

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA**

SUPREME COURT CIVIL APPEAL NO COA2022CV00108

BETWEEN	KEVIN ELLIS	APPELLANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	FIRST RESPONDENT
AND	CONSTABLE PETER ENNIS	SECOND RESPONDENT

Rudolph Smellie instructed by Charles R Campbell for the appellant

Miss Kristina Jones instructed by the Director of State Proceedings for the respondents

29 January 2025 and 31 July 2026

Civil practice and procedure – Assessment of damages – False imprisonment – Malicious prosecution – Whether general damages inordinately low – Whether learned judge erred in assessing quantum – Appropriate method of computation – Whether reducing scale appropriate – Whether the sum for exemplary damages was excessive

STRAW JA

[1] I have read the judgment of my learned sister Simmons JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

EDWARDS JA

[2] I too have read the judgment of Simmons JA and agree with her reasoning and conclusion.

SIMMONS JA

Introduction

[3] In this matter, Mr Kevin Ellis ('the appellant') appeals against an award of damages arising from injuries sustained by him on 13 November 2014. A judgment in default of defence having been entered on 11 March 2021, damages were assessed on 21 September 2022, against the Attorney General ('the first respondent') by Mott Tulloch-Reid J ('the learned judge'), as follows:

"a. Damages are assessed in favour of the [appellant] against the First and Second [respondents] who are to pay the [appellant]:

- i. Special Damages in the amount of \$99,000 plus interest at 3% per annum from November 13, 2014 to September 21, 2022.
 - ii. General Damages (Pain and Suffering) in the amount of \$5M plus interest at 3% per annum from October 31, 2019 to September 21, 2022.
 - iii. Damages for False Imprisonment in the amount of \$16,600,000 plus interest at 3% per annum from October 31, 2019 to September 21, 2022.
 - iv. Damages for Malicious Prosecution in the amount of \$1M plus interest at 3% per annum from October 31, 2019 to September 21, 2022.
 - v. Exemplary damages in the amount of \$1.3M.
 - vi. Costs in the claim which are to be taxed, if not agreed.
- b. The [appellant's] attorney at law is to file and serve the judgement."

Background

[4] On 31 October 2019, the appellant filed a claim for damages for assault and/or trespass to the person, false imprisonment, and malicious prosecution against the first respondent and Constable Peter Ennis ('the second respondent'). The appellant also claimed exemplary and aggravated damages, costs and interest. The first respondent was made a party to the proceedings by virtue of the Crown Proceedings Act.

[5] The claim arose out of an incident that occurred on 13 November 2014 at approximately 9:00 pm on Westmeade Boulevard, Bridgeport, in the parish of Saint Catherine. The sequence of events, as outlined herein, has been extracted from the appellant's witness statement and the particulars of claim, which were not challenged by either respondent.

[6] The facts as extracted from the appellant's witness statement and the particulars of claim are that on the night of 13 November 2014, the appellant, then 18 years old, was standing on the side of the road when the second respondent pointed a firearm at him and fired several shots, hitting him several times to the lower body.

[7] He was taken to the Spanish Town Hospital, where he was hospitalised and underwent surgery. During his hospitalisation, the appellant was kept under constant police guard, with his right hand handcuffed to the rails of the bed head. Three days after the surgery, the appellant was scheduled for another surgery as a result of an infection that had developed in his lower body. That surgery was, however, delayed by several hours as the officer responsible for guarding him did not have the keys to unlock the handcuffs. His evidence is that fluid was removed from his abdomen during that surgical procedure. Whilst at the Spanish Town Hospital, the appellant complained of pain in his left thigh, and a bullet was removed.

[8] The appellant was subsequently transferred to the University Hospital of the West Indies where he was admitted for over two weeks for pains to his stomach. Thereafter, the police came and retrieved him against the advice of medical personnel. At the time,

he had a drain tube in his stomach and had to use a catheter to urinate. He was taken to the Portmore Police Station. On the journey there, the officers stopped at various places, including a bar and a restaurant, and a location to purchase fresh fish. On arrival at the station, he was refused his medication, and he subsequently fainted in the guardroom.

[9] He remained in police custody and, on 23 January 2015, he was charged with the offences of robbery with aggravation and illegal possession of a firearm. On 4 February 2015, he was placed before the Gun Court and offered bail. The appellant appeared before the Gun Court on 10 occasions, and the case was adjourned each time on the prosecution's application. No witness attended any of the court sessions and, on 4 July 2017, the prosecution offered no evidence with respect to all charges against the appellant. The matter was, therefore, before the Gun Court for some two years and five months.

[10] The appellant asserts that he was in police custody for 83 days before he was placed before the Gun Court. In his witness statement, he described his conditions in custody as follows:

“38. I spent the period 15th November, 2014 to the 19th January, 2015 under Police Guard. I was under Police Guard at all times in both hospitals. My hand was handcuffed to the bed rails and I had to be in one position with several injuries, which put me through pain and agony. After I was taken from the Spanish Town Hospital on the second occasion in January 2015, I was placed in a cell at Portmore Police Station.

39. The cell was dark and hot. At night there were plenty of mosquitoes in the cell which bit me all over. There were also cockroaches. I had to lie or sit on the hard concrete surface of the cell with the unhealed wounds from the gunshot injuries also from surgery. The cell was overcrowded and had thirteen prisoners.”

[11] The appellant also expressed that while the matter was before the Gun Court, he was fearful and depressed.

[12] The respondents failed to file a defence and, on 11 March 2021, a judgment in default of defence was entered against the first respondent, leave having been obtained on 22 February 2021. Damages were assessed on 21 September 2022 as detailed in para. [3] above.

The appeal

[13] The appellant, dissatisfied with the amount awarded as general damages for pain and suffering, filed notice and grounds of appeal on 31 October 2022. The grounds of appeal are as follows:

“(a) That the Award of Five Million Dollars (\$5,000,000.00) for General Damages as Pain and Suffering represents an unreasonably, or inordinately, low and disproportionate estimate of damages.

(b) That the Learned Trial Judge erroneously concluded that Damages in the amount of Four Million Dollars (\$4,000,000.00) to Five Million Dollars (\$5,000,000.00) represented the claim for the totality of injuries sustained by the Appellant.

(c) That the Learned Trial Judge misunderstood the Submissions on behalf of the Appellant in relation to General Damages, as set out in particular, at Paragraphs 32, 33, 37, 38 and 39 of these Submissions”.

The appellant asked this court to set aside the award of general damages in the amount of \$5,000,000.00 and to increase that sum.

Counter-notice of appeal

[14] The respondents, also aggrieved by the learned judge’s award, filed a counter-notice of appeal on 14 November 2022, challenging the sums awarded for false imprisonment and exemplary damages. They have asked this court to set aside the judgment on the following grounds:

“(a) The award of \$16,600,000.00 for general damages for false imprisonment is manifestly excessive and amounts to an

erroneous estimate of the damages to which the Appellant is entitled having regard to the evidence and authorities.

(b) The learned judge fell into error and misdirected herself when she found that the [appellant] suffered significant humiliation, distress and agony despite the lack of clear evidence in this regard.

(c) The learned judge misdirected herself when she relied solely on the authority of **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman** [2016] JMCA Civ 40 in coming to her decision on the false imprisonment award on the basis that it was the only case cited from the Court of Appeal on the issue of humiliation and injured feelings.

(d) The learned judge fell into error when she relied on the authority of **John Crossfield** to arrive at the daily rate for the false imprisonment award and found it to be similar to the Appellant's case when the circumstances of imprisonment, the [Appellant]'s occupation and the length of imprisonment were not comparable.

(e) The learned judge erred by failing to follow the law and applied a daily rate that was inordinately high.

(f) The learned judge erred by failing to take into account the oral submissions of Counsel for the Respondents, consequent on which the learned judge failed to apply the principle set out in **Thompson v Commissioner of Police of the Metropolis and HSU v Commissioner of the Police of Metropolis** [1997] 2 All ER 762.

