pleadings ought to have particularised the alleged breaches of the claimant’s fundamental rights to enable the defendant to have knowledge of the case he is expected to meet.

[16] Implicit in a claim for false imprisonment, is a claim that one has also been deprived of his liberty and that his movement has been restricted. In this instance, the Attorney General has not resisted the claimant’s claim that he was falsely imprisoned for some 20 days. The claimant pleaded his case that there was a breach of his constitutional rights and for constitutional damages but did not particularize which constitutional right was breached. He also did not specifically

set out what factors constituted the breach, although there is very plainly evidence that supports his allegation of breach of his constitutional right to liberty.

[17] Section 13(3) of the **Charter** guarantees the right to liberty and security of the person and the right not to be deprived of those rights unless it is by way of the sentence of a court in respect of a criminal offence for which the individual has been convicted. Clearly, that right guaranteed to the claimant has been breached.

[18] The right to protection of property is guaranteed under section 15 of the **Charter**. Section 15(1) of the **Charter** provides that no property of any description shall be compulsorily taken possession of unless there is some kind of compensation or consideration in exchange for that property. However, pursuant to section 13(2)(q) of the **Charter**, the right to protection of property, though guaranteed, is not absolute as property may be taken in instances where it is demonstrably justified to do so. In **Rohan Fisher v Assets Recovery Agency and the Attorney General of Jamaica** [2021] JMFC Full 04, it was stated at paragraph 199 that:

“A citizen of Jamaica has the right to protection from being deprived of property by virtue of the fundamental rights and freedom guaranteed by the Constitution. That right, like all other constitutional rights is not absolute. Constitutional rights are guaranteed to the extent that those rights and freedoms do not prejudice the rights and freedoms of others. There may also be derogation from those rights to the extent that such derogation may be demonstrably justified in a free and democratic society. (See section 13(2) of the Constitution) ...”

[19] Section 15(2) of the **Charter** provides for circumstances in which a demonstrably justified limit to the right of protection of property can be imposed. These include but are not limited to instances where the taking of possession is by way of penalty for breach of the law under civil proceedings or after conviction for a criminal offence, upon the attempted removal of the property in question out of or into Jamaica in contravention of any law, in the execution of judgements or orders of the court, or for so long as may be necessary for the purposes of any examination, investigation, trial or inquiry.

- [20] In the instant case, the claimant's property, i.e., two cellular phones, a motor vehicle and a firearm were taken from his home by the police on the day that he was arrested. While his motor vehicle was returned to him a year later, he is yet to receive his two cellular phones and his firearm. The **Charter** does not differentiate between a permanent or a temporary compulsory taking of one's property without compensation.
- [21] The defendant averred that the BMW X6 was lawfully seized. The claimant has averred that there was no reasonable or probable cause for the seizure. The circumstance of the seizure makes it abundantly clear that there was no reasonable and/or probable cause to seize the motor vehicle. There was also no reasonable and/or probable cause to take the claimant's cell phones. In fact, the suggestion made to the claimant, albeit without there being any evidential basis, was that the cellular phones had been returned to him. The defendant has offered no evidence to suggest that the seizure and detention of the claimant's property was demonstrably justified. It has not been said whether the claimant's property was taken by virtue of any of the circumstances set out under section 15(2) of the **Charter** which would justify the taking.
- [22] The circumstances of this case differ from what transpired in the case of **Roshaine Clarke** (supra). In that case, the claimant filed an affidavit in response to the defendant's affidavit. In that affidavit in response, the claimant made new allegations which if borne out, constituted additional breaches of his constitutional rights. He deponed to matters that allegedly occurred during his initial detention that could have been addressed in his first affidavit, but which were not, as well as matters which occurred subsequent to the filing of the fixed date claim form. It was accepted by the claimant's attorney-at-law that the evidence of the subsequent actions as well as the earlier conduct, had not been pleaded. The court declined to consider the new evidence in the absence of those matters being pleaded.
- [23] There is a set procedure laid out in Rule 56.9 of the **Civil Procedure Rules** for bringing constitutional claims. The present claim was not filed in accordance with

that provision. Constitutional damages represents only one head of damages being sought.

[24] There is no provision in Rule 8.9 of the **Civil Procedure Rules** which stipulate that a claimant must specify the section of any law or statute that is being relied on although good practice would dictate that that be done. Rule 56.9(1) states that an application for an administrative order must be made by way of a Fixed Date Claim Form and it should be identified whether relief under the Constitution is being sought. Rule 56.9(2) requires that a claimant must file evidence on affidavit along with the claim form. Rule 56.9(3) sets out the details that the affidavit must contain.

