

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 28/2014**

**BEFORE: THE HON MR JUSTICE MORRISON P  
THE HON MRS JUSTICE McDONALD-BISHOP JA  
THE HON MISS JUSTICE P WILLIAMS JA**

<b>BETWEEN</b>	<b>ATTORNEY GENERAL FOR JAMAICA</b>	<b>1<sup>st</sup> APPELLANT</b>
<b>AND</b>	<b>SUPERINTENDENT CLINTON LAING</b>	<b>2<sup>nd</sup> APPELLANT</b>
<b>AND</b>	<b>CORPORAL HORACE FITZGERALD</b>	<b>3<sup>rd</sup> APPELLANT</b>
<b>AND</b>	<b>RODERICK CUNNINGHAM</b>	<b>RESPONDENT</b>

**Miss Deirdre Pinnock instructed by the Director of State Proceedings for the appellants**

**Charles Campbell and Matthew Campbell for the respondent**

**31 October 2016 and 20 July 2020**

**MORRISON P**

**Introduction**

[1] On 28 February 2014, Edwards J (as she then was) made an award of damages for malicious prosecution in favour of Mr Roderick Cunningham. Mr Cunningham's claim arose out of the actions of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants, who were at the material time a

superintendent of police and a corporal in the Jamaica Defence Force respectively and, as such, servants and or agents of the Crown. In addition to special damages, the judge awarded sums for general, aggravated and exemplary damages.

[2] In a notice of appeal filed on 14 April 2014, the appellant contended that the judge erred in law by (i) making an award of exemplary damages in circumstances where general damages and aggravated damages were adequate; (ii) concluding that an award for exemplary damages could be made in a claim in which malicious prosecution was the sole cause of action; and (iii) holding that the higher the rank or position of the wrongdoer, the higher should be the award of exemplary damages, and using this as a basis for her award of exemplary damages. In the alternative, the appellant contended that the judge's award for exemplary damages was excessive and not in accordance with the principle that such awards should be moderate.

[3] When the appeal came on for hearing on 31 October 2016, Miss Deirdre Pinnock, for the appellants, withdrew the second contention, that is, that an award of exemplary damages could not be made in a case in which malicious prosecution was the sole cause of action.

[4] The single issue which arises in the appeal is, therefore, whether the judge was correct to award exemplary damages and, if so, whether the amount awarded was manifestly excessive.

[5] Mr Cunningham unfortunately died before the appeal could be heard. Accordingly, by an order made on 22 March 2016<sup>1</sup>, the Administrator-General for Jamaica was substituted for Mr Cunningham as a party to the proceedings. For the purposes of this judgment, however, we will refer to Mr Cunningham as 'the respondent'.

[6] After hearing arguments on 31 October 2016, we dismissed the appeal, with costs to the respondent to be agreed or taxed. With profuse apologies for the delay in providing them, these are the promised reasons for this decision.

### **The background to the claim for malicious prosecution**

[7] I cannot possibly improve on the judge's graphic summary of the sorry facts of the case. I will therefore quote it in full<sup>2</sup>:

“[1] On the 16<sup>th</sup> of May 2000, a visit by the [respondent], Mr. Roderick Cunningham, to his girlfriend's home was to change his life forever, and not for the better. On leaving her home, the unthinkable happened. Whilst walking in a lane off Jacques Road in the Mountain View Avenue area of Kingston, Jamaica, at about 8:30 pm, under cover of darkness, he encountered heavy gun fire. A bullet ripped into his leg and he fell to the ground. He managed to crawl into a yard and was assisted inside the house by a 'Good Samaritan'. His leg was shattered with the bones exposed. Whilst he lay bleeding inside the house, the 'Good Samaritan' could only pray. He fell into unconsciousness and

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<sup>1</sup> Order in terms of notice of application for substitution of the respondent in proceedings made by F Williams JA (Ag) (as he then was).

<sup>2</sup> **Roderick Cunningham v The Attorney General for Jamaica, Superintendent Clinton Laing and Corporal Horace Fitzgerald** [2014] JMSC Civ 30, paras [1]-[4]

came awake to see the 3<sup>rd</sup> [appellant] and other soldiers over him.