(g) The learned judge erred by treating exemplary damages as compensatory damages, departing from the law and making an award for exemplary damages that was inordinately high." (Bold as in original)

Issues

[15] The grounds of appeal and the counter-notice of appeal raise several overarching issues for determination. These issues are:

- (1) Whether the learned judge misunderstood the submissions made by counsel for the appellant and, in so doing, erred in her assessment of general damages for pain and suffering, by awarding a sum that was an inordinately low or disproportionate estimate of damages (grounds of appeal (a), (b) and (c)).
- (2) Whether there was sufficient evidence to support the learned judge's finding that the appellant suffered significant humiliation, distress and agony (ground (b) of the counter-notice of appeal).
- (3) Whether the learned judge erred in principle by not utilising the sliding scale/tapered approach in assessing the damages for false imprisonment (grounds (c), (d), (e) and (f) of the counter-notice of appeal)
- (4) Whether the award of \$16,600,000.00 for general damages for false imprisonment was manifestly excessive having regard to the evidence and authorities (ground (a) of the counter-notice of appeal).
- (5) Whether the learned judge conflated compensatory and exemplary damages in making her award for exemplary damages, resulting in an inordinately high award (ground (g) of the counter-notice of appeal).

Standard of review

[16] With respect to the appellate court's remit in reviewing awards for damages, it is presumed that the trial judge's decision is correct. In **Stephen Clarke v Olga James-Reid** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 119/2007, judgment delivered 16 May 2008 ('**Stephen Clarke**'), Harrison JA stated:

"The principles applicable on a review of damages

5. We commence with the presumption that the decision on quantum made by the trial judge is a correct one. For the Appellate Court to vary the assessment of the trial judge it must be satisfied that the judge made a 'wholly erroneous

estimate of the damage.’ This means that the damage has varied too widely from the maximum or minimum figures awarded in similar cases by the Courts and therefore the Court of Appeal must intervene to make the required adjustment to achieve a reasonable level of uniformity. The exercise of looking at decided cases with the necessary adjustments, having regard to inflation and any special features of the injury or other assessable factors of the particular case, is directed at achieving this uniformity.

6. The principles governing an appellate court in its review of damages awarded by a lower court are well established. They were stated clearly by Greer L.J in ***Flint v Lovell*** [1935] 1 KB 354 at p. 360 as follows:

‘... I think it right to say that this court will be disinclined to reverse the finding of a trial judge as to the amount of the damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum.

To justify reversing the trial judge on the question of the amount of damages it will be necessary that this court should be convinced either that the Judge acted on 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.” (Emphasis as in original)

[17] Similarly, in **The Attorney General v Derrick Pinnock** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 93/2004, judgment delivered 10 November 2006, at para. 6, Panton JA (as he then was) expressed the view that:

“6. ...it goes without saying that the Court of Appeal, while giving due regard and respect to awards made by the judges of the Supreme Court, is not bound by such awards or their perceived pattern. **The important point to be noted is that an award will not be disturbed by this Court unless it is either inordinately high or inordinately low, or there is a breach of some other principle of law.**” (Emphasis added)

[18] In the instant case, the quantum awarded under each head of damages reflects the factual findings made by the learned judge and the inferences which she drew from the evidence before her. In reviewing those findings, this court is not entitled to substitute its own view of the facts simply because it might have reached a different result. Therefore, this court will only intervene where the trial judge's findings are shown to be plainly erroneous (see **Watt (or Thomas) v Thomas** [1947] AC 484). With the standard of review set, I will now go on to examine the issues as outlined above.

Issue (1): Whether the learned judge misunderstood the submissions made by counsel for the appellant and, in so doing, erred in her assessment of general damages for pain and suffering, by awarding a sum that was an inordinately low or disproportionate estimate of damages (grounds of appeal (a), (b) and (c)).

Appellant's submissions

[19] Mr Smellie, on behalf of the appellant, contended that the award for general damages for the sum of \$5,000,000.00 was inordinately low. Counsel also sought to challenge the learned judge's finding of fact that it was the appellant's position that a sum in the region of \$4,000,000.00 to \$5,000,000.00 should have been awarded as general damages for the injuries sustained.

Respondents' submissions

[20] Miss Jones, on behalf of the respondents, argued that the award for pain and suffering was not inordinately low so as to amount to an erroneous estimate of the damages to which the appellant was entitled. She also submitted that the award aligned with the cases relied on by the learned judge and that there was no support for the position that the award for general damages for pain and suffering and loss of amenities was an erroneous estimate of the damages to which the appellant is entitled.

Discussion

[21] The learned judge, in considering the award of general damages for pain and suffering, stated at para. [14] of the judgment:

“Mr Campbell is of the view that for the injuries resulting from the gunshots he received, the [appellant] should be awarded somewhere in the region of \$4M to \$5M...”

This statement indicates that the learned judge was of the view that this was the sum total of counsel’s submissions on the matter. Counsel for the appellant contends that the learned judge failed to fully appreciate the appellant’s skeleton submissions made in the court below. He argued that the learned judge misconstrued his submission to mean that an award of \$4,000,000.00 was sufficient to compensate the appellant for all his injuries. However, a review of counsel’s skeleton submissions in the court below reveals that counsel cited several cases from volumes 4 and 5 of Khan’s Recent Personal Injury Awards Made in the Supreme Court of Jamaica. After referencing cases related to gunshot wound injuries, counsel submitted at para. 32 of his submissions as follows:

“32. They each indicate that gunshot injury [sic] without adverse consequences attracts an award in the region of One Million Dollars (\$1,000,000.00) to Two Million Dollars (\$2,000,000.00). In this regard it is helpful to note that five of the gunshot injuries were to the left thigh, the penis, right scrotum, right thigh and right buttocks and would not have been the cause of the injuries V-Z in the Particulars of Claim including Nephrectomy.

33. Accordingly, these multiple five gunshot injuries, together, should attract an award of Four – Five Million Dollars. In this Claim the consequence of the other gunshot injuries resulted in serious internal injuries including the loss of kidney and also liver damage requiring hospitalization for over two (2) months.

...

37. The Judgment of Straw J. in DEVON WHITE may provide useful guidelines in the Courts [sic] deliberation on quantum. Both White and Ellis were hospitalized as a result of gunshot injuries. However, there are important differences. The Claimant White sustained three gunshot injuries to the left leg, right leg and to his abdomen respectively. He sustained

fractures to both legs. There was complete recovery from an abdominal operation and he spent 27 days in hospital.

38. [The appellant] received multiple gunshot injuries six (6) and two were to the chest. He required Emergency surgery on admission. As stated, there were several internal injuries resulting organ loss and damage. Separately, there were other injuries to his limbs and penis. He spent approximately 2 ½ months in hospital during which he wore a colostomy bag for most of his admission. **His injuries are more serious and extensive than in WHITE. The Learned Judge made an award of Four Million Five Hundred Thousand Dollars (\$4,500,000.00) in April 2009 which indicate a present award of Ten Million One Hundred and Ninety Two Thousand Six Hundred and Sixty Nine Dollars and Twelve Cents (\$10,192,669.12).**

39. The totality of injuries in Ellis would attract damages in excess of the award in WHITE.” (Emphasis added)

[22] In my view, the submission that “these multiple five gunshot injuries, together should attract an award of Four to Five Million Dollars” was made in relation to five of the appellant’s gunshot wounds only and not the totality of the injuries which were sustained by the appellant. The medical report of Dr Patricia McLean, dated 23 April 2019, lists seven gunshot wounds in total. This distinction becomes even clearer when the rest of counsel’s submission is examined. He continued to submit that, “the consequence of the other gunshot injuries resulted in serious internal injuries, including the loss of a kidney and also liver damage requiring hospitalisation for over two (2) months”. I am of the view that counsel’s reference to other gunshot injuries shows his intention to treat those injuries separately from the five gunshot wounds, which, as submitted, had no major effects on the appellant’s internal organs.

[23] Counsel submitted that the totality of the injuries suffered by the appellant would attract damages in excess of the sum awarded to the claimant in **Devon White**. In that case, the claimant was awarded the sum of \$4,500,000.00, which, according to counsel, when updated, would have amounted to \$10,192,669.12.

[24] I accept the appellant's counsel's submission that the learned judge, based on her summary of the appellant's submissions in the court below, misunderstood the appellant's submissions and erred in awarding the sum of \$5,000,000.00 to the appellant for general damages for pain and suffering and loss of amenities.

