[2016] JMCA Civ 40

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 132/2009

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA (AG)
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**JOHN CROSSFIELD**	**APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1st RESPONDENT**
	CORPORAL ETHEL HALLIMAN	**2nd RESPONDENT**

Miss Colleen Franklin and Mrs Andrea Lannaman instructed by Marion Rose-Green & Co for the appellant

Miss Marlene Chisholm instructed by the Director of State Proceedings for the respondents

20, 24 June and 8 July 2016

MORRISON P

Introduction

[1] This is an appeal from a part of the judgment of B Morrison J (Ag), as he then was, given in the Supreme Court on 10 September 2009. The respondents were adjudged to be liable to the appellant for the torts of false imprisonment and malicious prosecution and ordered to pay damages of $240,000.00 in respect of the former and $500,000.00 in respect of the latter. The respondents were also ordered to pay interest on these amounts in the manner set out in the judgment.

[2] The appellant's principal complaint in this appeal is that the amounts awarded by the judge for damages were insufficient compensation for the wrongs done to him. In addition, he contends that the judge erred in declining to award him aggravated and/or exemplary damages. The respondents say, on the other hand, that the amounts awarded by the judge constitute adequate compensation in all the circumstances and ought not therefore to be disturbed.

[3] On 24 June 2016, this court made the following orders:

1) Appeal allowed and the judgment of B Morrison J (Ag) is varied as follows.

2) Judgment is entered for the appellant against the respondents for -

(i) false imprisonment in the sum of $600,000.00, with interest at the rate of 6% per annum from 2 May 1996 to 21 June 2006 and thereafter at the rate of 3% per annum from 22 June 2006 to 10 September 2009;

(ii) malicious prosecution in the sum of $1,500,000.00 with interest at the rate of 6% per annum from 2 May 1996 to 21 June 2006 and thereafter at the rate of 3% per annum from 22 June 2006 to 10 September 2009;

(iii) aggravated damages in the sum of $400,000.00

3) Costs of the appeal to the appellant to be agreed or taxed.

[4] These are my reasons for concurring in these orders.

The factual background

[5] The appellant's claim against the respondents arose in the following way. The appellant was at the material time employed to Environmental Security Company Ltd (ESC Ltd) as an unarmed security guard. His evidence was that he was also an entertainer. His stage name was 'Red Danger'.

[6] On 2 May 1996, the appellant, along with another security guard, was stationed at the Queen's Warehouse (the warehouse) at the Norman Manley International Airport. At about 10:15 pm, the appellant saw a car enter the premises with four men aboard. The men, who the appellant thought to be suspicious-looking, attempted to break into the warehouse. The appellant sought the assistance of members of the Jamaica Defence Force (JDF), who were stationed nearby at the Norman Manley Alpha One Base. He requested that they call the police. The soldiers accompanied him back to the warehouse, by which time the men had left the warehouse compound. But, shortly thereafter, at about 11:00 pm, the same car returned to the warehouse compound, forcing the appellant to seek assistance again - this time unsuccessfully - from the soldiers. Upon the appellant's return to the warehouse compound, he now saw three men trying to pry open the grill to the warehouse. A fourth man was directed by one of the others to keep guard over the appellant. While he was being so guarded, a police

car drove onto the warehouse compound and the miscreants dispersed in various directions. The second respondent was one of the police officers in the car.

[7] That same night, the appellant gave a statement to, and was rigorously questioned by, the police. The next thing that happened was that the appellant found himself being arrested and charged by the second respondent for unlawfully dealing in cocaine, unlawfully taking steps to import cocaine, unlawfully having cocaine in his possession, unlawfully having in his possession warehouse-breaking implements and breaking and attempting to enter the warehouse. The appellant, who was taken into custody that said night, was detained for four days before being taken before the court on the 6 May 1996. He remained in custody until he was eventually granted bail on 11 July 1996.

[8] Of his time in custody, the appellant said this[1]:

> "22. I was handcuffed and placed in lock up. I was still in my uniform and begged the police to allow me to change my uniform and they said they do not have anytime for that. Some guys inside the lock up rushed towards me, they called me an informer and told me that I am going to die.
>
> 23. I felt so embarrassed as other member [sic] of the public, who came in the police station saw me in the lock up.
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> 24. I was taken to the Central Police Station and placed in a cell. Throughout the journey from Norman Manley Police Station to Central Police Station I was handcuffed and treated with grave disrespect.

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[1] At paras 22-36 of his witness statement dated 25 September 2007

25. The cell at Central Police Station was unbearable. The cell was over crowded. I shared the crowded cell with a number of other persons including murderers and gunmen.