[2] He was pulled from the house into the lane and placed into the trunk of a police car along with another man who appeared to be dead. Locked in the trunk of the car he was transported to the Kingston Public Hospital where he was removed to the emergency area bleeding and in pain. He was placed on a ward where the 2<sup>nd</sup> [appellant] came to see him. Thereafter, another group of policemen came and his hands were swabbed for gun powder residue. No gun powder residue was found.

On the morning of the 17<sup>th</sup> May 2000, he was taken into surgery and as a result of the damage done by the gun shot injury, his right leg was amputated. He was subsequently arrested and charged by the 2<sup>nd</sup> [appellant] for illegal possession of firearm and ammunition, shooting with intent and wounding with intent. He spent five days in hospital under police guard. During that time he was handcuffed to a bed rail. After being discharged he was taken into custody at the Elleston [sic] Road Police Station in Kingston then onto Port Royal Police Station where he was locked up for two weeks without facing the court. He was taken to the Gun Court on the 12<sup>th</sup> June 2000.

[4] He was taken to court without crutches and had to hop into court whilst holding onto the walls. He was humiliated and embarrassed as he was stared at by civilians and police. One police officer offered his shoulder to assist him in getting into court. He was offered bail on the urging of Queens [sic] Counsel with condition that he report to the police station every day. He attended court thereafter for a period of four years and ten months, where the case was called up numerous times. The trial itself lasted six days. The prosecution's witness were soldiers and police officers including the 2<sup>nd</sup> and 3<sup>rd</sup> [appellants]. The prosecution presented evidence that he had been in possession of a rifle and ammunitions which was [sic] exhibited in court and claimed he fired at the police and soldiers. The swab results however, were negative for gun powder residue. On the 16<sup>th</sup> March 2005 he was dismissed on a no case submission which was upheld by the learned judge. Although he was

dismissed he was placed back into custody and fingerprinted.”

[8] There is no challenge to any aspect of the judge’s summary of the facts on this appeal.

### **The claim**

[9] On this basis, the respondent commenced action for malicious prosecution. In addition to special and general damages, the respondent claimed aggravated and exemplary damages.

[10] In relation to aggravated damages, he relied on the following particular<sup>3</sup>:

“(a) That the [respondent] a citizen without any criminal convictions was put to ridicule distress and anguish over a period of 4 ¾ years of Court attendance as a consequence of the False charges laid against him by the [2<sup>nd</sup> appellant] and or the [3<sup>rd</sup> appellant].”

[11] And, in relation to “Exemplary Damages and or Aggravated Damages”, he relied on the following particulars<sup>4</sup>:

“(a) That in consequence of the False charges laid the [Appellants] pursued the case for an inordinate period of 4 ¾ years and upon his trial the [Respondent] was

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<sup>3</sup> Further Amended Particulars of Claim dated 4 March 2011, para. 9

<sup>4</sup> Further Amended Particulars of Claim, para. 8

dismissed of all charges without being called to answer the charges.

- (b) That as a consequence of the False charges laid by the Second [Appellant] and or Third [Appellant] and applications made by the servants and or agents of the Crown in relation to the condition of bail, the [Respondent] a disabled person had to report to the Vineyard Town Police Station everyday over a period of approximately three (3) years and thereafter every other day at the Duhaney Park Police Station.
- (c) That as a consequence of the charges laid by the servants and or agents of the Crown, the [Respondent] reported to the Vineyard Town and Duhaney Park Police Stations in excess of one thousand times.
- (d) That the Second [Appellant] and or the Third [Appellant] by laying the aforesaid charges caused the [Respondent] to be imprisoned at the Kingston Public Hospital and thereafter at the Port Royal Police lock up in circumstances of great pain and suffering pursuant to the shooting of the [Respondent] by the Third [Appellant] and or other servant or agent of the Crown resulting in the amputation of his right leg."

[12] The appellants did not contest the claim in so far as liability was concerned. As a consequence, on 5 December 2011, the respondent obtained judgment on admission, with damages to be assessed, against the 1<sup>st</sup> appellant. In a further amended defence limited to quantum of damages dated 30 October 2012, the 1<sup>st</sup> appellant averred<sup>5</sup> that "aggravated and exemplary damages do not apply in the circumstances of the case".