[25] In addition, I find that the learned judge's treatment of the cases cited by both counsel is inconsistent with the award of \$5,000,000.00 she made for general damages. Paras. 15 to 17 of the judgment states as follows:

"[15] In *Conrad Gregory Thompson v The Attorney General of Jamaica* 2018 HCV 02530 delivered on May 31, 2011, Frank Williams J (Ag) as he then was awarded the sum of \$3M to the Claimant who sustained 5 gunshot wounds which necessitated a thoracotomy, laparotomy and neck exploration, with repair to the left carotid artery. He had diminished power in his right hand. **Again these injuries are less serious than [the appellant's]. The impact of the injuries on [the appellant] was greater than those Mr Thompson sustained. According to Ms Whyte, the \$3M award updates to \$5.5M.**

[16] Ms Whyte argues that updated award in the **Barracks** decision and the **Thompson** decision should be discounted because Barracks had multiple surgeries to repair colon and Thompson had extensive surgical intervention. I do not agree with Ms Whyte in either instance. With respect to Barracks, he had two surgeries and the second was to complete the first. His recovery was uneventful. With respect to Thompson, I do not see where multiple surgeries were performed. On my reading of the decision, I see where a thoracotomy and laparotomy were done both of which are exploratory for the purposes of carrying out the surgery.

[17] I am of the view that [the appellant]'s award should be \$5M for General Damages for his pain and suffering and loss of amenities."

[26] Based on the above, it is apparent that although the learned judge accepted that the appellant's injuries were more serious than those suffered by the claimant in **Conrad Gregory Thompson v The Attorney General for Jamaica** (unreported), Supreme

Court, Jamaica, Claim No HCV 02530 of 2008, judgment delivered 31 May 2011 (**Thompson**), she went on to award the appellant the sum of \$5,000,000.00, which would amount to a lower award than that received by the claimant in **Thompson**. The sum awarded in the instant case is inconsistent with the learned judge's reasoning, which, if followed to its logical conclusion, would have resulted in an award of at least \$5,500,000.00 in keeping with the updating of the award in **Thompson**. It is, therefore, my view that the learned judge erred in her assessment of the general damages for pain and suffering. In the circumstances, this court is at liberty to disturb the award.

[27] Counsel for the appellant has submitted that an award of \$18,000,000.00 would be appropriate. In this regard, he referred to **Osbourne Barnes v The Attorney General** (unreported), Supreme Court, Jamaica, Claim No 1987 B 372, judgment delivered 21 February 2000 (**Osbourne Barnes**), **Clandeth Deer v The Attorney General and another** (unreported), Supreme Court, Jamaica, Claim No 1993 D 206, judgment delivered 14 June 1999, **Pansy McDermott v Garnett Lewis and the Attorney General for Jamaica** (unreported), Supreme Court, Jamaica, Claim No C L 1998 M 328, judgment delivered 25 April 2002 (**Pansy McDermott**), **Natalie Williams v Robert Stephenson** (unreported), Supreme Court, Jamaica, Claim No C L 1992 W 048, judgment delivered 19 November 1996 (**Natalie Williams**) and **Devon White v Lenworth Cammock and the Attorney General** (unreported), Supreme Court, Jamaica, Claim No 2006HCV00787, judgment delivered 2 April 2009. In **Osbourne Barnes** and **Pansy McDermott**, the respective claimants sustained one gunshot wound each and in **Clandeth Deer**, that claimant suffered two gunshot wounds. The assessed damages when updated to September 2022 (the date of the assessment) amounted to \$922,794.11, \$2,236,853.25, and \$1,176,562.49, respectively. The claimants in those cases, counsel submitted, did not suffer any "adverse consequences". In the circumstances, the claimant's five gunshot wounds should attract an award of \$4,000,000.00 to \$5,000,000.00.

[28] In **Natalie Williams**, the claimant suffered kidney and colon damage as a result of one gunshot wound and was awarded \$2,500,000.00 after a contested assessment of damages. When this award is updated using the consumer price index ('CPI') for November 1996 of 15.9 and 125.5 (the CPI for September 2022), it amounts to \$19,732,704.40.

[29] Reference was also made to **Devon White**, in which the claimant sustained three gunshot wounds and fractures to both legs and spent 27 days in hospital. He was awarded \$4,500,000.00 in April 2009. When this award is updated using the consumer price index (CPI) for April 2009 of 53.2 and 125.5 (the CPI for September 2022), it amounts to \$10,615,601.50. Counsel submitted that the injuries in the instant case were more serious than those sustained by the claimant in **Devon White** and would attract a higher award. I agree. Counsel pointed out that the appellant sustained seven gunshot wounds, lost a kidney and sustained a laceration of his liver. He spent approximately two and a half months in the hospital and wore a colostomy bag for most of that time. On arrival at the Spanish Town Hospital on 13 November 2014, the appellant had to be resuscitated in the emergency room. He then underwent surgery. In the circumstances, counsel submitted that based on the extent of the appellant's injuries he was deserving of a higher award than that awarded in **Devon White**.

[30] I have noted that the appellant's medical report also indicates that in addition to the kidney and liver damage, he had the following injuries:

1. Persistent bile leak from abdominal drain.
2. Foreign body to the penis and left anterior thigh.
3. Erectile dysfunction.
4. Abdominal pain.
5. Fluid in the abdomen.

6. 2.7 litres of blood in the peritoneal cavity.

7. Right nephrectomy (which could lead to hypertension and chronic kidney disease).

[31] Based on the cases discussed above, I am of the view that the sum of \$5,000,000.00 awarded to the appellant as general damages for pain and suffering and loss of amenities is inordinately low. At the very least, based on **Osbourne Barnes, Pansy McDermott** and **Clandeth Deer**, the damages would range from approximately \$7,000,000.00 to \$14,000,000.00 for seven gunshot wounds. The extent of the appellant's injuries which include kidney and liver damage is in my view closer to those suffered by the claimant in **Natalie Williams**. In the circumstances, I accept the submissions of the appellant's counsel that, in light of the injuries suffered by the appellant, an award of \$18,000,000.00 would be appropriate in keeping with the award in **Natalie Williams**. Grounds (a), (b) and (c), therefore, succeed. Accordingly, the award of \$5,000,000.00 for damages for pain and suffering ought to be set aside and an award of \$18,000,000.00 substituted therefor.

Issue (2): Whether there was sufficient evidence to support the learned judge's finding that the appellant suffered significant humiliation, distress and agony (ground (b) of the counter-notice of appeal)

Appellant's submissions

[32] Mr Smellie submitted that this court should be reluctant to interfere with an award of damages made in the court below unless such an award amounts to a wholly erroneous estimate of damages. Reference was made to **Stephen Clarke**, in support of that submission. Counsel argued that, given the relevant case law on damages awarded for false imprisonment, the learned judge had not varied too widely from the minimum or maximum figures awarded in similar cases. He posited that the awarded sum of \$200,000.00 per day is, in the circumstances, proportionate and reasonable.

Respondents' submissions

[33] Miss Jones argued that there was insufficient evidence before the learned judge to support the award made for false imprisonment. Counsel pointed out that injury to feelings was a material component of the learned judge's award for false imprisonment. Counsel also highlighted the portion of the judgment in which the learned judge stated that although the appellant had not categorically stated that he was humiliated or had injured feelings, she deduced that he was disturbed by what was said to him. Counsel submitted that in the absence of adequate evidence to support the finding that the appellant suffered significant humiliation, distress or agony, the learned judge, therefore, erred in arriving at this conclusion and consequently erroneously awarded a sum which took these factors into account.

[34] Counsel whilst maintaining that the award was excessive, did, however, accept that there was evidence from which the learned judge could have reasonably inferred that the appellant suffered some amount of distress during his detention. The extent of any such injury, it was submitted, did not justify such a high award. In the circumstances, counsel asked this court to review the evidence to determine whether it was appropriate for the learned judge to find that the appellant suffered significant humiliation. She submitted the cases of **The Attorney General v Glenville Murphy** [2010] JMCA Civ 50 ('**Glenville Murphy**') and **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 for consideration.

Discussion

[35] In the text, McGregor on Damages, 17th ed, para. 3707, the learned editors stated:

"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.”

