

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv1999/0308

BETWEEN:

DALE NAYLOR

Claimant

and

ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
COMMISSIONER OF POLICE
DAYNE HODGE
ST. JAMES HOLDING ANTIGUA LIMITED
WILLIAM FURLONGE

Defendants

Appearances:

Ms. E Ann Henry QC and Ms. Mandi Thomas, Counsel for the Claimant
Mrs. Carla Brookes-Harris, Counsel for the 1st, 2nd and 3rd Defendants

2020 March 18th
 March 23rd

JUDGMENT

- [1] **KELSICK, J [Ag.]**: The suit number in this matter reveals that the claim is now 20 plus years old. The incident that gave rise to the proceedings occurred on 21st November 1998. It is unnecessary to recount what caused this delay. It is sufficient to record that the matter came before Rawlins J on 2nd October 2002 for case management. The Claimant and the 1st, 2nd and 3rd Defendants were represented by counsel. In the recital to the order made on that date it is stated that “Counsel for the Claimant and the First, Second and Third Defendants agreeing that Judgment should be entered against those 3 Defendants with damages to be assessed at the conclusion of the trial against the Fourth and Fifth Defendants”.

- [2] As it turned out, the original fifth named Defendant was not the correct party and proceedings against the proper party (“St. James Antigua Club Limited”) were never served. As to the 5th named Defendant, his precise whereabouts are unknown and the Claimant no longer intends to proceed against him. Therefore, the trial contemplated in the recital just mentioned will not occur.
- [3] The matter came before me on 6th February 2020 for report. The Defendants’¹ counsel, commendably, agreed that the matter proceed to assessment based on the admission made before Rawlins J on 2nd October 2002. I made directions for the conduct of the assessment. This judgment will therefore deal, formally, with liability and substantively with assessment.
- [4] The assessment was scheduled for trial on 18th March 2020. However, the parties agreed (mindful no doubt of the risks posed by the Coronavirus) that the court should proceed with dealing with the assessment based on the submissions and witness statements filed.

Facts

- [5] The facts can be briefly stated.²
- [6] The Claimant is, and was at the relevant time, a physiotherapist working with sports, particularly cricket, teams. In March 1998 he left his vessel “Watercolor II” at the marina at St. James Club Hotel under, as the Claimant put it, the care of Captain X.³ In the claim subsequently filed against the Claimant referred to in paragraph [8] below, it was pleaded that Mr. Naylor “left Antigua bound for England giving the dockmaster of the St. James’s (sic) Club, [Captain X] instructions to ensure the safety of the said vessel”.
- [7] In November 1998, the Claimant travelled to Antigua and found his vessel impounded. He was then presented by Captain X with a document headed “Council of Lloyd’s Maritime Lien and Salvage Award” purporting to be a claim for US\$105,625 based on an appraisal in respect of a salvage operation said to have been carried on the vessel after the passage of Hurricane George in September of that year. The Claimant subsequently obtained information which led him to believe that there never was a salvage operation on his vessel and that he was the target of an attempted fraud, presumably involving Captain X.
- [8] He therefore refused to pay the fees. An admiralty claim was filed against the Owner of the vessel by St. James’ Club Limited and The Master and Crew of the vessel on 17th November 1998 in Claim No. 388 of 1998. The Claimant, as owner, intended to defend the claim and subsequently retained lawyers to file a Defence.
- [9] In the meantime the Claimant planned a trip to St. Thomas, USVI, to depart Antigua on 21st November 1998 and return on 24th November. He, and his friends Detective Constable John Kyffin

¹ “Defendants” from this point in the judgment shall be a reference to the 1, 2nd and 3 Defendants

² Taken primarily from the Claimant’s Witness Statement

³ I will not indicate the Captain’s name because of the allegations made by the Claimant to be referenced in the judgment

(of New Scotland Yard), Louise Kyffin, Chris Hutton, Katie Hutton and their children, went to the airport on 21st November and duly boarded LIAT flight number 542 bound for St. Thomas.

