[2015] JMCA Civ 63

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 60/2013

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

BETWEEN THE ATTORNEY GENERAL OF JAMAICA APPELLANT

AND GARY HEMANS RESPONDENT

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

Sean Kinghorn instructed by Kinghorn and Kinghorn for the respondent

21 October and 18 December 2015

MORRISON P (AG)

[1] I have read the draft reasons for judgment of my sister P Williams JA (Ag) and agree with her reasoning. I have nothing to add.

McDONALD-BISHOP JA

[2] I have read in draft the reasons for judgment of my learned sister, P Williams JA (Ag). I agree with her reasoning and I have nothing useful to add.

WILLIAMS JA (AG)

[3] This is an appeal from the judgment of Batts J, delivered on 31 May 2013, challenging the award of damages made in favour of the respondent upon the determination of liability in the appellant. The learned judge made the following award:

> Under the head of general damages:
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> | | |
> |---|---|
> | For assault (being the pain, suffering, loss of amenities and the embarrassment or "insult" from the injury) | $500,000.00 |
> | False Imprisonment | $250,000.00 |
> | Malicious Prosecution | $450,000.00 |
> | Aggravated Damages | $1,200,000.00 |
> | Exemplary Damages | $200,000.00 |
> | Special Damages | $219,000.00 |

The appeal

[4] The appellant appealed against the following:

> "(a) Damages for Assault (being the pain, suffering, loss of amenities and the embarrassment or "insult" from the injury) in the amount of $500,000.00;
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> (b) Damages for False Imprisonment awarded in the sum of $250,000.00;
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> (c) Aggravated damages in the amount of $1,200,000.00."

> The following findings of fact and law were challenged:
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> > "(i) An award for the embarrassment or "insult" from the injury is to be included in the award for assault."

The grounds of appeal were:

"(a) The learned Judge erred in law by taking into account the 'embarrassment' of the Respondent in arriving at the award for damages for assault. (Paragraph 59(a));

(b) The learned Judge erred as a matter of law by relying on the authorities of **Sheron** [sic] **Greenwood-Henry v The Attorney General** CL G 116 of 1999 (unreported decision of Sykes, J) and **Maxwell Russell v The Attorney General** HCV 4024/2006 (unreported decision of Mangatal, J) and the dicta therein in computing the award for False Imprisonment which award is in any event excessive in all the circumstances. (Paragraph 59(b));

(c) The learned Judge erred as a matter of law by relying on the authority of **Sheron** [sic] **Greenwood-Henry** CL G 116 of 1999 (unreported decision of Sykes, J) in determining the award of Aggravated damages which award is in any event excessive in all the circumstances (Paragraph 59(d))."

The Orders sought were:

"(i) That the Orders enumerated at paragraph 59 (a), (b) and (d) of the written Judgment of the Honourable Mr. Justice Batts made on May 31, 2013 be set aside and substituted therefor with more appropriate awards for quantum of damages;

(ii) Costs in the Court of Appeal to be [sic] Appellant's to be agreed or taxed;

(iii) Any further or other relief that this Honourable Court deems fit."

[5] On 21 October 2015, after hearing submissions from both counsel, the court made the following orders:

"1. The appeal is allowed in part.

2. The amount of $1,200,000.00 awarded for aggravated damages is set aside and the amount of $600,000.00 is substituted therefor.

3. The judgment of Batts J given on 31 May 2013 is affirmed in all other respects.

4. There will be no order as to the costs of this appeal."

We promised to put our reasons in writing and this is in fulfillment of that promise.

Factual background

[6] The factual circumstances, as found by the learned trial judge, can be briefly stated. On 16 May 2007, the respondent and some of his family members, some of whom were visiting from abroad, visited the Hellshire Beach in St Catherine. On exiting the location some time after 9:00 pm, the respondent was signaled by police officers to stop his motor vehicle and he duly complied. He was requested to produce his documents and a search was requested of his vehicle. What transpired thereafter culminated in the respondent being 'boxed', hit with a baton and then he was pushed and dragged into the police motor vehicle.

[7] The respondent was taken to the Portmore Police Station where he was kept in the holding area of the guard room before being taken to the cells. While being processed at the cells he was ordered by the policemen on duty there to take off all his clothes and to squat in a corner, which he did. The respondent described how he was completely embarrassed and humiliated by this treatment. He was eventually placed in custody until he received bail on 17 May at approximately 11:00 am.