[25] In the case of a claim where redress is sought under the Constitution, Rule 56.9(3)(c) requires that the provision under the Constitution which the claimant alleges has been, is being, or is likely to be breached must be set out. In the case of **Dawn Satterswaite v The Asset Recovery Agency consolidated with Terrence Allen v The Asset Recovery Agency** [2021] JMCA 28, the appellants had questioned the constitutionality of a restraint order which had been granted against them. K Anderson J declined to vary the order to provide for reasonable legal and living expenses for the appellant, Miss Satterswaite. He determined that he had no jurisdiction to vary an order made by another judge of concurrent jurisdiction on the basis that the law relied on by that other judge was unconstitutional. He determined that the constitutional challenge should have been the subject of an appeal to the Court of Appeal with the leave of the Supreme Court or a claim before the Supreme Court that the statutory provision was unconstitutional.

[26] Upon appeal to the Court of Appeal, the following pronouncement was made at paragraphs 134 and 138 of the judgment:

[134] It seems to us that, when confronted with a claim that is not, on the face of it, one by way of originating motion seeking redress for breach of constitutional rights, but which involves or calls for a consideration of such rights, a judge of the Supreme Court is by no means constrained by the rules to take the straight-jacketed approach of refusing the application for reason that the correct

originating document or procedure has not been used. Rather, these provisions bestow on such a judge a discretion to deal with matters that might not, strictly speaking, conform with procedural requirements, in such a way as to achieve the ends of the overriding objective of dealing with cases justly.

*[138] In the result, based on the guidance given in the authorities, it is very important for a party who perceives that a breach of their constitutional rights has occurred, or that questions have arisen in relation to their constitutional rights, to decide how they wish to properly access the court, and to make such adjustments as are legally appropriate in the process through the courts. In any event, we share the view put forward by the Attorney General, that a court need not be constituted as a “Constitutional Court” and a claim need not come before the court, as an originating motion, for a judge of the Supreme Court to determine questions arising, which relate to a party’s constitutional rights, as far as is applicable and necessary, **in cases where the main relief sought is not constitutional redress.** [Emphasis in the original]*

[27] Based on that pronouncement of the Court of Appeal, the trial judge has a discretion to entertain a claim for constitutional relief, where the main relief sought is not constitutional relief, although the format of the claim is not in keeping with the procedural rules regulating the bringing of a constitutional claim. Thus, even though the claim for constitutional relief was not brought by way of a fixed date claim form in this instance, it does not mean that the claim should be refused. It may be said that the main reliefs sought in this claim is for damages for false imprisonment and detinue, as well as lost wages. In this instance, the claim was brought by way of claim form, and there is nothing in Rule 8 of **the Civil Procedure Rules** stipulating that the particular provision alleged to have been breached must be identified. He is required based on Rule 8.7 (1)(a) to include in the claim form a short description of the nature of the claim and by 8.7 (1) (b) to specify any remedy that he seeks. It is set out in that same sub rule that the power of the court is not thereby limited and the court can grant any other remedy to which the claimant may be entitled.

[28] Section 19(1) of the **Charter** does not distinctively state that the specific Charter right which is alleged to have been breached must be identified. I do not view the failure to state specifically which rights were breached as fatal to the claim, when

it is abundantly and unmistakeably plain based on the evidence put forward to support the claim, that the claimant's right to protection of his property and his right to liberty and security of the person and the right not to be deprived of those rights have been breached. This point is particularly relevant with respect to the breach of the claimant's right to liberty and security of the person and the right not to be deprived of those rights, in light of the defendant's concession made in relation to the claim for false imprisonment. The defendant has implicitly accepted by this concession that at least one provision of the Constitution which is clearly identifiable has been breached.

[29] There can be no question that the manner in which the claimant was treated is the result of a grave misuse of state power. I do not believe that the claim should be denied. The claimant is therefore entitled to redress.