- [10] The flight took off and after about 30 minutes into the flight there was an announcement that the flight had to return to Antigua for technical issues. Upon landing in Antigua, a police officer, who the Claimant subsequently learned was the 1st Defendant, boarded the aircraft and asked for the Claimant by name.
- [11] Upon identifying himself, the Claimant was asked to disembark which he did, accompanied by Mr. Kyffin. On disembarking, the Claimant asked the 1st Defendant if he was under arrest to which the latter answered "Yes" and then took the Claimant's passport. The Claimant asked why he was being arrested and was told he was a fleeing debtor. The Claimant took this to be a reference to the debt claimed by St. James Club Hotel. At that point, Mr. Kyffin informed the 1st Defendant that the matter was before the court but the 1st Defendant appeared disinterested. Mr. Kyffin then reboarded and the flight left for St. Thomas. This was about 1pm.
- [12] The Claimant was then taken to the immigration area where he asked what his rights were, to which the response was that his "rights are to sit down and shut up". The Claimant was not at that point permitted to make any calls. However, within 10 minutes of arriving at the immigration area, the 1st Defendant put him on the phone with the 5th Defendant who insisted that he pay the debt immediately. The Defendant explained that he was challenging the debt in court. He was nevertheless kept in custody.
- [13] At about 4pm the Claimant was finally permitted to make a phone call. Through this, he was able to make contact with the British and Australian⁴ Embassies but these contacts, rather than assisting the Claimant, caused him anxiety and stress.
- [14] The Claimant was kept for about 6 hours at the airport, after which he was taken to the St. John's Police Station where he was kept in a holding area until approximately 11.30pm when he was finally released without charge. The Claimant was therefore detained for a total of 10 and a half hours.
- [15] The police did not release the Claimant's passport to him until 27th November 1998, after his attorney had written two letters demanding its return. The Claimant states that he was prevented from leaving Antigua for those six days that his passport was held after his release but he does not indicate when he was scheduled to return, and in fact returned, to the UK.
- [16] It is not disputed that the arrest and detention of the Claimant was unlawful.
- [17] The Claimant seeks special damages, general damages, and aggravated and/or exemplary damages.

⁴ The Claimant has dual British and Australian nationalities

- [18] I will deal, firstly with damages and aggravated damages, then exemplary damages, and lastly with special damages.

General Damages and Aggravated Damages

- [19] The Claimant relied on the case of *Millette v McNicolls* (2000) 60 WIR 362 in which de la Bastide CJ set out the factors to be taken into account in assessing damages for false imprisonment. The Chief Justice said:

“...it is obvious that one of the factors (and a very important one) to be considered in assessing damages for wrongful imprisonment is the length of the imprisonment. That is probably the most important factor, but there are others.”⁵

...

There is no doubt, that there must be an element of initial shock when a person is first arrested and imprisoned. This is an element which must be taken into account and compensated for in any assessment...regardless of whether the imprisonment is long or short...Certainly, the way in which the arrests and initial imprisonment are effected, the publicity which attended them, the affront to the dignity of the person, all of these factors determines (sic) the size of the element in the award that is referable to that. It has nothing whatever to do with the length of the subsequent imprisonment”.⁶

- [20] If I may say, with respect, in the latter passage the Chief Justice appears to be including elements which go to aggravated, rather than solely general, damages.
- [21] The Defendants relied on *Razack Mohammed v AG of Trinidad and Tobago* CV2009-02792 in which reference was made to a statement in McGregor on Damages. Paragraph 42.013 of the current edition of McGregor states:

“The details of how the damages are worked out in false imprisonment have for many years been few, but things are changing. Generally it is not a pecuniary loss but a loss of dignity and the like that is in issue, and has been left much to the jury’s or judge’s discretion. **The principal heads of damage arise from the consequences of the deprivation of liberty, i.e. the consequences of 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.** This will all be

⁵ Page 366b

⁶ Page 367d

included in the general damages which are usually awarded in these cases, with no breakdown.”

[22] General damages are purely compensatory.

[23] Aggravated damages, too, are primarily compensatory but are meant to take into account factors not included in those taken into account in assessing general damages. The position is stated by Lord Woolf MR in *Thompson v Commissioner of Police of The Metropolis* [1998] Q.B. 498, at page 514:

“(1) It should be explained to the jury that if they find in the plaintiff's favour the only remedy which they have power to grant is an award of damages. Save in exceptional situations such damages are only awarded as compensation and are intended to compensate the plaintiff for any injury or damage which he has suffered. They are not intended to punish the defendant.

(2) As the law stands at present compensatory damages are of two types. (a) ordinary damages⁷ which we would suggest should be described as basic, and (b) aggravated damages. Aggravated damages can only be awarded where they are claimed by the plaintiff **and where there are aggravating features about the defendant's conduct which justify the award of aggravated damages.** (We would add that in the rare case where special damages are claimed in respect of some specific pecuniary loss this claim should be explained separately.)

...

(8) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that **they had behaved in a high handed, insulting, malicious or oppressive manner** either in relation to the arrest or imprisonment or in conducting the prosecution. **Aggravating features can also include the way the litigation and trial are conducted.** (The aggravating features listed take account of the passages in the speech of Lord Reid in *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1072 , 1085 and *Pearson L.J. in McCarey v. Associated Newspapers Ltd.* (No. 2) [1965] 2 Q.B. 86 , 104.)” **[emphasis added]**

[24] The position then is that in a typical case the Claimant is, apart from any conduct of the Defendant, entitled to general damages for “deprivation of liberty, i.e. the consequences of the loss of time

⁷ To which I refer in this judgment as “general damages”

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.”⁸ However, these damages may be aggravated by the conduct of the Defendant.

