

**JUDGMENT**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006 HCV 4024

<b>BETWEEN</b>	<b>MAXWELL RUSSELL</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL FOR JAMAICA</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>CORPORAL MCDONALD</b>	<b>2<sup>ND</sup> DEFENDANT</b>

Mr. Charles Campbell for Claimant.

Miss Danielle Archer instructed by the Director of State Proceedings for the Defendants.

Heard: 6<sup>th</sup> December 2007 and 18<sup>th</sup> January 2008.

**Mangatal J:**

1. This is a claim by the Claimant for damages for false imprisonment, malicious prosecution, trespass to the person-assault, aggravated and exemplary damages. In the Defence dated 1<sup>st</sup> October 2007, the Defendants admit liability in relation to false imprisonment, malicious prosecution and assault, but put the Claimant to proof of his claim with regard to damages.

2. The Claimant describes the relevant events in his witness statement dated 20<sup>th</sup> November 2007. On the 18<sup>th</sup> November 2000 at about 7: 00 a.m. he was walking along Nelson Street in Buff Bay, Portland. He stopped and stood outside a supermarket. About five

minutes later an unmarked car drove up to near where the Claimant was.

3. A man dressed in ordinary clothes like a civilian suddenly jumped out of the front passenger's seat. This man had a shot gun in his hand which he pointed at the Claimant, saying "don't move". It turns out that this man was the Second Defendant Corporal Mc Donald.

4. The Claimant states that he did not know this man before and the Second Defendant did not say who he was or identify himself to the Claimant as being a police officer. As soon as the Second Defendant spoke the Claimant ran off. In a split moment the Claimant heard an explosion followed by another. When the Claimant heard the second explosion he fell to the ground on the road surface. The Claimant lay face down and felt blood coming from his back. The Claimant then realized that he had been shot.

5. After a few minutes some of the other men in the car came and took the Claimant up and took him to the Buff Bay Hospital. The Claimant was subsequently taken to the Annotto Bay Hospital and eventually transferred to the Kingston Public Hospital. The Claimant says that he spent a total of ten days in hospital under police guard.

6. After this time the Claimant says that he was then taken to the Denham Town Police Station and then on to the Port Antonio Police Station for another two days in the lock up. Whilst the Claimant was imprisoned in the lock up he says that the wound had not healed and was very painful.

7. The Claimant was subsequently charged for assault at common law in Port Antonio. Corporal McDonald laid the charge against the Claimant whilst he was in custody in Port Antonio, alleging that the Claimant attacked him with a knife and in defending himself he had to shoot the Claimant.

8. The Claimant states that these allegations were false and untrue. The Claimant attended court at Buff Bay Resident Magistrate's Court on

about five occasions. On the 19<sup>th</sup> September 2001 the case was tried in Buff Bay's Resident Magistrate's Court. Corporal McDonald gave evidence after which the Claimant states that his Attorney-at-Law made a No Case submission which succeeded.

9. The impact of the bullet pitched the Claimant to the ground and he fell on the road while running from Corporal McDonald. As a result the Claimant sustained bruises to his chin, elbow, knees and hands. After he was released from custody the Claimant attended the Annotto Bay Hospital and the Out Patient Clinic at Kingston Public Hospital as the wound was not yet healed. The Claimant says that he still experiences sharp pains in his shoulder and the upper part of his back from time to time.

10. The Claimant had a police guard maintained around him while he was in hospital and he was handcuffed in view of several patients and visitors to the hospital ward. Some of the comments made by these people caused the Claimant embarrassment. During this time the Claimant was handcuffed to a bedrail and was extremely uncomfortable as his hand was in an awkward position and he could not lie down properly. Eventually his wrist became bruised.

11. The Claimant states that he was upset and depressed that after the policeman shot him in these circumstances, he still laid a charge and pursued the matter in court for several months. The Claimant was placed in a cell in Port Antonio with prisoners who were charged with offences before the Portland Circuit Court. They said the Claimant should not be in their company and beat the Claimant up in the cell. The Claimant was punched and kicked in his head, stomach, back and all over his body. He was rescued by an Inspector at the station.

12. Although in his witness statement the Claimant states that he lived at 7 Third Avenue, Buff Bay in the Parish of Portland, in cross-examination he stated that he was not at 7 Third Avenue at the time he

gave the witness statement; he was then and was at the time of this Assessment being held at the lock-up at the General Penitentiary.