AGGRAVATED DAMAGES

[30] In **Thomson v Metropolitan Police Commissioner** [1998] QB 498, two claims were joined. These were claims for damages on account of the claimants being manhandled, assaulted, and abused by police officers employed by the defendant. The claims were for damages for assault, personal injury, malicious persecution, and wrongful imprisonment. At first instance, both claimants were awarded aggravated damages. The defendant appealed against the award of aggravated damages in each case. It was argued that the judge had improperly directed the jury on the issue of aggravated damages and that the awards were excessive. On appeal, the court gave guidance on the approach to be taken when there is a claim for damages under different heads. It was explained in the course of the judgment that:

As the law stands at present compensatory damages are of two types. (a) Ordinary damages which we would suggest should be described as basic, and (b) aggravated damages. Aggravated damages can only be awarded where they are claimed by the plaintiff and where there are aggravating features about the defendant's conduct which justify the award of

aggravated damages. (We would add that in the rare case where special damages are claimed in respect of some specific pecuniary loss this claim should be explained separately.)

- [31] In **Steve Oddman and Orville Bowra v Attorney General of Jamaica and Sergeant Carwood** [2016] JMSC Civ 166, K. Anderson, J stated at paragraph 86 that:

“Aggravated damages’ is the term used to describe an award of a sum of money to a claimant, by a court, in an effort to compensate that claimant, for the injury to that claimant’s proper feelings of dignity and pride, which was caused by the manner in which the tort was committed.”

- [32] In **Denese Keane-Madden v The Attorney General of Jamaica and Corporal T. Webster** [2014] JMSC Civ 23, Edwards J (as she then was), stated at paragraph 45 that:

“[45] Aggravated damages are imposed on a Defendant whose conduct increased the injury to the Claimant, causing distress, embarrassment and or humiliation and damage to reputation. In McGregor on Damages 17th edition, the learned editors in considering the factors tending to lend support to an award under this head said at page 1400 paragraph 37-012:

“The manner in which the false imprisonment is effected may lead to aggravation or mitigation of the damage and, hence of the damages. The authorities illustrate in particular the general principle stated by Lawrence L. J. In Walter v Alltools “that any evidence which tend to aggravate or mitigate the damage to a man’s reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man’s liberty; it also affects his reputation. The damages continue until it caused to cease by an avowal that the imprisonment was false”.

- [33] Further, at paragraph 46 Edwards J observed that the approach to awarding aggravated damages was recognised and adopted by Sykes J in the unreported judgement in **Leeman Anderson v The Attorney General of Jamaica** CLA 017 of 2002, decided on July 16, 2004. She went on to say that,

“Aggravated damages are awarded where the defendants conduct is sufficiently outrageous to merit condemnation and punishment. The outrageous behaviour usually carries features of malice, fraud, cruelty,

insolence and the like. See McGregor on Damages 17th edition at paragraph. 11-0001. Damages under this head is compensatory and not to be lumped with exemplary damages which are punitive.”

[34] Those principles were acknowledged and applied in **Ceon Allen v Percival Johnson & The Attorney General of Jamaica** [2022] JMSC Civ. 16, where the following observation was made:

“Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution.”

[35] It is the claimant’s submission that an award of one million dollars (\$1,000,000.00) would be appropriate in the circumstances. Counsel highlighted what he considered to be the aggravating features of the case. He pointed out that the claimant was detained without ever being charged and during the process of his detention, he was moved to three different facilities without being provided with a reason for his detention until after he retained an attorney at law. Further, the claimant was detained in inhumane and unsanitary conditions, and he was exposed to bacteria which has caused noticeable difference in his physical appearance from when he was first detained. Further counsel pointed to the claimant’s evidence that he was denied food in an aggressive manner when he made enquiries shortly after he was detained.

[36] The defendant’s submission is that no feature of malice, fraud, cruelty or insolence was evident in the defendant’s conduct to warrant an award of aggravated damages.

[37] In **Roshaine Clarke** (supra), the court took into consideration the following factors attendant upon the claimant’s detention thereby meriting an award of aggravated damages:

- (i) the continued detention after the review tribunal had recommended that the claimant’s detention order be revoked;

- (ii) the indignity of being arrested and placed and placed in an open back truck where he could be observed by members of his family including his minor children, the public at large including his community members thereby subjecting him to humiliation and disgrace and which brought him into ridicule and contempt.
- (iii) The failure to inform him of the reasons for his detention; and
- (iv) The inhumane conditions at the place of detention.

[38] In the present case, the claimant was imprisoned for some 20 days. He spoke of being visited by his father and wife daily. He said he slept on wet and cold concrete at the Barnet Street police and Freeport police stations. He said he was severely depressed and traumatized. He also stated that he has suffered loss and humiliation because of his detention. He gave his occupation as a businessman and said that he was unable to carry out his business as a result of being detained. He also complained of the loss of his firearm and of his United States visa. He has not however given any admissible evidence as to how the loss of his visa is connected to his unlawful detention.