[36] In assessing whether the learned judge took the relevant factors into account in arriving at the award for false imprisonment, paras. [18] to [21] of her judgment are instructive. They state:

“[18] Mr Ellis’ evidence, as contained in his witness statement, is that the day after the operation he was placed in handcuffs which were attached to the iron rails of the bed head and that he was under police guard. He stated further that he had to do a second operation but that was delayed for several hours because the keys for the handcuffs were not [sic] the guard on duty and the doctors had to contact the Spanish Town Police Station so that he could be released from the handcuffs. After the surgery, he was taken back to the ward and again handcuffed to the bed albeit he was in great agony.

[19] He was under police guard from November 14, 2014 to January 19, 2015 when he was taken from the hospital and taken to the Portmore Police Station. He was not transported immediately from the Hospital to the police station but instead, the police who were transporting him stopped at several places while he was handcuffed in the police van. He stated that the police officers even stopped at a bar for drinks, ate at a restaurant and bought fresh fish. On the same day, as a result of not being given the medication prescribed by the doctors, he fainted and was taken to the Spanish Town Hospital where he was again handcuffed and placed under police guard. He was taken back to the Portmore Police Station on January 21, 2015 and then formally charged on January 23, 2015 with offences of robbery with aggravation and illegal possession of firearm. Mr Ellis was brought before the Gun Court on February 4, 2015 and offered bail...

[20] Mr Ellis also stated in his witness statement that while he was handcuffed to the bed during his stay at the hospital, persons who came to the hospital to see their own relatives and friends inquired of the guard why he was handcuffed and they made insulting comments to him. Some of them covered their mouths and gossiped. One lady visitor loudly declared him a robber and a gunman and that is why he was shot. He

was stressed and the situation was hard for him to deal with as he was only 18 years old at the time. Mr Ellis' witness statement also indicated that police officers took pictures of him without his consent and warned him not to talk to INDECOM. He was put in terror by their behaviour and he was fearful.

[21] Of his time in jail and during Court proceedings, Mr Ellis said that he was fearful and depressed that he could be found guilty of the charges and sent to prison. He said the cell he was kept in was dark and hot, it was populated with mosquitos and cockroaches. The floor was his bed and chair and he endured the hard concrete surface of the cell with his unhealed wounds. The cell was overcrowded, he said. In addition to the cockroaches and mosquitoes, he had to share the cell with 13 prisoners. Prior to his arrest, he had never been arrested." (Emphasis supplied)

[37] It is clear from the above summary of the appellant's evidence that the conditions he endured while under police detention were less than ideal and caused him significant challenges, discomfort, distress, agony and embarrassment. Therefore, the respondents' contention that there was insufficient evidence to support the finding that the appellant suffered significant humiliation, distress or agony is, in my view, baseless. The learned judge had sufficient evidence before her to support an award for false imprisonment, which included injury to feelings. Ground (b) of the counter-notice of appeal, therefore, fails.

[38] As it pertains to the learned judge's award to the appellant for false imprisonment, there is some considerable overlap with the submissions in relation to issues 3 and 4 and therefore, both issues will be dealt with together.

Issue (3): Whether the learned judge erred in principle in assessing damages for false imprisonment (grounds (c), (d), (e) and (f) of the counter-notice of appeal)

Issue (4): Whether the award of \$16,600,000.00 for general damages for false imprisonment was manifestly excessive, having regard to the evidence and authorities (ground (a) of the counter-notice of appeal)

Appellant's submissions

[39] Mr Smellie submitted that the issue to be determined was whether the award the learned judge made was a wholly erroneous estimate of damages. Counsel contended that the learned judge had the benefit of well-known cases in coming to her decision, and it was, therefore, inaccurate to assert that she erred in her reliance on **Crossfield**.

Respondents' submissions

[40] Miss Jones submitted that the learned judge misdirected herself when she limited her consideration of comparable cases to **Crossfield** in arriving at an award for false imprisonment. She contended that the reasoning of the learned judge was flawed and incompatible with the established practice of using comparable cases and making adjustments to account for inflation or any varying factual circumstances for the purpose of assessing damages. This approach, she argued, was approved in **Crossfield** and **Glenville Murphy**. Counsel also submitted that **Crossfield** was distinguishable as the period of detention was three days as against 83 days in the appellant's case. She stated that the significant difference in the length of imprisonment was a crucial factor that ought to have been considered by the learned judge when she applied **Crossfield** to the instant case. Counsel submitted that the learned judge, therefore, erred when she used the updated award in **Crossfield** to arrive at the daily rate without making adjustments based on those circumstances.

[41] In addition, counsel asserted that the learned judge erred by failing to consider whether the sliding scale/tapered approach set out in **Thompson v Commissioner of Police of the Metropolis and Hsu v Commissioner of Police of the Metropolis** [1997] 2 All ER 762 ('**Thompson**') was appropriate based on the length of time that the appellant was detained. Miss Jones also relied on the cases of **Roshaine Clarke v The Attorney General of Jamaica** [2022] JMFC Full 3; **Takitota v The Attorney General & Ors (Bahamas)** [2009] UKPC 11 ('**Takitota**'); **Maxwell Russell v The Attorney General for Jamaica and anor** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV 4024, judgment delivered 18 January 2008 ('**Maxwell Russell**') and **Devon White**.

Discussion

[42] In assessing the respondents' challenge to the learned judge's approach in awarding damages for false imprisonment, it is necessary to restate the established principles that govern the quantification of damages in such cases. The law has long recognised that the essence of the tort of false imprisonment lies in the unlawful deprivation of personal liberty, and the compensatory award must reflect the seriousness of that infringement. The factors to be taken into account are set out in para. [34] above and the court is required to consider the purpose of the award and the interests it is intended to vindicate.

[43] In **Douglas Ngumi v The Attorney General of The Bahamas and others** [2023] UKPC 12 ('**Ngumi**'), Dame Ingrid Simler, who delivered the decision of the Board stated:

"72. The evaluative exercise called for in assessing the physical and mental deprivation caused by false imprisonment is no less difficult, and is even less precise. There are no guidelines and no mathematical formula is available to be relied on in every case. **Rather, the assessment must be sensitive to the unique facts of the particular case and the degree of harm suffered by the individual concerned, while at the same time reflecting a reasonable degree of proportionality to assessments made in similar cases and to awards for personal injury given the parallels between these two types of award...**" (Emphasis supplied)

[44] The learned judge's reasoning on this aspect of the case demonstrates that she was fully cognisant of the factors which had to be considered in making the award. She stated:

"[22] On Mr Ellis' count he was falsely imprisoned for a total of 83 days from November 14, 2014 to February 4, 2015...

[23] Although he did not categorically say in his evidence that he was humiliated or had injured feelings, the fact that he referred to what persons said about him while he was

handcuffed to the bed is sufficient for me to deduce that he was disturbed by what was being said about him. Ms Whyte has not submitted against an award to Mr Ellis's hurt feelings. She has only indicated that Mr Ellis has not proven he has suffered any loss of reputation or social standing arising from his detention. I agree with her submission in that regard...

...

[26] I am of the view that the **Crossfield case** is similar to Mr Ellis'. Mr Crossfield was more detailed in terms of the circumstances of his imprisonment. However, Mr Ellis' circumstances are not to be discounted because he had to endure his imprisonment when not in the best of health. Mr Crossfield did not have that burden to bear. I received no evidence from Mr Ellis about the food or his relationship with the other inmates but I am convinced that he, like Mr Crossfield, suffered significant humiliation, mental distress and agony.

[27] Ms Whyte has suggested \$50,000 per day for false imprisonment. Mr Campbell has suggested \$200,000. In **Crossfield**, Morrison P awarded \$150,000 per day. \$150,000 today updates to \$206,999.63 when the CPI for July 2022, which is 122.68 is used. I accept Mr Campbell's suggestion of \$200,000. When this sum is used, Mr Ellis would be entitled to \$16,600,000."

