JUDGEMENT BOOK COPY

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IN THE SUPREME COURT OF JUDICATURE

BEFORE: MR. JUSTICE BOYD CAREY

COMMON LAW

C.L. 1579 of 1972

PHYLLIS WALKER

vs.

ATTORNEY GENERAL
CONSTABLE EDWARD GEORGE BURKE

C.L. 1580 of 1972

RICHARD MILLENGEN

vs.

ATTORNEY GENERAL
CONSTABLE EDWARD GEORGE BURKE

January 14, February 27, 1976

R.H. Williams, Q.C. for plaintiffs
Lloyd Ellis of Attorney General's Chambers for defendants

These two matters are before me for assessment of damages, the defendants having failed to file any defence. Both plaintiffs claimed damages for assault, false imprisonment and malicious prosecution. In the case of Richard Millengen, there was an additional claim for trespass to goods. The plaintiffs sought to persuade the court that the facts warranted an award of punitive damages, while the defendants argued for compensatory damages, or at most agravated damages. I heard evidence from both plaintiffs on January 14, and reserved the question of my award in order to consider these rival contentions.

The facts must now be set out with some particularity. On 29th December, 1971, Miss Phyllis Walker was chauffering the other plaintiff in his car along the Washington Boulevard. She was signalled to a stop by the defendant, Constable Burke, who was on motor-cycle patrol in that area. He required her name, address and wished to see her driver's licence. She supplied the first two, but

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said that she did not have her driver's licence with her He did not appear satisfied that she was the holder of a licence and directed her to go home and fetch it. Miss Walker doubted whether that was a requirement of the Road Code.

Mr. Millengen who was seated by the driver, entered the discussion at this point, to intimate that the law did allow five days in which a driver's licence could be produced at the police station nearest to the plaintiff. The police constable remained adamant in the face of this knowledge. He was insistent that his order should be carried out. Mr. Millengen gave the officer his name and address, advised him that the car was his and that he was the Crown Solicitor. He stated that they were on their way to find a repairman to check on his refrigerator. The constable was commendably unimpressed by the status of the owner of the car, but his response was to say the least discourteous. Mr. Millengen, he said, "could not tell him how to do his job".

Millengen asked whether the officer would not permit them to go on to Patrick City which was in the neighbourhood, and thereafter go up to Elleston Flats where the other plaintiff resided, and where she could produce her driver's licence. The officer would not permit it. Mr. Millengen gave the constable his personal undertaking that the licence would be produced. These suggestions were all rebuffed. Miss Walker was thereupon arrested and charged with driving without being the holder of a driver's licence, and driving an uninsured motor car. The Crown Solicitor was not to be spared. He was charged for aiding and abetting the commission of those summary offences.

Miss Walker was ordered to drive to the police station. She declined. She was profoundly disturbed by what she had just experienced, and said that she was in no condition to drive. Mr. Millengen offered to do so. The offer was not accepted: Mr. Millengen was a prisoner, and could not be allowed to drive. That ground of refusal is somewhat difficult to appreciate, in view of Miss Walker's status at that time.

A stalemate having been reached, the constable endeavoured to gain possession of the ignition key. Mr. Millengen would have none of

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this. He ordered Miss Walker to hand him the key, which she did. He placed it in the pocket of his shirt. A tussle ensued between Millengen and the constable for possession of the key. Millengen had at this time got out of the car. In the course of this contretemps, a passing motorist was requested by the constable to summon a patrol car. Prior to the arrival of police reinforcements, however, a gentleman named Bond came upon this startling scene. He knew both the constable and Mr. Millengen. The latter asked Bond to identify him to the officer, Bond did so. This independent piece of information, did not affect the attitude of this constable in the slightest.

Two patrol cars, and five motor-cyclists arrived. The constable thought that he should add a charge of careless driving to the already existing catalogue, and indicated as much. When Millengen enquired how he had arrived at this, his riposte was that Millengen would know in court. The police presence provided more than morale; one of the arrivals promised his support in court. Mr. Millengen was understandably aghast at this subversion of justice. It did little good.