[39] One striking feature of the claimant's case is his failure to comply with Rule 8.9 (5) of the **Civil Procedure Rules** which requires a claimant to set out the grounds on which he is relying when he is making a claim for aggravated and/or exemplary damages. The claimant has not done so in this case. He has sought in submissions to advance the basis of an award of aggravated damages. Thus, even though there are features of the case that may be considered as aggravating, the claimant cannot recover damages under that head.

EXEMPLARY DAMAGES

[40] In **Takitota v Attorney General and others** [2009] UKPC 11, Lord Carswell stated at paragraphs 13 of the judgement that,

*“[13] The award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in **Rookes v Barnard** [1964] 1 All ER 367 at 408, to restrain such improper use of executive power. Both Lord Devlin in **Rookes v Barnard** and Lord Hailsham of St Marylebone LC in **Broome v Cassell & Co Ltd** [1972] 1 All ER 801 at 832–833 emphasised the need for moderation in assessing exemplary damages. That principle has been followed in *The Bahamas* (see **Tynes v Barr** (1994) 45 WIR 7 at 26), but in **Merson v Cartwright** [2005] UKPC 38, [2006] 3 LRC 264 the Privy Council upheld an award of \$100,000 exemplary damages, which they regarded as high but within the permissible bracket.*”

[41] At paragraph 14, he continued his exposition of the relevant law:

*[14] The award of damages for breach of constitutional rights has much the same object as the common law award of exemplary damages. The relevant provisions of the Constitution are art 17 (inhuman or degrading treatment) and art 19 (deprivation of personal liberty). The basis of the jurisdiction to award such damages was set out in **A-G v Ramanoop** [2005] UKPC 15, [2005] 4 LRC 301. Lord Nicholls of Birkenhead, giving the judgment of the Board, said (at [17]– [20]):*

‘[17] Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of Ch I rights and freedoms. This jurisdiction is an integral part of the protection Ch 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 this compensation. But this measure is no more than a guide because the award of compensation under s 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 s 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.*

[20] *For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under s 14 is confined to an award of compensatory damages in the traditional sense ...'*

[42] Since the award of constitutional damages serves the same purpose as the award of exemplary damages, there would be double recovery if the claimant were to be awarded damages under both heads. This court declines to make an award of exemplary damages.

SPECIAL DAMAGES

[43] The claimant has not made out a case for special damages. He has pleaded and also asserted in his witness statement that “for the period that I was detained and required recovery, I could not carry out my business’s typical day to day operations. This caused me to lose around (\$1,800,000) at \$60,000 a day for 60 days”. That information does not provide sufficient basis for the award of any sum for lost wages that he has claimed.

ASSESSMENT OF DAMAGES

FALSE IMPRISONMENT

[44] Regarding the quantum of damages for false imprisonment, counsel for the defendant submitted that the case of **Jahmeil Dodd v The Attorney General and Detective Sergeant Leroy Falkner/Faulkner** [2017] JMSC Civ 91 is instructive. At paragraph 34, McDonald J stated,

*“In assessing the quantum of damages for false imprisonment this Court considers the recent decision of **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman** [2016] JMCA Civ. 40, wherein the Court of Appeal, per Morrison P, had regard to the following passage from *McGregor on Damages* (Harvey McGregor QC, 17th Edn. Para. 37-007) as to what the Court will ordinarily consider when making such an award:*

“The details of how the damages are worked out in false imprisonment are few: generally it is not pecuniary loss but a loss of dignity and the like, and is left very much to the jury’s or judge’s discretion. The principal heads of damage would appear to be the injury to liberty, i.e. the loss of time considered primarily from a non-pecuniary viewpoint, and the injury to feelings, i.e. the indignity, mental suffering, disgrace and humiliation, with any attendant loss of social status and injury to reputation.”

[45] In the case of **Denese Keane-Madden v The Attorney General of Jamaica and another** (supra), Edwards J stated at paragraph 21 that:

“[21] In assessing damages under this head, the court is entitled to consider the loss of liberty, any attending injury to hurt pride and feelings, loss of time, loss of social status or reputation, mental anguish and social discredit.