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<sup>5</sup> At para. 4

### **The judge's decision**

[13] In a reserved judgment given on 28 February 2014, the judge assessed the respondent's damages as follows:

1. Special damages in the sum of \$82,000.00.
2. General damages in the sum of \$1,600,000.00.
3. Aggravated damages in the sum of \$600,000.00,  
with interest at 3% from 7 March 2011 to 28  
February 2014.
4. Exemplary damages in the sum of \$1,000,000.00.

[14] The judge also awarded the respondent his costs, such costs to be agreed or taxed.

[15] A large part of the judge's judgment was concerned with a question which is no longer in issue on appeal, given Miss Pinnock's decision not to pursue the contention that an award of exemplary damages is not available in a case in which malicious prosecution was the sole cause of action. For the reasons which the judge stated in her admirable discussion on the question, this was plainly not a good point and Miss Pinnock was quite correct to abandon it.

[16] But I must set out, more or less in its entirety, the judge's discussion on exemplary damages<sup>6</sup>:

"[37] The purpose of exemplary damages is to punish wrongdoers for conduct, which, in some cases, is referred to as contumelious or highhanded disregard of a claimant's rights or behavior described as arrogant, flagrant, oppressive or outrageous. It is also made to act as deterrence against potential offenders ... the test of outrageousness is applicable to Jamaica. It captures the elements of oppression and arbitrariness, (in the sense of arbitrary and oppressive behavior) as well as unconstitutional actions, in the sense of high handed cynicism and the flagrant disregard for people's rights. Such a test would limit the award to the most appropriate cases where there is truly outrageous conduct. Otherwise aggravated damages may be sufficient.

[38] Oppressive, arbitrary and unconstitutional conduct by government servants is the first common law category of the award outlined by Lord Devlin in **Rookes v Barnard**. Though awards in this category can legitimately be made, it is not mandatory but is made at the discretion of the court. For exemplary awards, moderation and conservatism is the order of the day, though the award should not be too low, as otherwise it would not be necessary to make one. In [**Thompson**], the English Court of Appeal set out guidelines for making the award in terms of monetary limits: 5000 pounds, being the lower limit and 50,000 pounds being the upper limit in the case of conduct involving a police officer at the rank of superintendent or above. No such guidelines exist here. We are however, guided by similar awards in similar cases. Of course I take the notion that the more outrageous the behavior the higher should be the award. There is also a place for the notion that the award should also vary based on the rank or position of the wrongdoer. The higher the rank or greater the position of the wrongdoer

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<sup>6</sup> Judgment, paras [37]-[43]



the higher should be the award. This is so for many reasons, the first and simplest of which is that they should know better than their subordinates. Secondly, the public has a greater expectation of proper behaviour from persons who hold high office and supervisory positions which is tantamount to a fiduciary responsibility. In this case the [2<sup>nd</sup> and 3<sup>rd</sup> appellants] are a superintendent of police and a corporal in the Jamaica Defence Force.

[39] The factors relied on by the [respondent] to support this award is that he was charged and imprisoned whilst in hospital; that having been shot by the 3<sup>rd</sup> [appellant] and other agents of the state, he was locked up at the police station in great pain having had a leg amputated which had not yet healed. He also contended that the charges were falsely laid as a result of which he was prosecuted for almost five years.

[40] He was charged with shooting with intent but the evidence of the 3<sup>rd</sup> [appellant] was that when he was shown the [respondent] on the night of the incident he identified him as the man who came back for the weapon which had dropped in the lane. He did not say he saw him with a gun shooting at any one. No evidence was given by him of how the [respondent] came to be shot resulting in the amputation of his shattered leg. Between 16<sup>th</sup> May and 12<sup>th</sup> June he was kept in lock-up with his amputated leg without facing court on his charges.

[41] The agents of the state acted not only with malice but also without reasonable and probable cause in prosecuting the [respondent]. There was no evidence that he shot and wounded anyone. Taken at its highest, the evidence of the 3<sup>rd</sup> [appellant] is that after the shooting and the [respondent] was found suffering from wounds to the leg in a house, he was identified by him as the man who opened the gate and the man who came for the weapon. The shooting took place at night in a lane and the 3<sup>rd</sup> [appellant] did not purport to identify any of the shooters down the lane. The [respondent] was found hours after the shooting in a house. No evidence was given by the 3<sup>rd</sup> [appellant] that the [respondent] was found in the house clutching a gun. There was no gun powder residue found on his hand.