26. I was taken from the Central Police Station on several occasions to the Half-Way-Tree Court and Ms. Halliman opposed bail. On each attendance to Court I thought I would be granted bail and released from jail but I was denied bail. I was in deep distress and cried on each occasion and I felt like dying, as I knew I had to return to the terrible conditions of the jail cell.

27. I was denied bail and spent about eight weeks in jail and was granted bail in July 1995 [sic]. Throughout this time the other inmates constantly abused me. During the time I was locked up, I was in constant fear for my life, as the other inmates branded me as an informer and threatened to do me harm. I was distressed and get [sic] little sleep. I cried, knowing that I tried to do the right thing and was being punished.

28. At one point, one of the inmates slapped me in my face and called me informer, whilst I was in handcuff and in the presence of the police.

29. The cell was [a] filthy, dirty hole with rats, roaches and every imaginable insect. The floor and walls had faeces and urine all over. Although pails were provided some prisoners would just defecate and urinate on the floor. I had to past [sic] urine and faeces in a pail in the presence of other prisoners.

30. I was itching all over my body and I developed diseases including skin fungus and chickenpox.

31. I was concerned about some of the prisoners because of the condition they had to endure and some were not in their right minds.

32. At nights I lay down on the cold concrete and when I was lucky I was able to get a piece of cardboard. Some of the prisoners even defecate and urinate on the cardboards. I thought I was going out of my mind due to the terrible conditions I had to endure.

> 33. The food that was provided was poorly cooked, it was insipid and cold. When I could eat, I had to eat in the filthy and unbearable condition of the cell. I was often times nauseous and sick because of the terrible inhumane conditions of the cell.
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> 34. During the time of my arrest my then common-law spouse, now wife, was a constable of police and working at the Half-Way-Tree Police Station. She would visit me. She was accused of being involved with a druggist and was investigated. When my wife came to visit me in lock up, she was treated with grave disrespect from other police officers.
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> 35. In jail I was threatened. One of the inmates told me that 'boy you a go dead early, you are an informer' I feared greatly for my life.
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> 36. I suffered great embarrassment as the information about arrest [sic] was published in the Daily Gleaner. This caused damage to my reputation, which was very distressing and humiliating. My then, common-law spouse and child's mother was and still is a member of the Jamaica Constabulary Force and my relatives was [sic] traumatized not only by my arrest but also the publication."

[9] On various dates (over 30 in all) between 6 May 1996 and 6 March 2001, the appellant was obliged to appear before the Half Way Tree Resident Magistrates Court. Over that period, various witnesses, including the second respondent, gave evidence for the prosecution. Finally, on 6 March 2001, the prosecution decided to offer no further evidence against the appellant and the proceedings against him were dismissed.

[10] For most of this period, the appellant remained employed to ESC Ltd as a security guard. But he resigned in 2000 to take up a better offer with another security company, to which he was still employed at the time of the trial of this matter in the court below. However, his evidence was that after he returned to work after his release

from custody in 1996 he underwent strict scrutiny and that other security officers made ugly comments about his character and called him all sorts of "despicable names".

The proceedings in the court below

[11] As a result, the appellant commenced proceedings against the respondents for damages for false imprisonment and malicious prosecution. In his statement of claim dated 10 October 2001, the appellant alleged that (i) the respondents acted falsely, maliciously, wrongfully and/or without reasonable and/or probable cause; and (ii) the conduct of the second respondent was "arbitrary, oppressive and/or unconstitutional". In these premises, the appellant claimed exemplary and aggravated damages. In their defence dated 23 July 2002, the respondents denied that the appellant had been arrested falsely and without reasonable and/or probable cause as alleged and specifically denied that the appellant was entitled to exemplary or aggravated damages.

[12] After a three day trial, the judge concluded that the second respondent had no reasonable grounds for suspecting that the appellant had committed any offence and found that he had therefore been falsely imprisoned. The judge considered that, had the second respondent investigated the matter properly, she would have been able to obtain confirmation of the appellant's account of what had happened from the JDF personnel at the nearby base. Instead, the judge said[2], in his, as usual, special way –

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[2] At page 8 of the judgment

> "... there was a rush to judgment – A heedless and mindless rush that obtunded the need for objectively investigating the matter instead of subjectively relying on the dynamic, the appearances, that intruded upon her in the anticipated criminality".