Arrangements were made to transport the plaintiffs to the police station. Mr. Millengen was concerned about the safety of his car left unattended on the highway. The officer assured him that he would send a wrecker at Millengen's expense to tow it away, Millengen warned that if any damage was done to his car, government would be responsible. That was a matter of little importance.

The defendant constable then took hold of Miss Walker and began tugging her towards a patrol car. Millengen however was not minded to leave his car. At last, reason prevailed, Millengen was permitted to drive his car with Miss Walker to the police station, although the going was not without incident. The constable could not forebear from pushing Millengen into his car, and when asked to lead the way, retorted, "I do not escort prisoners".

At the police station, Millengen was ordered to lock the car and hand over the keys. He duly locked his car, but was loath to part with the keys. He felt that in the same manner a charge of careless driving had been fabricated, as easily could some other charge, for

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example possession of ganja, be made against him. The constable again grappled with Mr. Millengen in his attempt to obtain possession of the ignition key. Support was not lacking from the other police officers who had, apparently come along to the station. They formed a circle about Millengen and constable Burke, and as Millengen endeavoured to evade the attempts of Burke, he was continually being jostled by the others. Miss Walker who was greatly concerned about Mr. Millengen's safety urged him to hand over the keys. He eventually did so when he was told that the car had been seized for examination by the certifying officer. Miss Walker was led into the station. Millengen followed shortly after this.

The charges already noticed, were formally made, and bail was offered to each of the plaintiffs in the sum of $100 with a surety. Although the police officer at that time, well knew, the identity of Mr. Millengen as the Crown Solicitor, bail with a surety was still being insisted upon. The plaintiffs could not, however, secure their release, because, as they were advised, no senior police officer was present to sign the bail bonds. By this time, Mr. Allan Rae, an attorney-at-law, who had been telephoned, having arrived, offered himself as a surety. Eventually, they were taken to the Constant Spring Police Station where they were released on bail to appear in court on 3rd January. Their ordeal which had begun at 8.15 p.m., on the Washington Boulevard came to an end at 12.35 a.m., on 30th December at the Constant Spring Police Station.

I trust that circumstances such as I have related, are rare in occurrence for this unchallenged catalogue of police action is the most disgraceful and deplorable that I have had the melancholy duty to record. For completion, I would add that the charges were not proceeded with, although the plaintiffs duly appeared at the Traffic Court. On 30th December, 1971, the driver's licence of Miss Walker was produced and found to be in order.

Mr. Williams, as I have previously indicated, pointed to the conduct of the constable as within the first categorization of Lord Devlin in Rookes v. Barnard (1964) 1 All E.R. 367 at p. 410, namely, "oppressive, arbitrary or unconstitutional action by the servants of the government". The case of Cassell & Co. Ltd. v. Broome (1972) 1 All

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E.R. 801 suggests that the interpretation of servants of the government should be extended to include police officers. See the opinions of Lord Hailsham L.C., Lord Reid, Lord Diplock and Lord Kilbrandon. Some Commonwealth jurisdictions have not chosen to follow Rookes v. Barnard, notably Australia, New Zealand and Canada. In Douglas v. Bowen reported in C.A.J.B. Volume 11, page 297, the Court of Appeal [Luckhoo P. (ag.) Edun J.A., Graham-Perkins J.A., dissenting] held that Rookes v Barnard should be followed in this country. If therefore, the evidence comes within Lord Devlin's first category, the plaintiffs would be entitled to be awarded punitive damages, since I must loyally follow decisions of the Court of Appeal.

Where servants of the Crown, act outside their powers, it is almost always possible to say that such action on their part, is arbitray, or oppressive. A police officer for example who arrests a citizen in circumstances where the Law gives him no power to do so, could be said to be acting arbitrarily, and it is quite possible to conceive of situations where such an unlawful arrest might even be regarded as oppressive. I do not think, however, that Lord Devlin was creating a category of cases, in which an award of punitive damages, was as inevitable as night following day. Indeed he was restricting severely the award of such damages.