[45] The methodology to be employed was confirmed in **Glenville Murphy** by Harris JA, at para. 20 of that judgment, where she stated as follows:

"[20] It has always been recognized that there may be some difficulty in deciding on a reasonable compensatory amount to be awarded to a claimant for damages suffered. **However, the practice in the courts in using comparable awards as the basis in making an award and applying the Consumer Price Index thereto, has not in any way worked prejudicially to a claimant.** The object of applying the Consumer Price Index is to take care of inflation. We see no reason to depart from the usual practice and cannot say that we are in agreement with the learned trial judge that the suggested approach of Lord Woolf should be adopted.

[21] **The fact that a successful claimant is entitled to reasonable compensation for damages for false imprisonment is not open for debate. Nor can it be disputed that injury to his liberty, his feelings and reputation are relevant. In making an award, each of these heads of damages must be considered but only a single award should be made.**" (Emphasis supplied)

[46] The respondents have joined issue with the learned judge's reliance on **Crossfield** and have argued that the daily rate should not exceed \$100,000.00. In para. [24] of her judgment, she stated thus:

"[24] **The Crossfield case is the only case cited from the Court of Appeal on the issue and as such I will use it as my guide in coming to my decision.** In that case Crossfield spent 4 days in prison. The Court of Appeal increased an award of \$240,000.00 to \$600,000.00. In increasing the amount, it took into consideration that Crossfield's circumstances were more egregious than those that Herwin Fearon faced in the case of **Herwin Fearon v the Attorney General of Jamaica and anor** Claim NO 1990/F-046 judgment delivered on March 31, 2005." (Emphasis supplied)

[47] In **Crossfield**, the appellant, who was a security guard and entertainer, was arrested and charged with 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 Queen's warehouse. He was detained for four days before being taken before the court on 6 May 1996. He remained in custody until he was granted bail on 11 July 1996. The trial process concluded in the Crown offering no further evidence. The appellant subsequently filed a claim against the Attorney General of Jamaica and Corporal Ethel Halliman for false imprisonment and malicious prosecution.

[48] Mr Crossfield's claim was successful, and he was awarded damages of \$240,000.00 for false imprisonment and \$500,000.00 for malicious prosecution. The trial judge declined to make an award of aggravated or exemplary damages. Crossfield appealed on

the basis that the damages awarded were insufficient compensation for the wrongs he had suffered. He also contended that the trial judge should have awarded aggravated and/or exemplary damages.

[49] The Court of Appeal allowed the appeal in part and, having determined that the award was too low in the circumstances, varied the award. Judgment was accordingly entered for the appellant as follows: (1) false imprisonment: \$600,000.00 with interest; (2) malicious prosecution: \$1,500,000.00 with interest; and (3) aggravated damages: \$400,000.00.

[50] Mr Crossfield's evidence before the trial judge was set out in para. [8] of the judgment of Morrison P, which I gratefully adopt:

"Of his time in custody, the appellant said this:

'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 any time 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.

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.

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.

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.

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.

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'."

[51] The overall conditions under which the appellant in the instant case was detained were, at a minimum, comparable to those faced by the claimant in **Crossfield**. However, in **Crossfield**, there was evidence that Mr Crossfield had suffered loss of reputation, while in the instant case, there was no such evidence. The appellant was detained for a far longer period and was in a compromised state of health throughout that period. In **Crossfield**, the court examined comparable cases and adjusted the award to reflect contemporary monetary values, a practice this court had previously endorsed in **Glenville Murphy**. This was the course adopted by the learned judge.

[52] The learned judge's application of the daily rate of \$200,000.00 for the entire period has also been challenged by counsel for the respondent, who has urged this court to endorse the approach approved by the English Court of Appeal in **Thompson**. In that case, Lord Woolf MR stated that in computing the damages to be awarded, the following ought to be done:

"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.”

[53] That approach was endorsed by the Privy Council in **Takitota** and, more recently, in **Ngumi**.

[54] In **Takitota** at para. 17 of that judgment, Lord Carswell, who delivered the decision of the Board, stated:

“17. The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention, and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure that they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of over eight years’ detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant.”

[55] In **Ngumi**, Dame Ingrid Simler also stated:

“72. ...It is now well-established that the initial shock of unlawful arrest and imprisonment may attract a higher notional element than a later period of detention because people do tend to adjust to their changed circumstances, and the initial shock generally gives way to adaptation and resignation, though this may not always be the case. The way in which the arrest was effected and any attendant publicity may be relevant factors in the assessment. Likewise, in assessing compensation for any later period of unlawful detention that follows, any loss of reputation, loss of enjoyment of life or normal experiences foregone, are likely to require consideration alongside the obvious factors of the length and conditions and treatment in detention.

73. **But damages in these cases should not ordinarily be assessed by dividing the award into separate periods or by fixing a rigid daily rate to be awarded for each day of incarceration and multiplying it by the number of days spent in unlawful detention. Rather, as the Board held in Takitota at paragraph 17, compensatory damages should be assessed in the round.** The appropriate figure should “reflect compensation for the long period of wrongful detention...any element of aggravation...the conditions of his detention and...the misery which he endured” and accordingly, the “final figure for compensatory damages should therefore amount to an overall sum representing appropriate compensation for the period of [lengthy] detention, taking account of the inhumane conditions and the misery and distress suffered”. That is the correct approach.

74. There **may** be cases where a notionally separate sum is regarded as appropriate to compensate for the initial shock of unlawful detention, but it is not necessary to distinguish between the initial and later periods of detention in every case. Nor is this necessarily the most principled way of making the assessment. **What the Privy Council made clear in Takitota however, is that if an initial or daily rate figure is taken and simply extrapolated (by multiplying the daily rate by the number of days) to compensate for a longer unlawful detention period, then it should ordinarily be tapered for the reasons given above.**

75. The Board emphasises however, the importance in every case of the first instance judge setting out the factors taken into account in making the assessment of damages for unlawful detention. **The conditions, treatment and length of the detention will be of prime relevance. There may be other features of the detention that cause particular harm or suffering that are regarded as relevant to the level of damages awarded.** If so, they should be identified. Thus, the award should indicate clearly the amount referable to assault and battery. There should be an identifiable award for false imprisonment and for both aggravated damages and exemplary or constitutional damages. As already stated, this is likely to impose a degree of discipline on what is a difficult evaluative exercise, and will

enable the parties to understand why the assessment has been made at a particular level. It should provide sufficient detail and analysis to enable an appellate court to decide whether or not the assessment is legally sustainable in the case of an appeal.” (Emphasis supplied)

[56] It appears to this court that the respondents’ reference to a “reducing scale” approach accords with the concept of “tapering” as articulated in **Takitota** and **Ngumi**. Both expressions convey the principle that, where a daily rate is used as a starting point in assessing damages for false imprisonment, that rate ought not to be applied rigidly over an extended period but should diminish over time to reflect that the initial shock of detention carries significantly more weight than subsequent days.

[57] That approach has been utilised in this jurisdiction in **The Attorney General v Peter Bando** [2020] JMCA Civ 10 (**Peter Bando**), **Maxwell Russell** and **Devon White**.

[58] In **Peter Bando**, this court found that although “the figure of \$250,000.00 for the first day of detention [could] remain, a sum of \$180,000.00 per day for each additional day of detention, thereafter, would be more just”. F Williams JA, who delivered the judgment of the court, reasoned:

“[82] In relation to the learned judge’s use of a reducing-scale approach, Lord Woolf MR propounded two reasons for its use in **Thompson v Commissioner of Police of The Metropolis**, at page 515. He opined that the reducing scale was utilised 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.’

[83] However, while (as submitted by the respondent), his suffering would have continued throughout the period of his detention, what is important is that the award should proportionally and reasonably compensate him. In my view,

the award of the learned judge is not proportionally sound and requires some adjustment..." (Bold as in original)

[59] In **Takitota**, the appellant was unlawfully detained for eight years. At para. 4. of the judgment Lord Carswell stated:

"4. The conditions in which he was detained were simply appalling. They were described by Longley J in a passage at para 28 of his judgment, the correctness of which has not been challenged:

'The Plaintiff was made to sleep on a filthy floor with only a single blanket in which to cover himself or attempt to make a bed. Conditions were hot and steamy in the summer. There was a bad mosquito problem. The Plaintiff testified that sometimes he was so hot that he had to put water on the floor and lay in it. There was no running water in the facility. The Plaintiff was obliged to urinate and defecate in a bucket. He said the stench was such that it made him vomit on countless occasions causing him to lose his appetite. There were four buckets of urine and faeces in an 18 by eight foot room filled with twenty to thirty-five people at any given time. The evidence of the Superintendent of Prison, Mr Culmer, confirmed these conditions. The Plaintiff had to endure these conditions for roughly eight (8) years while sealed in a room at Maximum Security Prison with hardened criminals in Fox Hill. He said and I am satisfied that it must have happened, that he had been assaulted and attacked and taken advantage of by prisoners and was afraid to use the bucket provided by the authorities and so sometimes he urinated and defecated himself.'