### **DAMAGES**

13. The parties agreed special damages in the sum of \$35,750.00. The medical report of Dr. Kevin Brown, Kingston Public Hospital, dated July 12 , 2001, was also admitted in evidence by consent as exhibit one.

### **FALSE IMPRISONMENT**

14. Mr. Campbell on behalf of the Claimant submitted that the period of imprisonment was for 12 days and that this was really not in dispute(though Ms. Archer for the Defendants sought to challenge the period). He submitted that whilst in some of the cases there is a school of thought that the status of the Claimant is important, in others the focus seems to be on the deprivation of liberty. Miss Archer on the other hand submitted that whilst it is the liberty of the person that an award for false imprisonment seeks to secure, the status or reputation of the Claimant/ victim is used to quantify what sum should be awarded.

15. A claim for false imprisonment is maintainable where a person is detained without lawful justification-**Flemming v. Myers and the Attorney General** (1989) 26 J.L.R. 525 at 530 per Carey J.A. **Flemming** and a number of other cases, for example, **Kerron Campbell v. Kenroy Watson and Attorney General of Jamaica** C.L.C. 385 OF 1998, January 2005, an unreported decision of Sykes J.(Ag.), as he then was, and **Glenville Murphy v. Constable Mitchell et al and the Attorney General** , October 2007, an unreported decision of Sykes J. and the English Court of Appeal decision **Thompson v. Commissioner of Police Themetropolic** [1998] Q.B. 498, demonstrate that, like personal injury cases, awards for false imprisonment should be adjusted for future inflation. In **Thompson** Lord Woolf M.R. at page 512 commented that damages for false imprisonment, i.e for loss of liberty, and damages for malicious prosecution, are compensation for something

which is akin to pain and suffering. It is therefore in my view wholly appropriate to use the Consumer Price Indices to update false imprisonment awards.

16. In **Thompson** Lord Woolf. M.R. indicated that the award ought to compensate the Claimant for the first hour or day that he has been deprived of his liberty at a certain rate and thereafter for subsequent time periods on a reducing scale. He stated at page 515:

*In a straightforward case of wrongful arrest and imprisonment the starting point is likely to be about £500 for the first hour during which the plaintiff has been deprived of his or her liberty. After the first hour an additional sum is to be awarded, but that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the plaintiff is entitled to have a higher rate of compensation for the initial shock of being arrested. As a guideline we consider, for example, that a plaintiff who has been wrongly kept in custody for 24 hours should for this alone normally be regarded as entitled to an award of about £3,000. For subsequent days the daily rate will be on a progressively reducing scale.*

17. I have looked at a number of awards for false imprisonment as follows and updated them based on the Revised Consumer Price Index Series for Jamaica:

**Ellis v. A.G.-Civil Appeal No. 37/01**

Award \$100,000.00 for 7 hours to a Justice of the Peace/Civil Servant. Date of award- December 20, 2004, updated approximately \$130,000.00.

**Kerron Campbell v. AG.-C.L.C. 385 OF 1998**

Award \$70,000.00 for 2 ½-3 hours to security

personnel. Date of award- January 6 2005,  
updated approximately \$91,000.00.

**Sharon Greenwood v. AG.-C.L.G 116 OF 1999**

Award \$100,000.00 for 16 hours. Date of award-  
October 26, 2005, updated approximately \$115,000.00.

**Keith Nelson v. Sergeant Gayle and the AG. -C.L. 1998/ N-120**

Award \$200,000.00 for 2 days to draughtsman. Date  
of award- April 24, 2007, updated approximately  
\$211,000.00.

**Herwin Fearon v. AG.-C.L.1990/ F-046**

Award \$280,000.00 for 3 days to minibuss operator. Date  
of award- March 31, 2005, updated approximately \$357,000.00.

**Cornel McKenzie v. AG.-C.L.M088 OF 2002**

Award \$442,000.00 for 26 days to truck driver at  
an express rate of \$17,000.00 per day.

Date of award-June 26, 2003, updated approximately  
\$703,000.00 or \$27,000.00 per day.