- [25] An award of general damages should indicate whether any part of it is comprised of aggravated damages and if so, how much.
- [26] I turn now to the quantification of the general damages. The Claimant and Defendants are not that far apart in their submissions, the Claimant submitting that \$75,000 is an appropriate award while the Defendant submit that \$50,000 would be appropriate. The Claimant cited **McMillan v. Carty** [2019] ECSCJ No. 364 which is very close, factually, to the present case.
- [27] In this case, the Claimant, a US national, was in Nevis working as a political consultant for the Nevis Reformation Party in connection with an upcoming election in Nevis. On 1st December 2017, Mrs. Sharon Brantley⁹ observed a drone hovering over her home. She got into her vehicle and followed the drone. She came upon a rental vehicle and saw two persons in it. She subsequently got information that led her to believe that one of these persons was the Claimant. She made a report to the police and the Claimant’s name was put on a watch list with the Immigration Department.
- [28] On 4th December 2017 the Claimant was at the Robert L. Bradshaw International Airport to leave the Federation. When he got to immigration at about 8.35 a.m. he was detained which detention continued for about 9 hours after which he was released without charge. He was arrested on suspicion of “invasion of privacy” an offence which the trial judge held did not exist in St. Kitts and Nevis. The judge found that the arrest was influenced by the fact that the complainant was the wife of the Deputy Premier.
- [29] The judge awarded \$75,000 for general damages for the false imprisonment. His reasoning is to be found in paragraph [62] where he said:
- “In **Elihu Rhymer v Commissioner of Police and Arthur James Jeremiah Clarke VG** 1999 CA 2, [1999] ECSC J0125-2, the Court of Appeal dismissed an appeal against the award by the trial judge of \$20,000.00 for false imprisonment for three (3) hours. That was in 1999, approximately 21 years ago. I have no doubt that in the circumstances of this case an award of \$75,000.00 for the false imprisonment of the Claimant seems reasonable.”
- [30] It is difficult to derive any meaningful assistance from this analysis. It is not clear what factors the judge took into account in coming to this figure. However, it is clear that the cases are very similar in terms of the wrongful arrest at the airport, and the length of detention.
- [31] The factors that I have taken into account are:

⁸ See para [21] above

⁹ The wife of the then Deputy Premier of Nevis, a member of the Concerned Citizens Movement party

1. There is no doubt that the Claimant would have suffered “indignity, mental suffering, disgrace and humiliation” as a result of the arrest. He was taken off a plane in front of his friends and other passengers on the plane (there is no evidence, however, as to how many other passengers there were) and treated like a criminal;
2. He was taken to the immigration area for 6 hours and then to the police station for another 4 or so. There was no evidence as to whether the Claimant could be observed while at the immigration area, or when he was transferred to, arrived at and/or detained at the Police Station;
3. There was no evidence as to the circumstances of his detention such as whether he was handcuffed, placed in a cell (the evidence given was the vague evidence of being placed in a “holding area”), given or denied refreshments and such;
4. The Claimant gave evidence that this was the most traumatic experience of his life. He said the experience would have caused onlookers to draw adverse inferences and conclusions about his reputation and character.
5. With respect to attendant loss of social status and injury to reputation, the only specific evidence given by the Claimant in this regard was that the arrest led to his business reputation and earning potential being affected. He went on that by letter dated 3rd December 1998, Mr. Kyffin informed him that the London French RFC Rugby Club was not able to consider a proposal made by the Claimant to treat the team. Upon reading the letter, however, it is not clear whether the decision was based on the Claimant being arrested. In the letter Mr. Kyffin stated:

“As you aware it was intended to fully discuss the services to be provided and the costs to the Club whilst we were sailing with you in the West Indies. Due to your unfortunate arrest in Antigua and your removal from our flight ...we were not able to do this.”

This suggests that the reason was that the decisions was based on the fact that Mr. Kyffin was unable to hold discussions because of the arrest and not that it was based on the arrest itself. This is supported by the fact that in his witness statement filed on the assessment, Mr. Kyffin makes it clear that he was at all times aware that the underlying dispute involved a civil debt which was being disputed.

6. The Claimant has not given any evidence of any reputational damage since 1998.

[32] There are some differences between this case and McMillan:

1. In this case, the Defendants accepted liability as long ago as 2002. In the McMillan case, liability was denied and the arresting officer gave evidence which the judge felt constrained to point out several times in his judgement was in many respects knowingly untruthful.