[42] Their actions in handcuffing the amputee to his bed after amputation under police guard was oppressive and cruel, their imposition of charges of shooting with intent and wounding with intent, the continued prosecution of said charges in the face of negative swab results was arbitrary and high handed. The failure to take the [respondent] to court within a reasonable time to be considered for bail was unconstitutional and callous. Their actions taken as a whole might be considered to be outrageous in the extreme.

[43] In **Keith Bent v The Attorney General**, Brooks J took the view that the unlawful pointing of a firearm at a member of the public by police was outrageous and arrogant conduct deserving of an award of exemplary damages. An award of one hundred thousand dollars (\$100,000.00) was made. In **Maxwell Russell** the Claimant was shot in the back by the police. An award of four hundred thousand dollars (\$400,000.00) was made in that case. In the instant case I am of the view that an award of one million dollars (\$1,000,000.00) is appropriate.”

### **The submissions on appeal**

[17] Miss Pinnock made three submissions on behalf of the appellants. Firstly, that the sums which the judge awarded for general and aggravated damages afforded the respondent adequate compensation for the wrong done to him, and that, in these circumstances, the judge ought not to have made any award for exemplary damages. Secondly, that the judge’s reliance on the decision of the Court of Appeal of England and Wales in **Thompson v Commissioner of Police of the Metropolis**<sup>7</sup> (**Thompson**) was misplaced, given the different factual basis of the guidance provided

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<sup>7</sup> [1968] QB 498

by the court in that case. And thirdly, that the judge's award for exemplary damages was outside of the range established by previous awards and was therefore excessive in all the circumstances of the case.

[18] For the respondent, Mr Charles Campbell submitted that the judge's award of \$1,600,000.00 for compensatory damages was modest. In these circumstances, the award of exemplary damages was entirely appropriate to show the court's disapproval of the conduct of the 2<sup>nd</sup> and 3<sup>rd</sup> appellants and to deter potential offenders from such conduct in the future. In arriving at the sum to be awarded for exemplary damages, the judge showed full awareness of the relevant principles and her award should not be disturbed.

### **A look at some authorities on exemplary damages**

[19] As Lord Devlin explained in **Rookes v Barnard**<sup>8</sup>, exemplary damages are a special category of damages. Unlike the object of ordinary damages, which is to compensate, the object of exemplary damages is "to punish and deter"<sup>9</sup>. In his hugely influential speech in that case, Lord Devlin went on to state three categories of cases in which an award of exemplary damages would be appropriate. These are cases in which (i) the claimant has been the victim of oppressive, arbitrary or unconstitutional actions by servants of the government; (ii) the defendant's conduct has been calculated by him

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<sup>8</sup> [1964] 1 All ER 367

<sup>9</sup> At page 407

to make a profit for himself which may well exceed the compensation payable to the claimant; and (iii) the award of exemplary damages is expressly authorised by statute.

[20] Lord Devlin also stated three considerations to be borne in mind when awards for exemplary damages are being considered<sup>10</sup>:

“... First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour. The anomaly inherent in exemplary damages would become an absurdity if a plaintiff totally unaffected by some oppressive conduct which the jury wished to punish obtained a windfall in consequence. Secondly, the power to award exemplary damages constitutes a weapon that, while it can be used in defence of liberty ... can also be used against liberty. Some of the awards that juries have made in the past seem to me to amount to a greater punishment than would be likely to be incurred if the conduct were criminal; and moreover a punishment imposed without the safeguard which the criminal law gives to an offender. I should not allow the respect which is traditionally paid to an assessment of damages by a jury to prevent me from seeing that the weapon is used with restraint ... Thirdly, the means of the parties, irrelevant in the assessment of compensation, are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant.”

[21] And finally, in a passage to which Miss Pinnock drew particular attention, Lord Devlin said this<sup>11</sup>:

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<sup>10</sup> At page 411

<sup>11</sup> Ibid

“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.”