18. I accept that the Claimant was falsely imprisoned for a period of 12 days. However, unlike most of the Claimants in the cases that I have looked at, this Claimant has not given evidence to suggest that there was damage as to his reputation, there is no evidence as to his employment or standing or reputation in the community. He would not therefore be entitled to compensation at the same rate as in some of the cases referred to above where reputation was a significant factor.

19. Taking all of the various factors into account, the approach of Lord Woolf commends itself to me and it seems reasonable to award damages for false imprisonment for the first 24 hours at the rate of \$75,000.00 and thereafter at a progressively reducing scale.

20. However, to my mind this Claimant suffered at the hands of the Defendants quite a degree of humiliation, indignity and injury to his feelings. He was beaten up in the prison, and was handcuffed in full view

of patients and visitors to the ward in hospital and suffered distress, depression and great discomfort. I find that these are aggravating features. In the circumstances I consider it appropriate to make an award of \$515,000.00 for false imprisonment. The practice generally has been that in awarding aggravated damages a separate award should not be made. However, in **Thompson** Lord Woolf indicated that although it was contrary to the then practice, juries should make separate awards for the basic award and the aggravated damages in order to achieve greater transparency. I am of the view that whether the award is that of a judge or jury, transparency and detail are important and desirable goals. Woolf M.R. also indicated that in his view aggravated damages should not be as much as twice the basic award. In my judgment it is appropriate to award \$200,000.00 for aggravated damages.

### **MALICIOUS PROSECUTION**

Damages are awarded for malicious prosecution where it is proved:

- (a) That the law was set in motion against the Claimant on a charge for a criminal offence;
- (b) That the Claimant was acquitted of the charge or it was otherwise determined in his favour;
- (c) That when the prosecutor set the law in motion he was actuated by malice or acted without reasonable or probable cause;
- (d) That the Claimant suffered damage as a result.

In the **Keith Nelson** case, Brooks J. made an award of \$400,000.00 for malicious prosecution. In the **Keith Nelson** case, the Claimant was shot and injured by a licensed firearm holder and then subsequently arrested and charged by the police with assaulting the firearm holder. In the instant case, it is the police officer Corporal McDonald who himself shot the Claimant in the back and who arrested and charged him for assault at common law. In the case of **Keith Bent et al v. AG** Suit No. 1998/B330,

an unreported decision of Brooks J., December 2006, following along the lines of an award made by Sykes J. in the **Kerron Campbell** case, Brooks J. awarded the First Claimant Keith Campbell \$90,000.00. Having stated that he did not find the Court of Appeal's award of \$2,000,000.00 for malicious prosecution and aggravated damages in the **Ellis** case helpful, since Mr. Ellis' status was a very prominent feature in the **Ellis** case, at page 13 - 14 of the Judgment Brooks J. stated:

*Keith works with his brother as a handy-man. The circumstances concerning the indignity, humiliation and embarrassment are worlds apart. I would use as a guide, the case of Kerron Campbell ...He was apparently a man of modest means.*

21. In the instant case, the prosecution in the Resident Magistrate's Court went on for nearly a year, so for this lengthy period of time the Claimant had the prosecution hanging over his head and was placed in peril. I find it appropriate to make an award of \$250,000.00 for damages for malicious prosecution.

#### **TRESPASS TO THE PERSON-ASSAULT AND BATTERY**

22. The medical report of Dr. Brown states that the Claimant suffered a gunshot entry wound overlying his right scapula. There was a moderate swelling distending the right axilla which was non-expanding. There was no neurovascular deficit detected in the right upper limb. A chest roentgenogram did not demonstrate any haemopneumothorax and a metallic shadow consistent with a bullet was noted in the soft tissue of the right lateral chest wall.

Dr. Brown indicates that the patient was observed in hospital and the swelling noted to diminish considerably in size. He remained stable and was therefore discharged after one week with arrangements made for follow-up at Annotto Bay Hospital. No adverse sequelae were anticipated.

23. I found guidance in the case of **Donovan Clarke v. Scott and the AG.** reported in Volume 5 of Khan's work on Recent Personal Injury

Awards at page 129. This was an assessment of damages carried out by McCalla J.(as she then was). In that case the Claimant was shot at close range and suffered a single gunshot entry wound and single gunshot wound to the right elbow joint. He had a small superficial laceration to the right side of his chest. The Claimant was taken to the Casualty Department of the Kingston Public Hospital where he had x-rays which were normal, his wounds were dressed and he was sent home. His injuries were not considered serious and there was no permanent partial disability. He was incapacitated for 4 weeks. In February 2000 Mc Calla J. awarded \$210,000.00 for assault. Updated this award amounts to approximately \$432,000.00. I think the instant case is more serious than that of **Clarke** because here the Claimant was hospitalized for a longer time.