The purpose of damages is essentially to compensate an aggrieved person for some "injuria". But there is also a secondary object, which is to punish a defendant whose conduct merits punishment.

> "Damages are designed not only as a satisfaction to the "injured person, but likewise as punishment to the guilty, "to deter from any such proceedings for the future, and as "proof of the detestation of the injury to the action itself". Per Pratt C.J., in Wilkes v. Wood (1763) 2 Wilks. K.B. 205.

The conduct must then merit punishment. This is an anomalous situation, for it is the function of the criminal law to inflict punishment, and the purpose of an action at law, to obtain redress by way of compensation. The award of exemplary damages is, however, an anomaly which the common law permits, and which Rookes v. Barnard (supra) seeks to restrict. Ibid p. 411. Conduct which merits such an award should in my judgment go beyond a mere want of jurisdiction, and should be accompanied by

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arrogance, insolence, humiliation, brutality and the like. This is not intended as any exhaustive list of situations, which I venture to put forward as indicative of the sort of conduct, which might call for an award of such damages.

Lord Devlin based his formulation of this first category on three cases, of some antiquity, namely, Huckle v. Money (1763) 2 Wils. K.B. 205; Wilkes v. Woods (1763) Lofft. 1; Benson v. Frederick (1766) 3 Burr. 1845. In the first two cases, the government was concerned to prevent publication of a paper the "North Briton" and actions were brought by private citizens who had suffered interferance at the hands of public officials. Both these cases involved the arbitrary and outrageous use of executive power. In the last case, the plaintiff was flogged at the order of his colonel, to "vex a fellow officer". This could be fairly described as a brutal use of power.

Support for the view I have formed as to the sort of situation which calls for an award of punitive damages, may be gathered from a dictum of Wooding C.J. in Marshall v. Semper 10 W.I.R. 129 at 132, where he said, that "exemplary damages should never be awarded against a defendant whose conduct has not been such as to call for punishment or deterrence merely because a co-defendant has been found to be within one of the categories of persons who should be punished or deterred". [Words underlined, mine].

In Hussien v. Chong Fook Kam (1970) A.C. 942 the Privy Council held that it is proper to mark any departure from constitutional practice, even if only a slight one, by exemplary damages. It might be thought that Lord Devlin was suggesting that an award of exemplary damages, was inevitable where official conduct fell within the first category of Rookes v. Barnard (1964) 1 All E.R. 36. But the Board was approving a dictum of Scott L.J. in Dumbell v. Roberts (1944) 1 All E.R. 326 at 329 where the learned Lord Justice said:

> "The more high-handed and less reasonable the detention is, "the larger may be the damages; and, conversely, the more "nearly reasonably the defendant may have acted and the "nearer he may have got to justification on reasonable "grounds for the suspicion on which he arrested, the smaller "will be the proper assessment".

What I suggest is to be extracted from these dicta, is that there must be conduct which merits punishment. The amount of the

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punishment will vary as the conduct is high-handed or less so.

An award of aggravated damages may be justified by reason of the manner in which the "injuria" was caused. In all personal torts, the plaintiff is entitled to show how the injury was inflicted because it may be relevant to the issue of damages. So in actions for defamation, where, as is well known, damages are given for injured feelings and reputation, the conduct of the defendant eg. malice or persisting in false charges are factors which may be considered as aggravating the damage and so increasing the amount of damages.

What was being argued by Mr. Ellis on behalf of the defendants and I hope I do no injusitice to his submissions was, that the status of Mr. Millengen as Crown Solicitor should not provoke the court to award punitive damages. Indeed, the status of that plaintiff should be ignored altbgether.

In torts affecting reputation such as false imprisonment, malicious prosecution, defamation, the status of the plaintiff is a relevant consideration. Lincoln v. Daniels "The Times 24th and 25th June, 1960 - the higher the status of the plaintiff, the higher the damages. I accept that the status of the plaintiff is irrelevant when the alternative choices are being made. It affects rather the quantum of damages.