[22] **Rookes v Barnard** survived searing scrutiny in **Cassell & Co Ltd v Broome and another**<sup>12</sup> (including a characteristically strident revolt by Lord Denning MR in the Court of Appeal<sup>13</sup>). In the course of a detailed review of the entire law on the subject, Lord Hailsham LC specifically adopted<sup>14</sup> Lord Devlin’s emphasis on the consideration that there should be no award for exemplary damages unless “[the jury] are satisfied that the punitive or exemplary element is not sufficiently met with the figure which they have arrived at for the plaintiff’s solatium ...”

[23] Before turning to some of our cases, I will mention two other English cases which also attracted the judge’s attention. The first is the decision of the Court of Appeal of England and Wales in **Thompson**. In that case, as a response to a number of very large jury awards of exemplary damages in cases of police misconduct, the court was concerned to clarify the directions to be given to juries as to the amount of

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<sup>12</sup> [1972] 1 All ER 801

<sup>13</sup> **Broome v Cassell & Co Ltd and Another** [1971] 2 All ER 187

<sup>14</sup> [1972] 1 All ER 801, at page 833

damages, particularly exemplary damages, to be awarded in such cases<sup>15</sup>. After proposing indicative figures for basic and aggravated damages in cases of wrongful arrest and imprisonment and malicious prosecution, the court went on to deal with exemplary damages in this way<sup>16</sup>:

“(12) Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury, (a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant’s point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendant; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers); and (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury’s disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose.

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<sup>15</sup> See Lord Woolf MR, at page 765

<sup>16</sup> At pages 775-776

(13) Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent."

[24] The second is the important decision of the House of Lords in **Kuddus (AP) v Chief Constable of Leicestershire Constabulary**<sup>17</sup> ('Kuddus'). The issue in that case was whether exemplary damages could be awarded against a defendant for the tort of misfeasance in public office. On its facts, the case is therefore far removed from the circumstances of this case. But the decision is of value for Lord Nicholls of Birkenhead's succinct statement of the continued role played by exemplary damages in the modern law:

"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

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<sup>17</sup> [2001] UKHL 29 para 63

of last resort, fill what otherwise would be a regrettable lacuna.”

[25] Turning now to cases in this jurisdiction, I should mention first, without dwelling on it, **Douglas v Bowen**<sup>18</sup>, in which this court accepted and applied Lord Devlin’s categorisation of exemplary damages in **Rookes v Barnard**. But Mr Campbell also referred us to some later examples of the principles in action, including the relationship between compensatory and exemplary damages. I will refer to a few of them, all of them claims against the state in respect of actions allegedly done by members of the Jamaica Constabulary Force.

[26] In **Attorney-General v Maurice Francis**<sup>19</sup>, the respondent was shot by a district constable who was carrying out police duties. The respondent was severely injured and the medical assessment was that he had incurred a 60% permanent impairment of the whole person and his expected life span had been reduced by approximately 20%. In addition to an award of \$3,500,000.00 for pain and suffering and loss of amenities, the trial judge awarded the respondent \$3,500,000.00 as exemplary damages.

[27] On appeal, the appellant contended (among other things) that the amount of \$3,500,000.00 for exemplary damages was manifestly excessive, bearing in mind the

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<sup>18</sup> (1974) 22 WIR 333

<sup>19</sup> (Unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 13/1995, , judgment delivered 26 March 1999



equally substantial sum awarded for pain and suffering and loss of amenities. The appellant succeeded on this point and this court reduced the award for exemplary damages to \$100,000.00. Rattray P considered that, the judge having made a substantial award of \$3,500,000.00 for compensatory damages, the award of a similar sum for exemplary damages was manifestly excessive. To similar effect, Langrin JA (Ag) (as he then was), after referring to **Rookes v Barnard** and **Cassell & Co Ltd v Broome and another**, observed that<sup>20</sup> –

“In applying these principles and taking into consideration that the employer would have already had to pay compensatory damages which is a penalty in itself the sum of \$3.5 million awarded by the trial judge [for exemplary damages] is extremely high.”