[13] As regards damages for false imprisonment, the judge pointed out that the appellant was brought to court on 6 May 1996, that is, four days after his arrest. The period of detention for which the respondents were liable to the appellant was therefore four days, on the basis that his remand in custody thereafter was pursuant to an order of the court and therefore lawful. The judge then considered the authorities which were cited to him by the appellant's counsel. These included **Herwin Fearon v The Attorney General of Jamaica and Constable Brown**[3], in which the claimant was awarded $280,000.00 for three and a half days detention. The judge then concluded as follows[4]:

> "The Claimant has asked for a sum of $600,000.00 whereas the defendants suggest a figure of $195,000.00. I think that the figures of $600,000.00 and $195,000.00 are in the first instance an over-exaggeration and in the second instance an underestimation. Using the benchmark of **<u>Fearon's case</u>** and bearing in mind the antecedents of the current claimant, the unproven trauma and undoubted embarrassment that he suffered, I think, that a sum of $60,000.00 per day is apposite bearing in mind that every passing hour in custody etches its corrosive effect on the mind. Thus, I award the sum of $240,000.00 for false imprisonment." (Emphasis as in the original)

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[3] Claim No 1990/F - 046, judgment delivered on 31 March 2005
[4] At page 10

[14] In relation to the claim for malicious prosecution, the judge concluded that the elements of the tort had also been amply made out, in that the appellant had been taken before the competent court; the proceedings had been terminated in his favour; the second respondent had instituted those proceedings with malice or had acted without reasonable or probable cause; and that the appellant had suffered damage as a result.

[15] However, on the question of damages, the judge found that "[n]ot one iota of evidence" was presented to show that the appellant had suffered any diminution in his reputation as a result of the proceedings. The judge also found[5] that the charges against the appellant "did not prevent him from going about his normal business ... did not injure his [job] prospects as in fact he got a better paying job, and lastly ... did not affect ... his relationship with his wife and indeed, any member of the community of his residence".

[16] Turning to the authorities relied on by the appellant to justify the award of $5,000,000.00 sought by him under this head, the judge considered the case of **Keith Nelson v Sgt Gayle and the Attorney General of Jamaica**[6] to be apposite. In that case, despite his finding that there was no evidence of "any deleterious effect" on the claimant as a result of his having been kept before the court for a period of three

[5] At page 11
[6] Claim No CL 1998/N - 120, judgment delivered on 20 April 2007

months, Brooks J (as he then was) awarded $400,000.00 as damages for malicious prosecution. In the instant case, the judge indicated[7] that he would "abide [sic] the authority of **Keith Nelson** and award the sum of $500,000.00 for malicious prosecution".

[17] The judge then dismissed the claim for exemplary damages, on the basis that it was "not pleaded as required"[8]; and, as regards the claim for aggravated damages, the judge said nothing at all.

The appeal

[18] Dissatisfied with the quantum of damages awarded by the judge, the appellant filed this appeal. At the outset of her admirable submissions on his behalf, Miss Franklin summarised the grounds of appeal as follows:

> (1) The learned trial judge erred in that he failed to make an award for aggravated damages and/or exemplary damages (ground one).
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> (2) Having regard to the injuries of the appellant and the evidence of the appellant and on behalf of the appellant, awards of $240,000.00 for false imprisonment and

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[7] At page 13 of the judgment
[8] Ibid

$500,000.00 for malicious prosecution are manifestly low (ground two).

(3) The awards made by the learned trial judge are grossly unreasonable and way below awards made by the court for similar injuries (ground three).

[19] It may be convenient to deal with grounds two and three, both of which raise essentially the same issue, ahead of ground one.

Grounds two and three: damages for false imprisonment and malicious prosecution

[20] These grounds raise the issue of whether the judge's awards for general damages for false imprisonment and malicious prosecution were adequate in all the circumstances. In respect of both, Miss Franklin submitted that the judge's awards were inordinately low and that they should accordingly be increased by this court. In making this submission, Miss Franklin readily acknowledged the traditional reluctance of appellate courts to interfere with awards of damages made by trial judges[9], but maintained that in this case the judge's awards were sufficiently low to warrant this court's intervention.

[9] As to which, see further para. [51] below

[21] For the basis upon which a court will ordinarily make an award of damages for false imprisonment, Miss Franklin referred us to the following passage from McGregor on Damages[10]:

> "The details of how the damages are worked out in false imprisonment are few: generally it is not a 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."

[22] Miss Franklin complained in particular that, although the judge had indicated that he would treat the case of **Herwin Fearon** as a "benchmark", his actual award of $240,000.00 did not reflect this. She based this submission on the fact that, when updated to the date of trial in the instant case, the award of $280,000.00 for three and a half days' detention in **Herwin Fearon** would have amounted to $447,960.62.