- [46] The claimant’s attorney at law in his submissions has asked that a global sum be awarded for compensatory damages. He submitted that in the circumstances, the amount of eight million dollars (\$8,000,000.00) would be an appropriate award. However, it is the submission of the defendant that the amount of one million two hundred thousand dollars (\$1,200,000.00) should be awarded to the claimant, in the circumstances.
- [47] In **Maxwell Russell v Attorney General for Jamaica and Corporal McDonald**, Claim No. 2006 HCV 4024, the claimant was shot in the back by a police officer and was hospitalized for 10 days under police guard. He was charged but was acquitted of the charges.
- [48] The claimant sued for damages for false imprisonment, malicious prosecution, trespass to the person-assault, aggravated and exemplary damages. The defendants admitted liability in relation to false imprisonment, malicious prosecution and assault but put the claimant to proof of his claim regarding damages.
- [49] Regarding the claim for false imprisonment, it was held that while the claimant gave no evidence to suggest that there was damage to his reputation, the court found that he suffered quite a degree of humiliation, indignity and injury to his feelings and in the circumstances awarded \$515,000.00 for false imprisonment.
- [50] In **Ceon Allen v Percival Johnson & The Attorney General of Jamaica** [2022] JMSC Civ. 16 the claimant was falsely imprisoned for nine days and was awarded \$282,000.00 for day one and \$203,000.00 for each of the eight days that followed. He was awarded a total amount of \$1,906,000.00 for this tort. The claimant has asked the court to have regard to this decision.
- [51] In **Denese Keane-Madden v The Attorney General of Jamaica and another**, the claimant was arrested at the airport upon suspicion of a bottle of cleaning

product that she had in her possession, containing an illegal substance. Upon testing at the airport and at a police facility, there was a false positive for the cleaning containing cocaine. She was charged four days later and spent 94 days in custody without bail. The claimant claimed, inter alia, damages for false imprisonment, exemplary damages, aggravated damages and vindictory damages. Regarding the claim for false imprisonment, the learned judge held that the claimant was entitled to damages for false imprisonment and taking into consideration the fact of the claimant's two previous convictions for drug offences, the elements of injury to pride, reputation, self-esteem and dignity were absent. She was awarded \$180,000.00 for six days.

[52] In the present case, the claimant was locked up for some 20 days. During that period, the claimant was deprived of the freedom to move about as he wished and to conduct his business. He spoke of being visited by his father and wife daily. No doubt, the fact of being in the lock up and being seen by his wife and father must have caused injury to his pride and dignity. The fact of being placed in handcuffs and being transported in the back of a truck, and having to sleep on wet and cold concrete in unsanitary conditions must have had the very same effect. It was no doubt humiliating for the claimant to be transported in the back of a truck along with other persons from his neighbourhood. He said that he was severely depressed and traumatized which of course explained the mental anguish he suffered. As a businessman in his community, there is no doubt injury to the claimant's reputation must have been occasioned, and he must have been lowered in status in the eyes of his community members.

[53] In considering what was an appropriate award for compensatory damages in **Roshaine Clarke** (supra), the court declined to follow the practice of calculating damages by awarding a sum for each day of detention as was established in **Thompson v Commissioner of Police of the Metropolis** [1998] QB 498, and followed in this jurisdiction.

- [54] The court examined the decisions of **Denese Keane-Madden v The Attorney General of Jamaica and another** and **Patrick Whitely v the Attorney General of Jamaica** [2016] JMSC Full 6. The observation was made that applying the daily rate as was done in those cases, would not be the correct approach. Two reasons were stated for not adopting that approach. Firstly, the court observed that the period of detention was very lengthy and as time progressed, the claimant could have made the necessary adjustments for his circumstances. Secondly, the court made an additional award for the aggravating features of the detention.
- [55] Counsel for the instant claimant in his submissions asked the court to award compensatory damages to the claimant. In **Roshaine Clarke** (supra), the claim was brought by way of a Fixed Date Claim Form alleging various breaches of the claimant's constitutional rights and was therefore not a private law claim.
- [56] This court declines to follow the approach in **Roshaine Clarke** (supra). In this instance, the claim was made in private law. There is a distinct head of damages for false imprisonment as evident from a reading of the claim, although it was not itemized in the concluding paragraph of the claim.
- [57] I have considered the awards made in the cases of **Denese Keane-Madden v The Attorney General of Jamaica and another** (supra), **Patrick Whitely v the Attorney General of Jamaica** (supra), **Maxwell Russell v Attorney General for Jamaica and Corporal McDonald** (supra), as well as **Ceon Allen v Percival Johnson & The Attorney General of Jamaica** (supra). I find that an award of one hundred and sixty thousand dollars (\$160,000.00) for the first day and one hundred and twenty thousand dollars (\$120,000.00) for each day thereafter is reasonable. The total award would therefore be two million four hundred and forty thousand dollars (\$2,440,000.00) for false imprisonment.