[28] In **Attorney General v Parchment et al**<sup>21</sup>, the respondent, who was accused of being a thief, was beaten by some men. It appeared that his leg was cut and broken. Police officers removed him from the scene and took him to the Red Hills Police Station, where he was locked up overnight. On the following day, the police took him to the Kingston Public Hospital, where he received medical treatment for his injured right leg and hand and remained for four days. Police officers then took him from the hospital, on a wheelchair, with his right leg and left hand in plaster casts, to the Constant Spring

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<sup>20</sup> At page 20

<sup>21</sup> (Unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2003, judgment delivered 30 July 2004

Lock-up, where he was put in a small cell with three other men. This was the trial judge's account of what then ensued:

"About a day after being placed in the cell he started feeling pains in his right foot. The inside of the cell was dirty and hot. His right foot became swollen. He started to feel pain and bawled out begging for medical attention. He told police officers, and Det. Inspector Campbell in particular that he was in pain and wanted to go to the doctor, Mr Campbell removed the three men from his cell but responded to his request by saying that he was a thief and should stay in the cell and suffer. He tried to relieve his pains by pushing his hand down the cast in order to scratch his foot. The prisoners who had been removed from his cell because of his foul odour also called out requesting that he be taken out of the cell for treatment. No one came to his assistance. Police officers came to the area but not to the section where he was. His cell was not cleaned for the duration of his stay. The doctor had made an opening in the cast and he tried to tear it off as he was in great pain and his foot was 'spoiling' inside, rotting away.

He remained in the cell for 5 days and was then taken out in a wheelbarrow, put in a jeep and taken back to Kingston Public Hospital where his leg was amputated the day after his arrival. On his return to the hospital he was hand-cuffed to a bed, put under police guard for six weeks after which officer Campbell removed his handcuffs and told him that he was on bail. He spent two months in hospital. Mr Parchment also testified that he has never been charged or taken before any court."

[29] The trial judge awarded the respondent \$2,200,000.00 as general damages for pain and suffering and loss of amenities. Although not specified, this amount included an award for aggravated damages. The trial judge also made an award of \$500,000.00 as exemplary damages. On appeal, the appellant maintained that an award of

exemplary damages was not warranted on the facts of the case, but that, even if it was, \$500,000.00 was inordinately high. In a judgment with which Bingham and Smith JJA agreed, Cooke JA held that, although this was, indeed, a proper case for an award of exemplary damages, \$500,000.00 was too high and should be reduced to \$100,000.00. This is how Cooke JA explained the decision<sup>22</sup>:

“Some of the epithets used by judges to describe behaviour which attracts exemplary damages are, malicious, insolent, willful, arrogant and cynical. Any of these epithets would be approximately descriptive of the callous behaviour of the police in the circumstances of this case. The learned trial judge was therefore justified in deciding that in this case exemplary damages were appropriate. So the next question is whether or not the award of \$500,000 should be disturbed.

Counsel for the respondent conceded that the award for exemplary damages was too high. I agree with this concession. However, the sum of \$300,000 suggested by counsel in substitution for \$500,000 does not find favour with me. 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.”

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<sup>22</sup> At pages 7-8

[30] In the consolidated claims of **Keith Bent, Faithlyn Bent and Sophia Bent v The Attorney General of Jamaica**<sup>23</sup> (**Bent**), Mr Keith Bent and his two sisters, Faithlyn and Sophia Bent, claimed damages for assault and battery, false imprisonment and malicious prosecution, arising out of a fracas with a group of police officers. The claim for malicious prosecution arose out of the charges laid against the claimants for assaulting the police, resisting arrest and using indecent language. These charges were all either dismissed or adjourned *sine die*, thereby effectively terminating the prosecutions in the claimants' favour. Brooks J (as he then was) awarded each of the claimants \$200,000.00 as damages for assault and battery, \$60,000.00 for false imprisonment and \$90,000.00 for malicious prosecution.

[31] In relation to exemplary damages, Brooks J considered<sup>24</sup> that the actions of the police in (i) beating, kicking, punching and pointing a gun at Mr Bent's head; and (ii) beating Miss Sophia Bent, who was eight months pregnant at the time, amounted to "outrageous, arrogant and cynical conduct", justifying awards for exemplary damages. On this basis, he awarded each of them \$100,000.00 for exemplary damages.

