

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 7/2003

**BEFORE: THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.**

BETWEEN: THE ATTORNEY GENERAL APPELLANT
AND: DELROY PARCHMENT RESPONDENT
AND: SUPERINTENDENT A. BROOKS 1ST DEFENDANT
AND: THE COMMISSIONER OF POLICE 2ND DEFENDANT
AND: DETECTIVE SERGEANT CAMPBELL 3RD DEFENDANT

**Katherine Francis and Ayisha Richards instructed
by Director of State Proceedings for appellant**

Bert Samuels for respondent

May 11, 13 and July 30, 2004

COOKE, J. A.

On the 5th June, 2002, there was judgment for the plaintiff/respondent as follows:

1. Special Damages in the sum of **\$30,400.00** from 10th day of February, 1992 to 5th June, 2002 with interest at the rate of 6% per annum.
2. General Damages for pain and suffering and loss of amenities in the sum of **\$2,200,000.00** with interest at the rate of 6% per annum from 7th December, 1992 to 5th

June, 2002, with interest at the rate of 6% per annum.

3. Exemplary damages in the sum of **\$500,000.00.**
4. Handicap on the labour market in sum of ~~\$100,000.00.~~
5. Costs awarded to the Plaintiff in accordance with Schedule A of Attorneys-at-Law costs Rules 1998 in the amount of **\$184,000.00."**

The award of \$2,200,000.00, although the precise sum is not stipulated, included an award for aggravated damages. The sole issue before this court pertains to the award of \$500,000.00 for exemplary damages. The appellant submitted that there should have been no such award and further contended that, if such an award was warranted, \$500,000.00 was inordinately high. Counsel for the respondent while maintaining that this was a proper case for an award of exemplary damages conceded that the stipulated award was too high and suggested the sum of \$300,000.00 in substitution thereof.

The factual circumstances in this case are taken from the judgment of McCalla J. and are now reproduced hereunder:

"Delroy Parchment testified that on the 3rd February, 1992, he went to Sterling Castle in Red Hills to visit a friend. Whilst there he was accused of being a thief and beaten by some guys. After the beating, he observed that his leg was cut and broken. Policemen removed him from the spot where he was beaten and took him to the Red Hills Police Station where he was locked up.

On the following day the police took him to the Kingston Public Hospital where he received medical

treatment. "Plaster Paris" was placed on his foot and hand. He remained at the Kingston Public Hospital for four days. Police officers Brooks and Campbell took him from the hospital to the Constant Spring Lock-up on a wheel chair with his right leg and left hand in casts. He was put in a cell, the size of which was about 10 ft. x 10 ft., along with 3 other men.

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 the 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."

In **Rookes v Barnard** [1964] A.C. 1129 Lord Devlin postulated three categories of circumstances to which a consideration of exemplary damages

would be appropriate. In our jurisdiction these categories have been accepted – see **Douglas v Bowen** (1974) 12 JLR 1544. This judgment is only concerned with the first category and was formulated as follows by Lord Devlin in **Rookes v. Barnard** (supra):

“The first category is oppressive, arbitrary or unconstitutional action by servants of the government.”(p.1226)

In Lord Devlin’s view an award of exemplary damages:

“serves a valuable purpose in restraining the arbitrary and outrageous use of executive powers” (p.1223) and that such an award “can serve a useful purpose in vindicating the strength of the law and thus affording a practical justification for admitting into civil law a principle which ought logically to belong to the criminal.” (p.1226)

In the formulation of the rationale for the award of exemplary damages Lord Devlin recognized that such an award was an anomaly. This is because an award of exemplary damages is not related to the purpose of compensation but to punish and deter. In **Owen Francis v Corporal Baker and Constable Bentley and Attorney-General** [1992] 29 JLR 424 the headnote in part (which is accurate) reads:

“ (i) & (ii) ...

(iii) exemplary damages ought to be awarded in a case where the servants of the government have acted in an oppressive, arbitrary and unconstitutional manner, in the instant case the first and second respondents had in addition behaved maliciously and there is every need to punish them for their acts in order to deter not only them but others from acting like them.”

Not surprisingly there has been some criticism of the continued existence of this head of damages. It is said that:

- (i) It is illogical in that such an award is inconsistent with the fundamental principle of damages being entirely compensatory in nature.
- (ii) Since **Rookes v Barnard** there have been developments whereby litigants can now seek constitutional redress and move a court for judicial review, and,
- (iii) awards of exemplary damages have not served the purpose of deterrence.

However, the demise of exemplary damages is not at hand. In **Kuddus (A.P)**

v Chief Constable of Leicester Constabulary [2002] UK HL 29 Lord

Nicholls of Birkenhead in his speech at paragraph 63 said:

"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."

In **Rookes v Barnard** (supra) Lord Devlin did not create an avenue whereby plaintiffs would receive windfalls at public expense. It is important to note that at p.1228 he said:

"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 it can award some larger sum."

In consideration of whether or not exemplary damages are to be awarded the first task to be addressed as in this case, is whether or not the impugned conduct fell within the category of "oppressive, arbitrary or unconstitutional action by servants of the government." A resolution of this issue will be determined by an examination of the factual circumstances which gave rise to the cause of action – see **Kuddus** (supra). There can be no exclusion of exemplary damages based upon the cause of action itself. I therefore find no favour with the submission on behalf of the appellant that an action in negligence necessarily precludes an award of exemplary damages. It all depends on the circumstances of each particular case.

What are circumstances of this particular case?

- (i) The police were aware that the respondent had a broken left leg which had been placed in a cast.
- (ii) The respondent consequent on the pain he was experiencing bawled out begging for medical attention. His fellow prisoners also sought of the police that the respondent received medical attention.
- (iii) His fellow prisoners also sought of the police that the respondent receive medical attention.

The deterioration in the condition of the respondent's leg was such that it emitted a foul odour.

- (iv) The foul odour was so offensive that prisoners who shared the cell with the respondent asked to be removed – which request was granted.
- (v) The respondent's plea for medical attention was ignored. Detective Inspector Campbell told him that he was a thief and should stay in the cell and suffer.
- (vi) The respondent remained in the cell for five days after which he was taken out in a wheelbarrow put in a jeep and taken to the Kingston Public Hospital where his leg was subsequently amputated.

In placing the respondent in custody and having him confined at the Constant Spring Police Station the police were acting as servants of the Crown.

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.

In the **Attorney General v Maurice Francis** SCCA No. 13/95 delivered on the 26th March 1997, Rattray P. at p. 5 accepted that in making awards for exemplary damages there should be moderation. It is my view that although there was a substantial award as compensation, this was inadequate in respect of punishment and deterrence. State agents are the servants of the public. This court would be remiss if it did not put the greatest emphasis on this cardinal fact. The recognition, and obedience to the tenets and principles that govern the protection of the liberties of the citizen is an essential attribute for the well-being of the State. This case demands that there should be an award for exemplary damages. However, the award of \$500,000 was inordinately high. In all the circumstances, it is my view that an award of \$100,000 would serve the purpose of punishment and deterrence.

Finally, there will be no order as to costs.

BINGHAM, J.A.:

I agree

SMITH, J.A.:

I agree