[23] Miss Chisholm candidly acknowledged the force of this submission by observing that it was not clear to her how the judge had in fact distinguished between the two cases. In this regard, Miss Chisholm very helpfully drew our attention to the decision of this court in **The Attorney General v Glenville Murphy**[11], in which, speaking for the court, Harris JA explicitly sanctioned the practice in false imprisonment cases of "using

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[10] Harvey McGregor QC, McGregor on Damages, 17th edn, para. 37-007

[11] [2010] JMCA Civ 50, para. [20]

comparable awards as the basis in making an award and applying the Consumer Price Index thereto".

[24] In **Herwin Fearon**, the court found that the claimant had been unnecessarily detained from the afternoon of 3 July 1989 to the morning of 7 July 1989. As regards the manner of his initial detention and the conditions under which he was detained, the trial judge said this[12]:

> "The manner in which the claimant had been taken to the police station and the conditions under which he had been kept at the police station would have caused him humiliation. He is a minibus operator in the May Pen area [sic] He is well known in the area and this would have resulted in damage to his reputation.
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> He was pushed to the police station. On the first day of his detention, the claimant was kept in a grilled area of the police station. On the following days, he was placed in a very small cell with eight other persons some of whom were charged with murder. This cell was filthy and reeked with the odor [sic] of urine. He had no opportunity to lie down. He had to sit on the concrete floor during his sojourn there. Clearly he would have been very uncomfortable. This would have affected him emotionally and would have caused him mental anguish and humiliation."

[25] In assessing the damages for false imprisonment in **Herwin Fearon**, the trial judge considered previous awards made in like circumstances, compared them with Mr Fearon's case and updated those awards to reflect the then current money values, before arriving at a figure of $280,000.00. In my view, the circumstances in which the

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[12] At page 9

appellant was unlawfully detained in the instant case were certainly no less egregious – and may in fact have been somewhat worse - than those of Mr Fearon's detention. So it seems to me that, applying the method adopted by the experienced trial judge in that case, and approved by this court in **Attorney General v Glenville Murphy**, the appellant ought to have been awarded at least the same amount as Mr Fearon, in the money of the day at the time of trial.

[26] I have therefore come to the conclusion that Miss Franklin has made good her case for an increase in the damages for false imprisonment. Miss Chisholm, who did not disagree, suggested a figure of $520,000.00, on the basis that the award in **Herwin Fearon**, when updated, would have supported an award of damages for false imprisonment of $130,000.00 per day at the date of trial in this case. Bearing in mind the extent of the claimant's ordeal in this case and taking all things into account, I considered the amount of $600,000.00 contended for by Miss Franklin to be more reasonable in all the circumstances.

[27] Turning now to the question of damages for malicious prosecution, Miss Franklin made the essentially similar complaint that the judge's award of $500,000.00 was manifestly low when compared with other cases of like nature. She submitted that, given the extended period over which the appellant had been before the court, an award of $2,000,000.00 would have been appropriate in this case.

[28] I will first consider the basis upon which the court will usually assess damages in cases of malicious prosecution. On this, Miss Chisholm referred us to McGregor on Damages, where the following appears[13]:

> "The principal head of damage here is to the fair fame of the claimant, the injury to his reputation. In addition it would seem that he will recover for the injury to his feelings, *i.e.* for the indignity, humiliation and disgrace caused him by the fact of the charge being preferred against him ... It therefore seems that the claimant can recover in respect of the risk of conviction: this is basically injury to feelings."

[29] Miss Chisholm also referred us to **Thompson v Commissioner of Police of the Metropolis and Hsu v Commissioner of Police of the Metropolis**[14], in which the Court of Appeal of England laid down guidance on the appropriate amount of damages recoverable by a plaintiff in an action against the police for unlawful conduct. With regard to malicious prosecution, Lord Woolf MR said that[15] -

> "... the figure should start at about £2,000 and for prosecution continuing for as long as two years, the case being taken to the Crown Court, an award of about £10,000 could be appropriate. If a malicious prosecution results in a conviction which is only set aside on an appeal this will justify a larger award to reflect the longer period during which the plaintiff has been in peril and has been caused distress."

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[13] At para. 38-004
[14] [1997] 2 All ER 762
[15] At page 775

[30] So it appears that injury to reputation, injury to feelings - that is, the indignity, humiliation and distress caused to the claimant - and the overall length of the prosecution are all relevant factors in arriving at an appropriate award of damages for malicious prosecution.