[32] In **Maxwell Russell v The Attorney General for Jamaica and another**<sup>25</sup> (**Russell**), the claimant claimed damages for false imprisonment, malicious prosecution and trespass to the person. The claim for malicious prosecution arose out

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<sup>23</sup> (Unreported), Supreme Court, Jamaica, Suit Nos 1998/B 330, B384 and B385, judgment delivered 19 December 2006

<sup>24</sup> At page 14

<sup>25</sup> (Unreported), Supreme Court, Jamaica, Claim No 2006 HCV 4024, judgment delivered 18 January 2008

of the plaintiff's prosecution in the Resident Magistrate's Court for allegedly assaulting a police officer. The prosecution was continued for nearly a year before it was dismissed on a no-case submission made by the claimant's counsel.

[33] Having awarded the claimant \$515,000.00 for false imprisonment, \$200,000.00 for aggravated damages and \$250,000.00 for malicious prosecution, Mangatal J then considered his further claim for exemplary damages. The claim was based on the actions of a policeman, who was dressed in plain clothes, and who did not identify himself as such, in shooting the unarmed claimant in the back as he ran away from him, not knowing that he was a policeman. Mangatal J accepted that this was outrageous conduct on the part of the policeman and, having determined that the amounts awarded for compensatory damages, including aggravated damages, were not sufficient to punish the wrongdoer for his outrageous conduct, made a further award of \$400,000.00 for exemplary damages.

[34] And, finally, I will mention **Openiah Shaw v The Attorney General for Jamaica**<sup>26</sup> ('**Shaw**'), in which the claimant claimed damages for assault and battery and false imprisonment. Having found for the claimant on liability, R Anderson J awarded her damages of \$80,000.00 for false imprisonment, \$1,000,000.00 for assault and battery and \$600,000.00 for aggravated damages.

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<sup>26</sup> (Unreported), Supreme Court, Jamaica, Claim No HCV 05443/2005, judgment delivered 13 March 2007

[35] As regards exemplary damages, R Anderson J referred to a passage from **Kuddus**<sup>27</sup>, in which Lord Slynn of Hadley reiterated Lord Devlin's caution in **Rookes v Barnard** against awarding exemplary damages save in cases where compensatory and aggravated damages were insufficient punishment for the defendant's outrageous conduct. On this basis, R Anderson J declined to make an award for exemplary damages, saying the following<sup>28</sup>:

"I am of the view that in considering the particular circumstances of this case, there ought not to be an award for exemplary damages. In my judgment, while the conduct of the agents of the state was unfortunate, I believe this claimant may be adequately compensated by an award of basic and general damages, and I so hold."

[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

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<sup>27</sup> [2001] UKHL 29, para. 6

<sup>28</sup> At page 23

punish the defendant and deter others<sup>29</sup>. And further, the cases all urge moderation in the amounts awarded for exemplary damages.

### **Discussion and conclusions**

[37] I approach the matter on the basis that, although an appellate court is generally disinclined to interfere with an award of damages by a trial judge, it will do so if it is of the view that the trial judge acted on some wrong principle of law, or made an award that was either so high or so low as to be “a wholly erroneous estimate of the damages to which the [claimant] is entitled”<sup>30</sup>.

[38] There can be no doubt that, for the reasons which the judge gave<sup>31</sup>, this was a fit case for an award of exemplary damages. The badly injured respondent was forced to endure a period of nearly a month in the police lock-up before being taken before the court. The 2<sup>nd</sup> and 3<sup>rd</sup> appellants then instituted and pursued a prosecution against the respondent for very serious offences. The unchallenged evidence (not least of all the absence at the very outset of any trace of gunpowder residue on the respondent’s hands) suggested that the prosecution ought never to have been brought in the first place. So much so that, at the end of the day, the prosecution’s case could not

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<sup>29</sup> In addition to those cited in this judgment, examples of recognition of this principle by this court may also be found in, among others, **The Attorney General and another v Gravesandy** (1982) 19 JLR 501, per White JA at page 504; and **John Crossfield v The Attorney General of Jamaica and another** [2016] JMCA Civ 40, per Morrison P at paras [48]-[50]

<sup>30</sup> **Flint v Lovell** [1935] 1 KB 354, per Greer LJ at page 360; see also **The Attorney General v Glenville Murphy** [2010] JMCA Civ 50, per Harris JA at para. [23]

<sup>31</sup> At paras [39]-[42] – see para. [16] above

withstand a submission of no case to answer. But yet, the case remained on the court's list for nearly five years. For approximately three years during this period, the respondent, an amputee, was obliged to report to the Vineyard Town Police Station as a condition of his bail every day; and, thereafter, to the Duhaney Park Police Station every other day. Over this period, the respondent attended court in Half-Way-Tree on numerous occasions, with the threat of a conviction for serious criminal offences hanging over his head.