He attempted on at least three occasions to commit suicide. After hospital treatment he was again returned to prison, being transferred after some time to a minimum security unit and ultimately in 1998 to a detention centre. The Court of Appeal categorised his treatment not only as 'less than humane' but as a 'flagrant misuse/abuse of power'."

[60] And at para. 9:

“9. There are two further substantial difficulties in the calculation carried out by the Court of Appeal. First, **the Respondents' argument is quite correct that it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment:** cf *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, 515, [1997] 2 All ER 762, [1997] 3 WLR 403, per Lord Woolf MR.” (Emphasis supplied)

[61] I have noted that the court in **Glenville Murphy** did not endorse that approach. Harris JA, in her discussion of **Thompson**, stated at paras. [19] and [20]:

“[19] The learned judge went on to say at paragraphs 25 and 26:

‘The point there is that the Court of Appeal has seen it fit to bring greater rationality to this area of assessment. I am not saying that we must use the same figures but it is not impossible for there to be some judicial consensus on what is an appropriate base figure. His Lordship [in **Thompson**] emphasised the importance of the shock of the first hour of arrest. I shall use this approach. The Master of the Rolls went to speak of what would be an appropriate sum for a twenty hour false imprisonment. I shall also take into account that in false imprisonment it is quite legitimate to take account (sic) the injury to feelings and injury to reputation. I shall itemize each aspect of the award. I apply all this to the facts as I have found them...’

While the learned trial judge recognised that the figures used in **Thompson’s** case might not be used as a base figure here in Jamaica for making an award, he cast some doubt on the appropriateness of the use of the Consumer Price Index as the benchmark for updating awards. **He was of the view that there ought to be some judicial consensus as to a base figure. He was content to use an approach suggested by Lord Woolfe in Thompson’s case in which he intimated [sic] that a sum should be awarded for the first hour and thereafter an additional sum should be awarded on a progressively reducing scale for any further period of imprisonment.**

[20] It has always been recognized that there may be some difficulty in deciding on a reasonable compensatory amount to be awarded to a claimant for damages suffered. However, the practice in the courts in using comparable awards as the basis in making an award and applying the Consumer Price Index thereto, has not in any way worked prejudicially to a claimant. The object of applying the Consumer Price Index is to take care of inflation. **We see no reason to depart from the usual practice and cannot say that we are in agreement with the learned trial judge that the suggested approach of Lord Woolf should be adopted.**" (Emphasis supplied)

[62] I am, however, of the view that **Glenville Murphy** can be distinguished from the instant case, as the period of detention in that case was approximately 24 hours as against 83 days in the instant case.

[63] In the instant case, the learned judge adopted the method of computation expressly cautioned against by the Privy Council in **Takitota**, by fixing a daily rate of \$200,000.00 and multiplying it by the 83-day period of detention to arrive at the award of \$16,600,000.00 without applying any tapering. Whilst I accept that this court is not bound to apply the principle as stated in **Takitota** and **Ngumi**, they are highly persuasive. In any event, I also have the benefit of this court's decision in **Peter Bando**. It is my view that the approach approved by the Privy Council in **Takitota** and **Ngumi**, and our own court in **Peter Bando**, is the preferred method of assessing damages for false imprisonment where the period of detention may be regarded as lengthy. Such an approach is anchored in proportionality and fairness. Damages should, therefore, be assessed "in the round" and a single global figure arrived at, which reflects the totality of the claimant's experience, including the length of detention, any aggravating features, the conditions endured, and the distress suffered. This method, in my view, would achieve a more just result.

[64] The period of initial shock in this case ought to be calculated from the day of the shooting when he was taken into custody (13 November 2014) to the date of the appellant's second surgery (21 November 2014) when he was again handcuffed to his

hospital bed. That period amounts to eight days. Adopting the approach recommended by the Privy Council in **Takitota** and **Ngumi** and utilised in **Peter Bandoo**, I have used the sum of \$200,000.00 per day for the period of the initial shock and \$100,000.00 per day for the remaining period. In reaching that conclusion, I employed a tapered approach similar to that in **Peter Bandoo** but allowed a longer period for the initial shock based on the particular circumstances of this case. The resulting assessment yields a figure of \$9,100,000.00 which is significantly less than the award made by the learned judge. I find that the sum awarded by the learned judge was inordinately high and ought to be set aside. In the circumstances, grounds (a), (c), (d), (e) and (f) of the counter-notice of appeal succeed.

Issue (5): Whether the learned judge conflated compensatory and exemplary damages in making her award for exemplary damages, resulting in an inordinately high award (ground (g) of the counter-notice of appeal)

Appellant's submissions

[65] Mr Smellie submitted that an award of exemplary damages is at the discretion of the court and is based on the circumstances of the case. He advanced that the learned judge was cognizant of the principles that should guide the court in determining whether an award of exemplary damages ought to be made. He submitted that the learned judge bore in mind the factors set out at para. [34] of the judgment in her determination of whether an award was warranted. Specific mention was made of the undisputed fact that the appellant was shot "5 times and once when he was running away". He submitted that in formulating the award, the learned judge considered the extent of the outrageous conduct on the part of the second respondent. Therefore, the award of exemplary damages ought not to be disturbed. Counsel, in addressing the respondents' submission that the employer in this case would be responsible for the sum awarded, stated that whilst that is true, it is the employer who is responsible for unleashing the wrongdoer on the public. Moreover, an award of exemplary damages would likely cause the employer to take steps to prevent the wrongdoer from carrying out the acts complained of.

Respondents' submissions

[66] Counsel for the respondents did not dispute that an award for exemplary damages was warranted. However, she argued that the sum awarded ought to have been moderate in consideration of the fact that the Crown would bear the responsibility of making the payment. Counsel also submitted that the award in **Conrad Thompson** was not an appropriate guide. She argued that the learned judge in that case carried out a similar exercise of adjusting the award in **Maxwell Russell**, though not exactly, to come to the sum of \$700,000.00. That figure was, in turn, updated by the learned judge in this matter. She submitted that, in all the circumstances, a sum of no more than \$400,000.00 would be an appropriate award for the appellant.

Discussion

[67] The object of exemplary damages is to deter and punish. Lord Devlin in **Rookes v Barnard** [1964] 1 All ER 367 ('**Rookes v Barnard**'), listed three categories of cases in which an award may be made under this head. They are:

1. Where the claimant has been the victim of oppressive, arbitrary or unconstitutional actions by servants of the government;
2. Where the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the claimant; and
3. Where the award of exemplary damages is expressly authorised by statute.

[68] The considerations which should guide the court in making such an award were stated in the following terms at page 411:

“In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then they can award some larger sum. If a verdict given on such direction has to be reviewed on appeal, the appellate court will first consider whether the award can be justified as compensation, and, if it can, there is nothing further to be said. If it cannot, the court must consider whether or not the punishment is in all the circumstances excessive. (See also **Cassell & Co Ltd v Broome and another** [1972] 1 All ER 801).” (Bold as in original)

[69] The learned judge addressed the issue in paras. [34] and [35] of the judgment where she stated thus:

“[34] I take my guide from the case of **Rookes v Barnard [1964] 1 All ER 367** in coming to my decision with respect to exemplary damages. Lord Devlin in that case said that one of the bases on which exemplary damages are to be awarded is in cases of oppressive, arbitrary or unconstitutional action on the part of servants or agents of the Crown. I believe that when the 2nd Defendant shot the Claimant 5 times and once when he was running away, when he pointed him out in an identification parade and then failed to attend not even one of the Court dates in the criminal proceedings after he himself laid charges against the Claimant, he acted in an oppressive, arbitrary and unconstitutional manner. Such action by a police officer whose duty it is to serve and protect is to be frowned on. Mr Campbell has asked for an award of \$2M, Ms Whyte is not of the view that any award should be made. I disagree with her and will be guided by the **Thompson case** whose facts are similar to the case before me. In that case, an award of \$700,000 was made and that updates to \$1.3M.