[31] Miss Franklin referred us to a number of cases under this head, but it is, I think, only necessary to refer to two of them. In **Earl Hobbins v The Attorney General and Constable Mark Watson**[16], the claimant was charged with the offence of fraudulent conversion. The prosecution against him in the Resident Magistrates Court was discontinued in his favour when the Resident Magistrate made 'no order' in the case. By that time, as the trial judge (Beswick J) put it, the claimant had "suffered the burden of mandatory court attendances for approximately six months". The claimant was awarded $600,000.00 for malicious prosecution. As at the date of the trial in the instant case, this award translated to $813,267.00.

[32] And then there is **Keith Nelson**, upon which the judge seemed to rely. The claimant in that case, after being shot by a licensed firearm holder, was detained by the police and eventually arrested and charged with assaulting the firearm holder. He was acquitted of the charge after the firearm holder failed to appear at the trial. In making an award of $400,000.00 for malicious prosecution, Brooks J said this[17]:

[16] Claim No CL 1998/H196, judgment delivered on 29 January 2007

[17] At page 13

> "[The claimant] is a qualified graduate of a tertiary institution. There is no evidence of any deleterious effect on him arising from the prosecution. Despite that I find that for the three months that he had to deal with matter of the prosecution, during which he was still suffering from his injury, he should receive an award of $400,000.00."

[33] The award of $400,000.00 in **Keith Nelson** would have been worth approximately $570,000.00 at the time of trial. So, in the instant case, although he did not say so, it may well have been on this basis that, as has been seen, the judge took the view that he would "abide [sic] the authority of **Keith Nelson** and award the sum of $500,000.00 for malicious prosecution". But, in the face of these authorities, in which the claimants had had to endure far shorter periods before the courts by reason of malicious prosecutions, Miss Chisholm quite sensibly conceded that that award was on the low side and suggested an award of $1,000,000.00 as more appropriate. In putting forward this figure, Miss Chisholm pointed out that there was no evidence of loss of reputation by the claimant, who had not only retained his job after his arrest, but had in due course moved on to better paying employment.

[34] Given the importance which the authorities attribute to injury to reputation as a component in damages for malicious prosecution, this is obviously a fair point. But it must be balanced, in my view, by the extraordinarily protracted period over which the appellant was obliged to be before the court in this case. If the claimant's damages for malicious prosecution for three months in **Keith Nelson**, which the judge purported to apply, were worth $570,000.00 at the time of trial in this case, then it seemed to me that an award of damages to the appellant for a malicious prosecution extending over a

period of 46 months must surely have been worth at least $1,500,000.00. Taking all these factors together, it therefore seemed to me that an award of $1,500,000.00 would strike a fair balance between all the relevant factors in this case.

Ground one: exemplary and/or aggravated damages

[35] Miss Franklin's first point on this ground was that the judge was in error in thinking that the appellant had not pleaded either aggravated or exemplary damages. In response, Miss Chisholm quite properly conceded that the judge had fallen into error on this point. This was obviously a lapse by the judge: not only did the appellant clearly plead his claim to both exemplary and aggravated damages, but the respondent specifically traversed the claim[18]. So the issue of the appellant's entitlement to exemplary damages was therefore squarely before the court.

[36] It may be convenient to deal with aggravated damages first. The principle upon which aggravated damages are awarded was well summarised by McDonald-Bishop J (as she then was) in **Delia Burke v Deputy Superintendent Carol McKenzie and The Attorney General of Jamaica**[19]:

> "The claimant has claimed aggravated damages in addition to general damages for false imprisonment and trespass. It is settled as a matter of law that aggravated damages are compensatory in nature and are awarded to a claimant for the mental distress, which he suffered owing to the manner

[18] See para. [7] above
[19] [2014] JMSC 139, at para. [73]

> in which the defendant has committed the tort, or his motive in so doing, or his conduct subsequent to the tort."

[37] On this basis, McDonald-Bishop J therefore considered[20] that "the manner in which the false imprisonment or trespass was effected may lead to an aggravation or mitigation of the damage, and hence damages".

[38] Accordingly, unlike exemplary damages, the object of which is to punish the defendant for his or her wrongful conduct[21], the objective of an award of aggravated damages is compensatory. Such an award is intended to reflect the fact that the particularly egregious nature of the defendant's conduct has been such as to cause greater – or 'aggravated' – damage to the claimant[22]. Therefore, as Lord Woolf MR observed in **Thompson**[23] -

> "... Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. 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. Aggravating features can also include the way the litigation and trial are conducted."