CONSTITUTIONAL DAMAGES/VINDICATORY DAMAGES

[58] The following passage from **Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2)** (supra) which appears at pages 321-322 of the judgment is also quoted in **Roshaine Clarke** (supra) at paragraph 132:

“Finally, their Lordships would say something about the measure of monetary compensation recoverable under s 6 where the contravention of the claimant’s constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration.”

[59] The claimant submits that an award of two million dollars (\$2,000,000.00) is an appropriate amount for constitutional/vindictory damages. In **Roshaine Clarke** (supra), the court considered the failure to inform Mr. Clarke of the reason for his detention as soon as was reasonably practicable, the failure to bring Mr. Clarke as soon as was reasonably practicable before an officer authorized by law or a court, and the failure to release Mr. Clarke for 26 days even after the Review Tribunal recommended his release. The court considered the continued detention of Mr. Clarke to be particularly egregious. The court awarded four million dollars (\$4,000,000.00) under this head.

[60] The defendant did not put forward a version by way of evidence as to why the claimant was taken out of his house after a search of his house and motor vehicle revealed nothing incriminating and locked up for just about three weeks, then released without ever being charged. The claimant said that the explanation offered whilst he was still in custody after he retained the services of his attorney at law, was the very vague and general assertion that he was being detained on reasonable suspicion of being in illegal possession of drugs and guns.

[61] The court must show disapproval and condemnation of such arbitrary conduct on the part of those whose duty to citizens, is to serve protect and reassure. This court

is of the view that an award of damages for false imprisonment only will not suffice to express the necessary disapproval of the state acting in such a manner to deprive a citizen of his freedom to move about, spend time with family and carry on his lawful business in circumstances where he was never charged.

[62] As was stated in **Maharaj No 2** (supra), compensation by way of constitutional damages “would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration.” The claimant as indicated earlier, has not succeeded in his claim for lost wages as an item of special damages. That does not mean that the court is not entitled to take into consideration the fact that the claimant was at the time of his arrest a businessman and the evidence that he was not able to carry on his business, and that he suffered loss as a result. I do not believe that his failure to quantify that loss should restrict the court in making an award that takes into consideration loss occasioned by his inability to work. The award should also take into account the fact that the claimant was deprived of his property without any justification.

[63] Counsel has sought to draw comparisons between the instant case and the case of **Roshaine Clarke** (supra). The claimant, Roshaine Clarke, was detained on four separate occasions during the period of February 2018 to February 2020, during the Emergency Powers Regulations 2018, more commonly known as the St. James States of Emergency.

[64] Mr. Clarke was detained over the following periods:

- He was first detained on February 14, 2018 for over seven months. He was released September 27, 2019.
- He was detained for a second time on July 15, 2019 until July 18, 2019.
- He was detained for a third time on November 30, 2019 until December 3, 2019.

- He was detained for a fourth time on January 13, 2020, until February 15, 2020

[65] Mr. Clarke did not receive any reason(s) for his detention for three months after the initial detention and this prevented him from putting his case before a review tribunal. He contended that this was a breach of his Charter rights to be informed as soon as is reasonably practicable of the reasons for his detention.

[66] There is no question of a very extended period of detention in the instant case, or repeated detention as happened in the case of **Roshaine Clarke** (supra). Neither is there any question of continued detention after the claimant's release was recommended. The breach of the present claimant's constitutional rights although quite egregious, does not possess the aggravating features that typified the breach in Mr Clarke's case. In this instance I believe that a reasonable award for the breach of Mr Mitchell's constitutional rights is two million dollars (\$2,000,000.00) as sought by the claimant.

[67] In the result, the court makes the following orders:

1. Judgment in favour of the claimant.
2. The claimant has not proven his case in detinue or his claim for special damages.
3. The claimant has not particularized his case for aggravated damages and is therefore not entitled to recover damages under that head.
4. There will be no award of exemplary damages.
5. The claimant is awarded the sum of \$2,440,000 for the tort of false imprisonment.

6. The claimant is awarded the sum of \$2,000,000 for breach of his constitutional rights.
7. Costs to the claimant to be taxed if not sooner agreed.

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A. Pettigrew-Collins
Pusine Judge