[35] Aggravated damages are meant to be compensatory. They are awarded in instances when the defendant’s

conduct has caused greater or aggravated damage to the claimant. There is no doubt in my mind that Mr Ellis was subjected to aggravating circumstances. Mr Ellis suffered at the hands of police officers in his arrest and detention. Against his doctor's orders he was taken from the hospital and transported to the Portmore Police Station. He was not given the medication which was prescribed for him by his doctors resulting in him fainting upon arriving at the police station and then having to be transported to the Spanish Town Hospital. He was bounced about in an unwell state while police officers had drinks at a bar and ate at a restaurant. I took all of these factors into account in making my award for False Imprisonment and therefore must agree with Ms Whyte that in circumstances where the aggravating features are reflected in the award for false imprisonment, no award should be made for aggravated damages."

[70] In **Attorney General for Jamaica and ors v Roderick Cunningham** [2020] JMCA Civ 34 ('**Roderick Cunningham**') Morrison P, at para. [24], referred to the following statement of Lord Nicholls of Birkenhead in **Kuddus (AP) v Chief Constable of Leicestershire Constabulary** [2001] UKHL 29 at para. 63, with approval:

"The availability of exemplary damages has played a significant role in buttressing civil liberties, in claims for false imprisonment and wrongful arrest. From time to time cases do arise where awards of compensatory damages are perceived as inadequate to achieve a just result between the parties. The nature of the defendant's conduct calls for a further response from the courts. **On occasion conscious wrongdoing by a defendant is so outrageous, his disregard of the plaintiff's rights so contumelious, that something more is needed to show that the law will not tolerate such behaviour. Without an award of exemplary damages, justice will not have been done. Exemplary damages, as a remedy of last resort, fill what otherwise would be a regrettable lacuna.**"
(Emphasis supplied)

[71] Where the sum to be awarded is concerned, the following passage from **Roderick Cunningham** is also instructive. At para. [46] Morrison P stated:

“[46] ...The principle is that exemplary damages should be moderate and should not be awarded unless the court considers that the awards in those categories would not be sufficient to punish the wrongdoers for their outrageous conduct towards the claimant. Ultimately, it is a matter for the discretion of the judge assessing the damages to make this determination...In this case, as it seemed to me, the judge’s approach struck a fair balance between adequate compensation to the respondent and well-deserved punishment for the oppressive misuse of the State’s prosecutorial machinery.”

[72] In that case, the claimant was shot during a nighttime incident, sustaining catastrophic injuries that led to the amputation of his right leg. Despite being seriously wounded, he was treated as a criminal suspect: placed in the trunk of a police car, guarded, and placed under police guard in hospital for five days, and later detained for weeks without being brought promptly before a court. He was charged with serious firearms offences. He, thereafter, attended court for a period of four years and 10 months, during which the case was called up numerous times. The trial itself lasted six days. The prosecution’s witnesses were soldiers and police officers. The prosecution presented evidence that he had been in possession of a rifle and ammunition, which were exhibited in court, and claimed that he fired at the police and soldiers. His hands were swabbed, and the results were negative for gunpowder residue. The case was ultimately dismissed on a no-case submission, which the trial judge upheld. In addition, although the charges against him were dismissed, he was returned to custody and fingerprinted.

[73] In the instant case, the appellant was before the court for two and a half years during which there were 10 court dates. The case was adjourned on every occasion by the prosecution as no witnesses attended those hearings. The case against the appellant was ultimately dismissed. Having been shot by the second respondent and having undergone surgery, he was removed from the hospital against doctors’ orders and was

driven to various places *en route* to the Portmore police station. In addition, he was denied medication. He also fainted at the police station and had to be taken back to the hospital. Such conduct was clearly oppressive, and I agree with the learned judge's finding that an award of exemplary damages would without more, be warranted. However, these factors were considered by the learned judge in arriving at the daily rate for false imprisonment, which I have already applied to eight days of the period of imprisonment.

[74] The real issue is with the quantum. Morrison P, in **Roderick Cunningham**, found that the award for exemplary damages in the amount of \$1,000,000.00 could not be considered to be manifestly excessive in the circumstances of the case. He stated:

"[45] Looked at in this way, there was therefore an ample basis for the judge's finding that, given an award of \$400,000.00 for exemplary damages in relation to a malicious prosecution which lasted just under a year in **Russell**, a prosecution which dragged on for nearly five years in this case, in the circumstances described in paragraph [38] above, should attract an award of \$1,000,000.00 for exemplary damages. In these circumstances, I cannot say that the end result was a figure for exemplary damages that was so excessively high as to make it a wholly erroneous estimate of the amount of damages to which the respondent was entitled in this case.

...

[47] It is for these reasons that I concluded that the judge's award for exemplary damages should not be disturbed and that the appeal should be dismissed..." (Bold as in original)

[75] Morrison P, however, indicated that it would have been helpful if the trial judge had stated the precise factor by which she updated the awards from the cases she relied on in order to arrive at the figure of \$1,000,000.00.

[76] Morrison P also stated that if there was a weakness in the trial judge's analysis, it lay in the fact that, in arriving at the award of \$1,000,000.00 for exemplary damages,

she did not have regard to the principle outlined in **Rookes v Barnard** that exemplary damages ought to be awarded if, and only if, the sum awarded by way of compensation, was inadequate to punish for outrageous behaviour.

[77] Exemplary damages are not meant to be a windfall for a claimant. How, then, is an appropriate sum arrived at? In this matter, the appellant was awarded exemplary damages in the sum of \$1,300,000.00. This was in circumstances where \$16,600,000.00 was awarded for false imprisonment. In arriving at the sum for false imprisonment, the learned judge stated, at para. [35] of the judgment, that she took the factors stated in para. [72] of this judgment, as enunciated in **Roderick Cunningham**, into account. However, there is no indication that she considered whether the damages awarded were sufficient to compensate the appellant for the “outrageous conduct” of the second respondent. I do bear in mind that an award under this head is discretionary. However, the failure of the learned judge to consider the entire principle in **Rookes v Barnard**, permits this court to interfere with the award of exemplary damages made by the learned judge. In essence, she failed to consider whether the compensatory damages were adequate before making the award for exemplary damages. That was an error.

[78] In **The Attorney General v Delroy Parchment and ors** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2003, judgment delivered 30 July 2004 (**‘Delroy Parchment’**), which was referred to by Morrison P in **Roderick Cunningham**, Cooke JA stated at pages 7-8:

“The fact that exemplary damages may be appropriate, does not necessarily compel an award under this heading. Exemplary damages, and the quantum in respect of such award is dependent on whether or not and to what extent the compensatory award is inadequate to punish and deter state agents as regards their outrageous conduct. In this case there was an award for aggravated damages. The global award cannot be said to have been parsimonious – it was substantial. To reiterate the award of exemplary damages is not to provide

windfalls to plaintiffs at the public expense.” (Emphasis supplied)

[79] Morrison P, at para. [36] of **Roderick Cunningham**, having reviewed numerous cases that considered this issue, stated:

“[36] These cases all recognise and proclaim the court’s power to award exemplary damages in deserving cases, as a valuable means of punishing and deterring outrageous and contumelious disregard by servants or agents of the state of the rights of persons in Jamaica. However, following the steer given by Lord Devlin in **Rookes v Barnard**, the cases all say that exemplary damages should only be awarded in cases in which the court considers the level of compensation afforded by an award of basic and aggravated damages to be insufficient in the circumstances of the particular case to punish the defendant and deter others. And further, the cases all urge moderation in the amounts awarded for exemplary damages.”

[80] I have found that the sum awarded for false imprisonment ought to be reduced from \$16,600,000.00 to \$9,100,000.00. Exemplary damages are awarded not to compensate a claimant but to punish the defendant and deter similar misconduct, so they do not readily lend themselves to mechanical inflation adjustments. This, I believe, is at the centre of the respondents’ contention. Unlike compensatory damages, which may properly be updated to reflect the current value of money, an award of exemplary damages must be moderate, proportionate, and tailored to the punitive purpose it serves at the time it is made.