[8] The respondent attended a doctor for medical attention on that day, having been bailed. He was examined and the following findings were made relative to his injuries:

> "Head and Neck
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> Traumatic rupture of right tympanic membrane (Ear Drum).
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> Hematoma to left temple seen
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> Neck was tender posteriourly, with pain on flexion and decreased range of motion due to pain.
>
> Anterior Chest Wall
>
> Tenderness to areas of his anterior chest wall especially the left lower side. There was an area of redness and swelling which was markedly tender to his left lower chest anteriority. Auscultation was normal."

[9] Upon assessment of the injuries, it was found that there were the following:

> "Traumatic rupture of right eardrum due to barro trauma. Soft tissue injury to skull, with swelling and tenderness to both sides, and heamatuma [sic] to left temple. Injury to neck muscles posteriourly. There was also soft tissue and muscle injury to his anterior chest wall, with significant bruising to the left lower area of his anterior chest wall. This was consistent with being beaten with a hard blunt object, a baton in his case."

[10] The respondent was charged for the offences of assaulting constable, abusive and indecent language and had to attend the St Catherine Resident Magistrate's Court holden at Spanish Town to answer the charges. All charges were eventually dismissed for want of prosecution on 22 January 2008. The police officers failed to attend court on any of the occasions the matter was called up.

Submissions on the award for aggravated damages

[11] During the hearing of the appeal, counsel for the appellant Miss Chisholm correctly recognized that she was not being successful in attacking the awards made for assault and false imprisonment and abandoned those grounds. The challenge therefore, remained only as to the award for aggravated damages. She argued that, in all the circumstances, there could be no justification for such a high award to be made under this heading, having regard to the applicable authorities. She submitted that the learned trial judge had erred in making an inordinately high award where the facts relied on do not fall within a specified category such as "airport cases" where high awards are generally made. In particular, she argued, he erred as a matter of law by relying on the authority of **Sharon Greenwood-Henry v The Attorney General of Jamaica** Claim No CL G 116/1999, judgment delivered on 26 October 2005.

[12] Miss Chisholm noted that it is trite law that aggravated damages are compensatory and are awarded for injury to a claimant's proper feelings of dignity and pride. They are to be awarded only where there are aggravated features about the defendant's conduct which justify such an award. Further, she submitted, these damages are awarded where these aggravating features were such that would result in the claimant not receiving sufficient compensation for the injury suffered if the award was restricted to a basic award. She then urged that the award for aggravated damages should not, in the ordinary way, be as much as twice the award for basic damages, except, perhaps where on the particular facts, the basic damages were modest. She noted that this principle was accepted by Mangatal J in **Maxwell Russell**

v The Attorney General of Jamaica and Anor Claim No 2006 HCV 4024 delivered on 18 January 2008.

[13] She submitted that since the award of damages for assault, battery and false imprisonment also seeks to compensate the claimant for injury to his feelings caused by any aggravating features of his arrest, this factor must be considered in ascertaining a sum for aggravated damages, otherwise, it may result in the risk of double counting.

[14] She submitted further that in the instant case, the aggravating features found by the learned trial judge include the respondent's treatment at the police station, "being made to strip and stoop as aforesaid and the fact that the officers did not attend court". She noted that the learned trial judge applied **Greenwood-Henry v The Attorney General** without giving any explanation for its application to the instant case. It then was her submission that the facts in that case reflect egregious conduct by the defendant's servants and the features were clearly distinguishable from the circumstances in the instant case.

[15] In concluding her submissions, Miss Chisholm considered the principles applicable on a review of an award made by a judge as stated by Greer LJ in **Flint v Lovell** [1935] 1 KB 354 and of Harrison JA, in a judgment of this court, in **Stephen Clarke v Olga James-Reid** SCCA No 119/2007 delivered 16 May 2008. She then submitted that in all the circumstances, the learned trial judge's estimate of the aggravated damages was inordinately high. She urged that there should be no award, or, if any sum was awarded, it should be moderate.

[16] In response, Mr Kinghorn accepted the appellant's statement of the applicable principles. He then pointed to the respondent's evidence which supports the damage done to his feelings and dignity. Firstly, there was the humiliation from attending court on numerous occasions given the fact that as the respondent said, he was a well known taxi operator in the St Catherine area and the "stigma which attaches to you when you are seen at court frequently is that you are a law breaker".

[17] Further embarrassment and humiliation were caused from the fact that the respondent was accosted in the plain view of the public at the Hellshire round-a-bout and he was hit in the face and chest there. He was also embarrassed by the treatment of being handcuffed and taken to the station and then further humiliated because he was forced to take off his clothes and be naked at the police station.