[39] In these circumstances, there was, in my view, ample evidence of arbitrary and oppressive conduct on the part of agents of the State and the judge was plainly right so to find. Miss Pinnock, to her credit, did not seriously contend otherwise. But Miss Pinnock's main point was that this was a case in which the amounts awarded by the judge for basic and aggravated damages were sufficient punishment for the misdeeds of the agents of the state and that there was therefore no need for a further award of exemplary damages.

[40] As the judgment shows<sup>32</sup>, Miss Pinnock made the identical submission in the court below (albeit as an alternative to her primary argument at that stage, which was that exemplary damages were not usually awarded for the tort of malicious prosecution). The judge was therefore fully aware of the point, as appears clearly from

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<sup>32</sup> Judgment, para. [26]



her reference to Lord Devlin's speech in **Rookes v Barnard** in the following passage in her judgment<sup>33</sup>:

"In commenting on the award of exemplary damages Lord Devlin said that in cases where the making of the award was appropriate, the jury should be directed that if, and only if, the sum they awarded by way of compensation, was inadequate to punish for outrageous behaviour and mark their disapproval of such conduct and to act as a deterrence, then they should award a larger sum."

[41] I accept that, if there was a weakness in the judge's analysis, it lay in the fact that, in arriving at her award of \$1,000,000.00 for exemplary damages, she did not return to this aspect of the matter explicitly. However, it is clear that the judge did have in mind that: (i) the award of exemplary damages is discretionary, based on the circumstances of the case; (ii) no award should be made unless the court is satisfied that the amount for compensatory damages is inadequate to punish the wrongdoers; and (iii) awards of exemplary damages should be moderate.

[42] In arriving at the figure of \$1,000,000.00 for exemplary damages, the judge compared the awards made under that head in **Bent** and **Russell**, some eight and six years before respectively. In this regard, it might, again, obviously have been helpful for the judge to state the precise factor by which she updated those awards, in particular the latter, to arrive at the figure of \$1,000,000.00.

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<sup>33</sup> Ibid

[43] However, as has been seen<sup>34</sup>, the judge also dealt with the matter on the basis that, firstly, “the more outrageous the behavior the higher should be the award”. This was entirely in keeping with **Russell**, where Mangatal J held that a higher award for exemplary damages was justified by the fact that shooting a man in the back (as happened in that case) was “even more outrageous conduct than simply pointing a firearm at his head”<sup>35</sup> (as happened in **Bent**, where Brooks J awarded \$100,000.00 for exemplary damages).

[44] Secondly, based on **Thompson**, the judge considered that “the award should also vary based on the rank or position of the wrongdoer”. It is true that, as Miss Pinnock submitted, **Thompson** was concerned to fix monetary limits for jury awards in the various categories in this kind of case. But there is nothing in Lord Woolf MR’s judgment in that case to suggest that this would not be a relevant consideration in a case in which the damages were at large. It seems to me that, in principle, the approach is soundly based in the notion that, as the judge put it<sup>36</sup>, officers of higher rank “should know better than their subordinates”.

[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

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<sup>34</sup> At para. [16] above

<sup>35</sup> Judgment, para. [27]

<sup>36</sup> Judgment, para. [38] – see para. [16] above

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.

[46] None of the cases cited to us in this appeal suggested that an award of exemplary damages should be either a token amount or bear a fixed proportion to the awards for compensatory and aggravated damages in the same case. 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 and the decisions at first instance in **Bent, Russell** and **Shaw** are all examples of the way in which trial judges have applied the principles in the light of the particular circumstances of each case. 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.

[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, with costs to the respondent to be agreed or taxed.

**MCDONALD-BISHOP JA**

[48] I have read in draft, the reasons for judgment of Morrison P. I accept them as reflecting my reasons for concurring in the decision of the court and there is nothing that I could usefully add.

**P WILLIAMS JA**

[49] I too have read the draft reasons for judgment of Morrison P and agree with his reasoning and conclusion. I have nothing further to add.