[81] Notwithstanding this distinction, an award of exemplary damages remains a matter within the discretion of the trial judge. In the exercise of her discretion, the learned judge awarded the sum of \$1,300,000.00 as exemplary damages. The conduct of the second respondent, for whom the first respondent is vicariously liable, was found to be oppressive and outrageous. In those circumstances, the learned judge had the discretion to impose a punitive award to register the court’s disapproval of his actions and to deter similar conduct.

[82] In exercising that discretion, the learned judge was required to consider whether the compensatory sums awarded were sufficient to punish the respondents and to mark the court's disapproval of the oppressive conduct of the second respondent. She was also entitled to have regard to decided cases with broadly comparable circumstances in arriving at an appropriate figure. I also note that most of the factors which would form the basis of an award of exemplary damages in this matter to a great extent overlap with those taken into account in the assessment of damages for false imprisonment and therefore ought not to form the basis of an award under this head.

[83] Whilst I am mindful of the well-established principle that an appellate court ought to be reluctant to interfere with a discretionary award, the learned judge did not consider whether the compensatory damages were sufficient. An award of exemplary damages is not intended to be a windfall. The sums awarded for general damages for pain and suffering and loss of amenities and false imprisonment are, in my view, insufficient to compensate the appellant for the actions of the second respondent for whom the first respondent was ultimately responsible and to register the court's disapproval of the second respondent's conduct.

[84] The respondents have submitted that although an award for exemplary damages is warranted, the sum awarded under this head should not exceed \$400,000.00. We have noted that there is no counter-notice of appeal challenging the award itself. What has been challenged is the methodology and the quantum. Based on the circumstances, I am of the view that the sum previously awarded is disproportionate and inordinately high and may even be described as a windfall. Accordingly, I am of the view that the sum of \$1,300,000.00 initially awarded as exemplary damages ought to be set aside and an award of \$400,000.00 be substituted therefor. Accordingly, ground (g) of the counter-notice of appeal succeeds.

Conclusion

[85] The learned judge appears to have misunderstood the submissions made on the appellant's behalf in respect of damages for pain and suffering and loss of amenities. She

also erred in her application of the relevant cases to the circumstances in this case. This resulted in an inordinately low award for pain and suffering and loss of amenities. Accordingly, the award of \$5,000,000.00 should be set aside, and the amount of \$18,000,000.00 substituted therefor. Concerning the award of \$16,600,000.00 for false imprisonment, the authorities make it clear that applying a wholesale daily rate across the period of detention is not appropriate. Rather, the court, in making an award for lengthy detention, should arrive at a sum “in the round” having regard to all the circumstances of each individual case. Having regard to those considerations and to the circumstances of this case, I am of the view that the sum awarded under this head is excessive. Accordingly, the sum of \$9,100,000.00 based on the reasoning above ought to be awarded.

[86] In addition, the sums ultimately awarded as compensatory damages are, in my view, insufficient to register the court’s disapproval of the second respondent’s conduct. In light of the respondents’ concession that an award of exemplary damages is warranted, I accept the submission that an award of \$400,000.00 is sufficient in all the circumstances. Accordingly, I propose that the initial award of \$1,300,000.00 be set aside and the sum of \$400,000.00 be substituted therefor. In the premises, the appeal succeeds, while the counter appeal succeeds, in part.

Costs

[87] In determining the question of costs of these proceedings, the general rule is that costs follow the event. The unsuccessful party will therefore be ordered to pay the costs of the successful party unless otherwise ordered by the court. This is encapsulated in rule 64.6 (1) of the CPR. However, by virtue of rule 64.6 (2), the court has the discretion to order the successful party to pay all or part of the unsuccessful party’s costs or make no order as to costs. Rule 64.6(3) states that, in deciding who should pay the costs, the court must have regard to all the circumstances. Some of those circumstances are set out in rule 64.6(4). In **Gordon Stewart v Goblin Hill Hotels Limited and others (No**

2: Costs) [2016] JMCC COMM 39, (**Goblin Hill**), Sykes J (as he then was) at para [6] stated:

"[5] Rule 64.6 (1) captured the starting point of the common law. This is supported by Morrison JA (now President) in **Capital & Credit Merchant Bank Ltd v Real Estate Board** [2013] JMCA Civ 48 who said at paragraph 10:

[10] The question of whether to make any order as to costs - and, if so, what order is therefore a matter entrusted to the discretion of the court. The starting point under the rules, reflecting the longstanding position at common law, is that costs should follow the event. The court may nevertheless make different orders for costs in relation to discrete issues. It should in particular consider doing so where a party has been successful on one issue but unsuccessful on another issue. In that event, the court may make an order for costs against a party who has been generally successful in the litigation.

[6] What does giving effect to the rule look like in practice? Waller LJ in **Straker v Tudor Rose (a firm)** [2007] EWCA Civ 368 gave good practical advice on this matter. He set out a methodology which should be followed. His Lordship said at paragraphs 11 – 13:

...The court must first decide whether it is case where it should make an order as to costs, and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must take into account all the circumstances including (a) the parties' conduct, (b) whether a party has succeeded on part even if not the whole, and (c) any payment into court.

12. Having regard to the general rule, the first task must be to decide who is the successful party. The court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include (a) a failure to follow a pre-action protocol; (b) whether a party has unreasonably pursued or contested an allegation or an issue; (c) the manner in

which someone has pursued an allegation or an issue; and (d) whether a successful party has exaggerated his claim in whole or in part.

13. Where, particularly in a commercial context, the claim is for money, in deciding who is the successful party, I agree with Longmore LJ when he said in Barnes v Time Talk (UK) Ltd. [2003] EWCA Civ 402 para 28 that "the most important thing is to identify the party who is to pay money to the other". In considering whether factors militate against the general rule applying, clear findings are necessary of factors which led to a disapplication of the general rule, e.g. if it is to be said that a successful party "unreasonably" pursued an allegation so as to deprive that party of what would normally be his order costs, there must be a clear finding of which allegation was unreasonably pursued."

[88] The determination of the issue of who is the successful party was addressed by Lightman J in **Bank of Credit and Commerce International SA v Ali (no 3)** [1999] NLJ 1734 Vol 149, who stated:

"For the purposes of the CPR success is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense"

[89] Ward LJ in **Day v Day** [2006] EWCA Civ 415, stated at para [17]:

"[17] I would go further and say that in a case like this, the question of who is the unsuccessful party can easily be determined by deciding who has to write the cheque at the end of the case;..."

[90] In the instant case, the appellant succeeded in his appeal challenging the learned judge's assessment of the general damages for pain and suffering and loss of amenities. That sum was increased by \$13,000,000.00. However, the respondent's counter appeal was also successful as the sum awarded for false imprisonment was reduced by \$7,500,000.00. The sum awarded for exemplary damages was reduced from \$1,300,000.00 to \$400,000.00. This resulted in an increase of the sum awarded to the appellant by \$4,600,000.00. Looked at in the round and assessed as a whole, based on

Goblin Hill and **Day v Day**, the appellant is the successful party. In the circumstances, costs of the appeal should be awarded in his favour. In respect of the counter notice of appeal, although the respondents succeeded in reducing the sums awarded for false imprisonment and exemplary damages, the overall impact is in favour of the appellant as the respondents will be the parties to “write the cheque” for an increased sum at the end of the day given the appellant’s success in the appeal. Accordingly, I propose that there be no order as to costs on the counter notice of appeal.

STRAW JA

ORDER

1. The appeal is allowed.
2. The counter-notice of appeal is allowed, in part.
3. The award of general damages in the sum of \$5,000,000.00 is set aside and the sum of \$18,000,000.00 substituted therefor.
4. The award of \$16,600,000.00 made for false imprisonment is set aside, and the sum of \$9,100,000.00 is substituted therefor.
5. The award of \$1,300,000.00 for exemplary damages is set aside, and the sum of \$400,000.00 is substituted therefor.
6. Costs of the appeal to the appellant to be agreed or taxed.
7. No order as to costs on the counter notice of appeal.