[18] Mr Kinghorn submitted that the court was entitled to accept the evidence of embarrassment on the occasions that the respondent spoke of and to make an award which took into consideration the aggravating features of the respondent's ordeal. He further submitted that in respect of his embarrassment and humiliation, which had dogged the respondent for years, and recognising the damage which he indicated, was done to him emotionally, the court properly gave an award of $1,200,000.00 which was reasonable and in keeping with that made in **Greenwood-Henry v The Attorney General**.

[19] Mr Kinghorn submitted that the awards made for false imprisonment and malicious prosecution were not sufficient in these circumstances. Thus, he went on to

urge that the learned trial judge was correct in looking at the entire scenario as described by the respondent, and found that it was out of the realm of an ordinary tort and therefore required greater compensation.

Discussion and analysis

[20] It is accepted that the applicable principle to be applied by the Court of Appeal in reviewing damages awarded by a judge were stated by Greer LJ in **Flint v Lovell** at page 360, where he said:

> "In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that 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 damage to which the plaintiff is entitled."

This principle has been considered and applied in several cases in this court. In **Stephen Clarke v Olga James-Reid**, Harrison JA at paragraph 5 had this to say:

> "…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."

[21] It was against this background that we considered the award of $1,200,000.00 for aggravated damages. The learned trial judge in making this award stated as follows:

> "I apply **Greenwood-Henry v A.G**… and note that the circumstances of aggravation include his treatment at the police station, being made to strip and stoop as aforesaid and the fact that the officers did not attend court."

[22] It is to be assumed that by identifying these factors, the learned trial judge recognized that aggravated damages are to be awarded only where there was some feature in the behaviour of the appellant that required the respondent being additionally compensated beyond what he would have received for the assault, false imprisonment and malicious prosecution.

[23] In **Richardson v Howie** [2004] EWCA 1127 Thomas LJ, in considering the approach to a claim for aggravated damages, had this to say at paragraph 16:

> "It is necessary to begin with the judgment of Lord Devlin in **Rookes v Barnard** [1964] AC 1129; rather than refer to the various passages in his speech at pages 1221 – 1232, it is convenient to adopt the helpful summary in the Law Commission consultation paper on Aggravated, Exemplary and Resitutionary Damages (1993) at paragraph 3.3 which counsel were agreed represented an accurate summary of his speech and the conclusions to be drawn from it:
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> > 'In **Rookes v Barnard** Lord Devlin said that aggravated awards were appropriate where the manner in which the wrong was committed was such as to injure the plaintiff's proper feelings of pride and dignity or gave rise to humiliation, distress, insult or pain…. It would therefore seem that there are two elements relevant to the availability of an aggravated

> award, first exceptional or contumelious conduct or motive on the part of the defendant in committing the wrong and second, intangible loss suffered as a result by the plaintiff, this is injury to personality'."

And at paragraph 17 he went on to say:

> "Even though this is an admirable summary, it is, however, important to bear in mind Lord Devlin's observations at page 1121, where after referring to the circumstances where aggravated damages could be awarded, he concluded:
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> > 'These are matters which the jury can take into account in assessing the appropriate compensation. Indeed, when one examines the cases in which large damages have been awarded for conduct of this sort, it is not at all easy to say whether the idea of compensation or the idea of punishment has prevailed'."

[24] In the instant case, there can be no dispute that the respondent did in fact suffer injury to his feelings of pride and dignity which gave rise to humiliation and distress. As the learned trial judge mentioned, specifically when making the award, the humiliation and embarrassment that must have arisen from having to squat naked in a corner in the police station must be a major factor in an award of this nature. In all the circumstances, it cannot be said that the learned trial judge erred in making an award under this head.

[25] In considering the quantum which was awarded, the case of **Greenwood-Henry v The Attorney General** was relied on by both parties for opposing reasons. For the appellant, Miss Chisholm submitted that the learned trial judge was wrong to rely on it, whereas for the respondent, Mr Kinghorn argued that the award made was reasonable in light of the amount awarded to the claimant in that case.

[26] It will then be useful to consider briefly the facts and judgment in the **Greenwood-Henry** case. The claimant was suspected of being a "drug mule" on a trip to London, England. She was pulled from the line at the Norman Manley International Airport, taken to the police station and then to the Kingston Public Hospital where she was x-rayed, "laxitised" and then released midday the following day.

[27] The learned trial judge, Sykes J, described what the claimant was subjected to as a traumatic experience. He noted that she was stripped and searched by a female officer and her vagina was invaded by this officer in circumstances of questionable hygienic conditions. Then at the hospital, without lawful excuse or justification, she was subjected to an anal and vaginal examination. She was intimidated into drinking a laxative which she neither wanted nor requested. The learned trial judge then found that no one could deny the injury to the claimant's dignity, pride and self-esteem. He found she was entitled to both aggravated and exemplary damages. He made an award, which at the time of trial in the instant matter after indexation, amounted to $1,481,654.29.