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[20] At para. [77]
[21] See Andrew Burrows, Remedies for Torts and Breach of Contract, 3rd edn, page 409.
[22] See **Broome v Cassell & Co. Ltd** [1972] 2 WLR 645, per Lord Hailsham LC at page 671
[23] At page 775, direction (8)

[39] In this case, as has been seen, despite the fact that it was expressly pleaded, the judge said nothing at all about aggravated damages. In support of her submission that this court should now make such an award, Miss Franklin relied on (i) the failure of the second respondent to perform a full and proper investigation into what happened at the warehouse on the night of 2 May 1996; (ii) the imprisonment of the appellant on false charges for a lengthy period in circumstances of great discomfort and indignity; (iii) the pursuit of the case against the appellant for the inordinately long period of four years and 10 months; and (iv) the ridicule, distress and anguish to which the appellant was "carelessly put" over the said period of four years and 10 months.

[40] For her part, Miss Chisholm submitted that, were the court to adjust the amounts awarded for false imprisonment and malicious prosecution along the lines which she had suggested, there would be no scope for any further award for aggravated damages. In other words, whatever elements of aggravation there might have been would have been sufficiently provided for in the basic awards for false imprisonment and malicious prosecution. In any event, Miss Chisholm submitted, also in reliance on Lord Woolf MR's guidance in **Thompson**[24], an award for aggravated damages should not in the ordinary way be more than twice the award for basic damages, save perhaps where, on the particular facts, the basic award is modest.

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[24] At page 775, direction (10). See also **Maxwell Russell v The Attorney General & Corporal McDonald**, Claim No 2006 HCV 4024, judgment delivered on 18 January 2008, per Mangatal J at page 7.

[41] Miss Chisholm referred us to **Maxwell Russell v The Attorney General & Corporal McDonald**[25], in which Mangatal J made an award of $515,000.00 to the claimant, who had been falsely imprisoned for 12 days. But, in addition, the learned judge made a separate award of $200,000.00 for aggravated damages, on the basis that the 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."

[42] In the instant case, the appellant was handcuffed and placed in the lock up while still in his uniform as a security guard, thus attracting the abusive attention of other prisoners and the embarrassing observation of visitors to the police station; he was obliged to share an overcrowded cell with various undesirables, who branded him as an informer, threatened him with harm and, in one case, actually assaulted him in the presence of the police; the cell in which he was kept was filthy beyond belief, with virtually no amenities, sanitary or otherwise; his then common law spouse, herself a police officer, was, in his powerless presence, ridiculed and treated with disrespect by other police officers by virtue of her connection to him; he was inadequately fed; and information about his arrest was publicised in a daily newspaper. According to the appellant, all these matters caused him great embarrassment, distress and humiliation.

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[25] See note 24 above

[43] The circumstances of the appellant's imprisonment in this case were therefore at least as bad as those in which the claimant in **Maxwell Russell** was detained, albeit that the period of imprisonment for which the respondents are liable in this case is shorter. But in this case, there was more. Obviously foremost among the wholly unusual features of the case is the lamentable fact that it was not until after more than 30 court appearances, spanning almost five full years, during which various prosecution witnesses, including the second respondent, gave evidence, that it finally dawned on the prosecution, as must surely have been obvious from the outset, that there was no case against the appellant. During this extended period, the appellant would have had to endure the repeated and renewed indignity, humiliation and disgrace of having to return to court time and again as an accused person. Related to this would have been the appellant's added embarrassment, as a security officer himself, and the discomfort brought on by the ridicule of his colleagues. And added to this would have been the ever present and distressful risk of conviction for offences which, as would subsequently become clear, he did not commit.

[44] It therefore seemed to me that, taking Mangatal J's award of $200,000.00 in **Maxwell Russell** (which would have been worth approximately $225,000.00 by the time of the trial in this case) as a base, an award to the appellant of $400,000.00 for aggravated damages was amply justified by all the circumstances to which I have referred.

[45] But, Miss Franklin went on to submit, this was also a fit case for the award of exemplary damages. She accepted that, as this court held in **Douglas v Bowen**[26], the cases in which exemplary damages might be awarded were as stated by Lord Devlin in the well-known case of **Rookes v Barnard**[27], that is, (i) cases of oppressive, arbitrary or unconstitutional action on the part of servants of the government; (ii) where the defendant's conduct has been calculated by him to make a profit for him or herself which may well exceed the compensation payable to the claimant; and (iii) where expressly authorised by statute. Citing the matters to which I have already referred in the context of the claim for aggravated damages[28], Miss Franklin submitted that this case fell comfortably within the first category, on the basis that the second respondent had been guilty of oppressive, arbitrary or unconstitutional conduct in her treatment of the appellant.