24. I also looked at the case of **Renford Facey v. Constable Burnett and the AG.** Reported at Volume 4 of Khan's Work at page 201. However, the Plaintiff's injuries in that case were considerably more serious than those in the instant case.

25. In my judgment an award of \$500,000.00 is appropriate in respect of damages for assault.

### **Exemplary Damages**

26. In this case a claim for exemplary damages has been pleaded. The Claimant in this case was shot in the back while running away from a man who was armed with a shotgun, a man he did not know who was dressed in plain clothes, who pointed the shotgun at him, did not identify himself as being a policeman and said "Don't Move". This is an alarming example of oppressive, arbitrary, highhanded and outrageous behaviour by a servant of the Government. In the **Keith Bent** case Brooks J. awarded \$100,000.00 for exemplary damages. At page 14 of the Judgment his Lordship commented on the type of conduct that merits punishment, with such clarity and lucidity that I cannot help but agree. Brooks J. stated:

*I hope we never get to the stage where the unlawful pointing of a firearm at a man's head, by the police, is not regarded as outrageous, arrogant and cynical conduct.*

27. It seems tolerably clear that shooting a man in the back should be regarded as even more outrageous conduct than simply pointing a firearm at his head.

28. In **Attorney General v. Maurice Francis** S.C.C.A 13/95, an extract of which is included at page 300 of Khan's Volume 5, the Respondent was shot in the back by the police while walking through a short cut. He was seriously injured. The trial judge awarded \$3.5 million as Exemplary Damages. The Attorney General appealed on quantum. On the question of exemplary damages the Court of Appeal ruled that the award of \$3.5 million was excessively high and an amount of \$100,000.00 for exemplary and aggravated damages should be substituted therefore. The Court felt that this sum was adequate to achieve the deterrent effect on employees as well as to achieve better control and supervision.

29. Ordinarily the court will not award exemplary damages if it is satisfied that the award for compensatory damages, inclusive of aggravated damages, sufficiently punishes the wrongdoer for his outrageous conduct. In this case I am not so satisfied and in my judgment this is an appropriate case for the award of exemplary damages.

30. In the **Thompson** case, Lord Woolf M.R. commented at page 312 that it is more difficult to justify an award for exemplary damages where the Defendant and the person responsible for meeting any award is not the wrongdoer, but his employer. In the same vein is Sykes J's comment at paragraph 24 of his judgment in **Sharon Greenwood-Henry** :

*It is said that exemplary damages is to be a deterrent to future conduct of this nature. One wonders whether that laudable objective is achievable without some financial contribution from the offender.*

31. I am aware that there exist Force Orders for the Jamaica Constabulary Force pursuant to which the Attorney General's Department, after looking at the means of the offending police officer, may make a recommendation that the officer pay or contribute to the satisfaction of the Judgment. Assuming that the Second Defendant Corporal McDonald is still a police officer, were such a recommendation to be made by the Attorney General's Department, it would go a long way in fulfilling the purpose of the Court's award of exemplary damages. I would award \$400,000.00 for exemplary damages.

32. Damages are therefore assessed as follows:

Special Damages	\$35,750.00
General Damages	

False Imprisonment	\$515,000.00
Aggravated Damages	\$200,000.00
Malicious Prosecution	\$250,000.00
Assault	\$500,000.00
Exemplary Damages	<u>\$400,000.00</u>

Total General Damages	\$1,865,000.00
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Interest is awarded on special damages in the sum of \$35,750.00 at the rate of 6% per cent per annum from 18/11/00 to 21/06/06 and at the rate of 3% per annum from the 22/06/06 to the 18/01/08.

Interest is awarded on the sum of \$ 1,465,000.00 (i.e being general damages, less the sum awarded for exemplary damages), from the 10/11/06, the date the Defendants acknowledge service of the Claim Form, to 18/01/08 at the rate of 3% per annum.

Costs to the Claimant to be taxed if not agreed.