[28] It is true that in matters such as this, the court must strive to achieve a level of uniformity that the court in determining compensation to a claimant can be guided by comparable awards in similar cases. However, the factual circumstances of each case must ultimately determine whether a mere indexation of previous awards will do justice to the case.

[29] In many cases, the humiliation suffered by a claimant, while crying out for some compensation, such compensation must be moderate in all the circumstances. It has been recognized that there can never be any mathematical formula to govern assessment of damages and even more so for aggravated damages. The fact that this award is one which is compensatory, as distinct from being punitive, must be borne in mind. There is a risk of over compensation arising out of double counting since it would be legitimate for a judge to include in an award for false imprisonment and/or malicious prosecution an ingredient for humiliation, distress and such other injuries to the feelings of the claimant.

[30] The approach suggested by Lord Woolf MR in **Thompson v Commissioner of Police of the Metropolis** [1997] 2 All ER 762 as to the directions to be given to a jury concerning the appropriate level of damages recoverable under this heading is useful. At page 775, he stated:

> "(10) …We do not think it possible to indicate a precise arithmetical relationship between basic damages and aggravated damages because the circumstances will vary from case to case. In the ordinary way, however, we would not expect the aggravated damages to be as much as twice the basic damages except perhaps where, on the particular facts, the basic damages are modest.
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> (11) It should be strongly emphasized to the jury that the total figure for basic and aggravated damages should not exceed what they consider is fair compensation for the injury which the plaintiff has suffered. It should also be explained that if aggravated damages are awarded such damages, though compensatory and not intended as a punishment, will in fact contain

> a penal element as far as the defendant is concerned."

[31] One matter that is found to be of some significance in the instant case, is that the learned trial judge indicated that he felt constrained to make some observations about the Constitution of Jamaica and its genesis. He then explained that he had found it necessary to do so because of some surprising features of the case. At paragraph 7 he stated:

> "…Surprising because when the evidence from the Defendant was completed the matter of a lawful reason to stop and request a search of the Claimant's vehicle had not been addressed. Indeed, the attorney-at-law representing the Crown when asked stated that, reasonable cause was the fact that the police were conducting random searches for guns and drugs. It is the casual attitude by the Defendant and its witnesses to the individual's right to freedom of movement, freedom of the person and freedom from search which has caused me to restate the source of these rights and the history of struggle to attain them. It bears repeating that while lawfully driving his motor vehicle the Claimant was exercising his right to freedom of movement and was entitled to expect that that [sic] as well as his other rights would not be interfered with without lawful excuse."

[32] After reviewing the evidence and finding the appellant liable for assault, false imprisonment and malicious prosecution, the learned trial judge went on to state that even on the account given by the appellant's witnesses, no lawful reason was given for stopping the respondent's vehicle nor was there any lawful reason advanced for the desire to search his vehicle or for the alleged request for his documents.

[33] Further, there was a finding that there was no lawful reason to stop and search the car and the learned trial judge commented at paragraph 58:

> "…In Jamaica the citizen is free to move about without an obligation to carry a pass, and is not to be subject to arbitrary or random search. This is still a constitutional guarantee."

Thus, although there was no claim for a breach of constitutional rights, the learned trial judge recognized the existence of such a breach. Although this was not a matter raised or complained about by the respondent, this was the only area in law that the learned trial judge dealt with in any detail. Given the manner in which this issue was dealt with, one cannot help but wonder if it did not influence, in some way, the amount awarded for aggravated damages although not expressly stated. The fact that it was not relied on by the respondent as part of his claim means, to my mind, that the learned trial judge would not have had an appropriate basis to factor it into his consideration in awarding aggravated damages, if he had done so.

[34] The facts which justified the award in **Greenwood-Henry v The Attorney General** on which he admittedly relied are, to my mind, far worse than those on which the respondent in the instant case sought to advance his claim for aggravated damages. On this basis alone the learned trial judge's reliance on that case, is to my mind, somewhat misplaced.

[35] The humiliation and embarrassment suffered by the respondent would have been a consideration in the amounts awarded for assault, false imprisonment and malicious prosecution. The amount awarded for aggravated damages is more than twice that awarded under each of those heads.

[36] In all the circumstances, therefore, in a context where the basic awards cannot be said to have been inordinately low or far less than modest, the sum awarded for aggravated damages was in my view, an erroneous estimate of the damage to which the respondent was entitled. It is for these reasons that I agree with my learned colleagues, Morrison P (Ag) and McDonald-Bishop JA, that the award for aggravated damages should be set aside as stated in paragraph [5].