[46] As an example of a recent case in which exemplary damages were awarded for conduct falling under this heading, Miss Franklin referred us to the decision of McDonald-Bishop J in **Delia Burke**. In that case, the claimant, a bank manager, purchased building materials from a well known hardware store for use at her home and had them delivered and placed in her driveway in clear view of the main road. At around 9:30 pm that night, the claimant, who had retired to bed, was awakened by loud shouts outside her premises. Her elderly mother, who was unwell, was also

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[26] (1974) 12 JLR 1544
[27] [1964] AC 1129
[28] See para. [39] above

awakened by the commotion. The claimant found her house totally surrounded by numerous police cars, with more than 10 police officers, armed with guns, blocking the gates to the premises. The officer in charge of the operation threatened to arrest and charge the claimant in connection with the building materials which were on her premises, on the basis of a report they had received from the hardware store that a woman had fraudulently purchased goods from the store earlier that same day. The officer refused to look at her receipts from the hardware store (saying that he did not have his glasses with him) and other police officers barged into her premises without her consent and without any warrant permitting them to do so. She was detained and taken under police escort to the Constant Spring Police Station, but later that same night she was released without being charged, after the intervention of her attorney-at-law. The officer in charge of the raiding party, after telling her that they had detained the wrong person, apologised to her.

[47] In addition to general damages for false imprisonment ($200,000.00) and trespass ($65,000.00), the court also awarded the claimant aggravated and exemplary damages ($250,000.00 for each). As regards exemplary damages, the learned judge said this[29]:

> "I have looked at everything in the round bearing in mind that the claimant was not detained for any prolonged period at the police station and was released with an apology (even if it was a half-hearted one as the claimant would want me to think). She was not physically abused. I, however, accept

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[29] At para. [87] of her judgment

> that the invasion of one's privacy by agents of the state in the sanctity of his or her home, especially at night, and to restrain that person's liberty without lawful authority, justification or excuse under such circumstances, is serious enough for the court to penalise such conduct and to take steps to deter such conduct in the future. The police should serve and protect and not seek to violate the rights of the citizens, particularly, in the sanctity of their homes, without good and justifiable reason and to do so in a high-handed and oppressive manner."

[48] But Miss Chisholm went on to submit that, on the facts of this case, the appellant was not entitled to an award of exemplary damages. She referred us to the judgment of this court in **The Attorney General and another v Gravesandy**[30], in which White JA cautioned that the judge's description of the police officer's conduct as 'oppressive and arbitrary throughout' did not necessarily mean that there should be an award of exemplary damages:

> "Lord Devlin warned against this approach in his judgment in *Rookes v. Barnard* (supra). At p. 1229 he said:
>
> > 'It would not be right to take the language that Judges have used on such occasions to justify their (an appellate court's) non-intervention and treat their words as a positive formulation of a type of case in which exemplary damages should be awarded. They have used numerous epithets - wilful, wanton, high-handed, oppressive, malicious, outrageous - but these sorts of adjectives are used in the judgments by way of comment on the facts of a particular case. It would, on any view, be a mistake to suppose that any of them can be selected as

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[30] (1982) 19 JLR 501, 504

> definitive, and a jury directed, for example, that it can award exemplary damages whenever it finds conduct that is wilful or wanton'."

[49] White JA went on to observe that -

> "The judge has to be careful to understand that nothing should be awarded unless he is satisfied that the punitive or exemplary element is not sufficiently met within the figure which has been arrived at for the plaintiff's solatium which is the subject of the compensatory damages in the assessment of which aggravated damages will be awarded."

[50] I agree with Miss Chisholm on this point. While the conduct of the second respondent in arresting and charging the appellant without proper investigation was improper and – as it has turned out – completely indefensible by any measure, it seems to me that it nevertheless falls short of the kind of high-handed and oppressive behaviour, demanding punishment, that characterised the conduct of the police in **Delia Burke**. In my view, given the fact that I have already concluded that there ought to be an award for aggravated damages, this case falls well within Lord Devlin's observation in **Rookes v Barnard**[31] that "[a]ggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages". In all the circumstances, I did not therefore consider this to be a fit case for the award of exemplary damages.

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[31] [1964] 1 All ER 367, 412

Conclusion

[51] During the hearing of this appeal, I was acutely conscious of the traditional disinclination by an appellate court to interfere with the findings of a trial judge with regard to damages, purely on the basis of the court's view that, had they had it to do, they would have awarded lesser or greater sums. But, as Greer LJ explained in the well-known case of **Flint v Lovell**[32], such intervention will be warranted where this court accepts that "either the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damages to which the plaintiff is entitled". In such cases, as K Harrison JA further explained in **Stephen Clarke v Olga James-Reid**[33], this court "must intervene to make the required adjustment to achieve a reasonable level of uniformity".