In considering these alternative choices, it would seem that in general the surrounding circumstances will differ in degree only. Both will involve circumstances of aggravation but in the one the facts should be so oppressive or high-handed or brutal as to warrant punishment or deterrence; in the other, an increase in the award would suffice as representing an adequate assessment of any factor of aggravation. In punitive damages, the amount over and above compensation for aggrieved feelings is really a fine: it is not an assessment of compensation. Therein lies the anomaly of such an award.

The case of Valentine v. Rampersad 17 W.I.R. 12 which was concerned with a similar choice, is instructive. The trial judge there regarded the action as a proper case in which an element of aggravation should be taken into account in assessing compensatory damages but declined to award exemplary, i.e. punitive damages, because he was not

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persuaded that the respondent's conduct was either so high-handed or ruthless to warrant punishment. The respondent had committed acts which, if done in this country, would amount to an offence under the Rent Restriction Act of "doing an act calculated to evict a tenant". (Sec. 27 Rent Restriction Act). The Court of Appeal of Trinidad (Phillips, Fraser and de la Bastide JJ.A.) unamimously held that the respondent's conduct was oppressive in a real sense and warranted punishment by exemplary damages.

Let us see, therefore, whether the facts in these actions before me, merit awards of exemplary damages or of aggravated damages. One final matter should first be disposed of. The award does not depend on the nature of the tort, but whether the defendant's tortious conduct, comes within Lord Devlin's first category. Nothing in Lord Devlin's formulation restricts the range of torts and punitive damages had hitherto been awarded in a wide range of tortious conduct.

The order of the police officer to Miss Walker to return home for her driver's licence was not one permitted by the Road Traffic Law. His insistence on her returning home to procure it, clearly went beyond a mere want of jurisdiction. It was arbitrary. After Miss Walker had declined to drive to the police station because of her nervous condition, the police constable's refusal of Mr. Millengen's offer to drive his own car to the police station, was clearly unreasonable. Prior to the arrival of police reinforcements, the officer had information from an independent source as to the status and identity of Millengen. A charge of careless driving was added. Not only was there a want of reasonable and probable cause, this was malicious conduct: it was explicable only on the ground that the constable was actuated by spite.

Then his action in forcing Miss Walker towards the police car, was quite unnecessary: the use of force was uncalled for. This was oppressive conduct. The assault upon Mr. Millengen at the police station in an endeavour to get the ignition keys, also tended to show that this police constable was not concerned with his duty to serve.

The insistence on bail with a surety in these circumstances was also arbitrary and oppressive conduct. The officer well knew the identity of Mr. Millengen. To demand that the Crown Solicitor enter into Bond with a surety in respect of charges which were without foundation,

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could only be described as humiliating outrageous and arrogant. The entire performance of the defendant constable is the sort of conduct which should be visited with punishment so as to deter this constable and others.

There was no evidence that the car had any mechanical or other defect. At any rate, the constable had not intimated any such either to the driver or the owner. The wrongful detention of Mr. Millengen's car, was all a part of the malevolence and spite of this officer. I have come to the conclusion that the actions of the defendant constable comes within Lord Devlin's first category, as being oppressive and arbitrary. Both plaintiffs are therefore entitled to an award of punitive damages.

The statement of claim was amended to allow a claim for special damages of $100 as attorney's fee in each case. The plaintiffs are each entitled to that amount.

In so far as Miss Walker is concerned, I assess damages as follows:-

Special Damages	$ 100.00
Assault	$ 500.00
False imprisonment Malicious prosecution	$3,000.00
	$3,600.00

In respect of Mr. Millengen's claims, I assess damages as follows: -

Special Damages	$ 100.00
Assault	$ 1,000.00
False imprisonment Malicious prosecution	$ 3,000.00
Trespass to goods	300.00
	$ 4,400.00

Before parting with this case, I feel compelled in the light of these facts to recommend that the appropriate authority should order this police officer to pay or repay (as the case may be) the greater portion of these amounts.

B.H. Carey
Puisne Judge.