[52] For the reasons I have sought to give in this judgment, this is a case in which I have been satisfied that the judge's assessment of the damages due to the appellant was wholly erroneous and that this court's interference was therefore required. I cannot leave the matter without paying tribute to the quality of the advocacy on both sides - to Miss Franklin, for her thoroughness and tenacity; and to Miss Chisholm, for the

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[32] [1935] 1 KB 354, 360; and **Stephen Clarke v Olga James-Reid**, SCCA No 119/2007, judgment delivered 16 May 2008, per K Harrison JA at para. 5
[33] SCCA No 119/2007, judgment delivered 16 May 2008, para. 5

conspicuous fairness of her approach to what was, on her side, a particularly testing assignment.

Postcript

[53] As I have indicated, the court announced the result of this appeal on 24 June 2016. Subsequently, by letter dated and delivered that same day, the attorneys-at-law on the record for the respondents advised the Registrar as follows:

> "Reference is made to the captioned appeal and to the result handed down this morning by the Learned Panel of Justices of Appeal, the Honourable Mr. Justice Morrison (President), the Honourable Ms. Justice Williams and the Honourable Ms. Justice Edwards.
>
> Having regard to the date of service of the Writ of Summons by the Appellant on October 11, 2001, we believe there was an error in respect of the commencement date (May 2, 1996) for which interest is payable on the judgment sum.
>
> In the circumstances, we seek your assistance in having the error corrected before the Certificate of Result is perfected."

[54] At the request of the court, the Registrar made an enquiry of the attorneys-at-law for the appellant as to their position on this letter. By letter dated 5 July 2016, they responded as follows:

> "We agree with the position put forward by the Attorney General's Department as inadvertently it also escaped us that the actual date for computation of interest for false imprisonment and malicious prosecution being General Damages ought rightly to commence as at October 11, 2001 being the date of service of the Writ of Summons."

[55] The upshot of this correspondence is that the parties are agreed that the judge's award of interest on general damages for false imprisonment and malicious prosecution from 2 May 1996 was wrong, because (i) the date of service of the writ in this matter was 11 October 2001; and (ii) the appropriate date from which interest falls to be awarded on general damages is the date of service of the writ or, as it is now called, the claim form[34].

[56] However, there was no appeal from this aspect of the decision. So, no doubt because of this, the judge's lapse eluded this court, as indeed it did counsel for the parties during the hearing of the appeal. But, even without a formal ground of appeal on the point, it seems to me that this court would inevitably have corrected the judge's error of its own motion had it been alerted to it. In these circumstances, I think that it is right for this court to correct the error and to adjust its own order accordingly, given that (i) the error was brought to its attention before the certificate of the result of the appeal pursuant to rule 2.18(1) of the Court of Appeal Rules 2002 was perfected; and (ii) the parties are in agreement on the point. If authority for this approach is needed, it can be found in what Harris JA described in **Brown v Chambers**[35] as the court's inherent power to, as an aspect of its general power to control its process, "correct a clerical error, or an error arising from an accidental slip or omission … in its judgment or order".

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[34] **Central Soya of Jamaica Ltd v Junior Freeman** (1985) 22 JLR 152
[35] [2011] JMCA Civ 16, para. [11]

[57] I would therefore propose that the order announced by the court on 24 June 2016 be amended in the manner indicated in bold print below:

1) Appeal allowed and the judgment of B Morrison J (Ag) is varied as follows.

2) Judgment is entered for the appellant against the respondents for -

(i) false imprisonment in the sum of $600,000.00, with interest at the rate of 6% per annum from **11 October 2001** to 21 June 2006 and thereafter at the rate of 3% per annum from 22 June 2006 to 10 September 2009;

(ii) malicious prosecution in the sum of $1,500,000.00 with interest at the rate of 6% per annum from **11 October 2001** to 21 June 2006 and thereafter at the rate of 3% per annum from 22 June 2006 to 10 September 2009;

(iii) aggravated damages in the sum of $400,000.00

2) Costs of the appeal to the appellant to be agreed or taxed.

P WILLIAMS JA (AG)

[58] I have read, in draft, the reasons for judgment of the learned President. I agree with his reasoning and conclusion, as well as with the revised order which he has proposed. I have nothing further to add.

EDWARDS JA (AG)

[59] I too have read the draft reasons for judgment of the learned President. I also agree with his reasoning and conclusion, as well as the revision of the order as indicated.