2. In the McMillan case, there was no offence whatsoever of “invasion of privacy”. There is, however, a jurisdiction (however ancient) for the court to apprehend an absconding debtor, by way of the issue of a writ ne exeat regno, in certain circumstances.
3. The judge placed reliance in McMillan on the Claimant’s arrest being reported on social media, particularly Facebook. In this case, the incident occurred prior to the prominence, if not existence, of social media and no evidence of published reports was given.
4. There was no suggestion in the present case of political influence affecting the decision to arrest.

[33] The first and third of these considerations are particularly important. The reason for the third is obvious. As to the first, paragraph 42.025 of McGregor states:

“The manner in which the false imprisonment is effected may lead to aggravation **or mitigation** of the damage, and hence of the damages. The authorities illustrate in particular the general principle stated by Lawrence LJ in *Walter v Alltools*,¹³¹ that

‘any evidence which tends to aggravate or mitigate the damage to a man’s reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man’s liberty; it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false.’ ”

[34] Taking McMillan as the high-water mark, I would therefore assess the general damages in this case at \$50,000.00.

[35] I turn now to the claim for aggravated damages. As will be apparent from paragraph [23] above, this involves an inquiry into the conduct of the Defendants to determine whether the Claimant’s injuries have been aggravated. There are two relevant complaints. When asked at the airport what his rights were, the 1st Defendant told the Claimant they were to sit down and shut up. The second was that the Claimant was denied a phone call for 3 hours.

[36] There is no evidence of any other conduct of the Defendants which is said to have aggravated the damages. It must be noted that this conduct cannot be the conduct of arrest itself because this is the subject of the award of general damages. It must be conduct that is “high handed, insulting, malicious or oppressive”.

[37] The Claimant relied on the award of \$25,000 in McMillan for aggravated damages. Again, it is not easy to derive any assistance from this award because it is not clear what factors were taken into account.

[38] With respect to being told to shut up and sit down, this was indeed an aggravating circumstance. So too was the denial for three hours of the phone call. The effect would no doubt have to been to increase the humiliation and anxiety of the Claimant over and above what he would have experienced had he been treated with respect or at the very least not with disrespect. But an additional award of \$25,000 is entirely disproportionate. The Defendants suggested a sum of \$10,000 which I think this, was generous.

[39] I would award \$10,000 for aggravated damages.

Exemplary Damages

[40] Unlike general and aggravated damages, exemplary damages are punitive, not compensatory. Because of this, it has been described as providing a windfall for the Claimant. Because it is punitive, its availability is strictly circumscribed.

[41] The leading authority remains **Rookes v Barnard** [1964] A.C. 1129.¹⁰ There are three cases in which an award of exemplary damages is available:

1. Where the tort involves oppressive, arbitrary or unconstitutional conduct by government servants;
2. Where the conduct was calculated to result in profit; and
3. Where the award is authorised by statute.

[42] In the present case, only the first is relevant. It would be useful to cite paragraph 13-019 of McGregor:

“Two conditions¹¹ must be satisfied before a first category case can be established. The first concerns the conduct of the defendant. This has to be shown to be, in Lord Devlin’s words, oppressive, arbitrary or unconstitutional and, while it was said in *Holden v Chief Constable of Lancashire*, that unconstitutional action would suffice without the need for additional oppressive or arbitrary behaviour, so that in effect the three epithets fall to be read disjunctively, unconstitutional action will not suffice without the presence of aggravating features; the central requirement for exemplary damages has always been, as already said, the presence of **outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like**. So, the public nuisance negligently committed in *A.B. v South West Water Services*, was described by Sir Thomas Bingham MR as being ‘quite unlike the abuses of power which Lord Devlin had in mind’. In *Ministry of Defence v Fletcher*, an award of exemplary damages to a victimised army recruit was set aside by the Employment Appeal Tribunal as the

¹⁰ as modified by *Kuddus v Chief Constable of Leicestershire* [2002] 2 A.C. 122

¹¹ The second condition is not in dispute in the present case

conduct of the army officers, **though deplorable**, did not cross the **high threshold set for a finding of oppressive or arbitrary behaviour**. In *R. (on the application of Lumba (Congo)) v Secretary of State for the Home Department*, where the Secretary of State for the Home Department was held liable for the false imprisonment of foreign national prisoners pending their deportation, the Supreme Court was not prepared to award exemplary damages to the claimants since there had not been conduct so outrageous and so unconstitutional, oppressive or arbitrary as to justify such an award. There is a careful analysis of the conduct of the senior Home Office personnel by Lord Dyson with whom, on exemplary damages, the other eight Justices agreed.”

[43] Therefore, it is clear that an award of exemplary damages is not appropriate simply because the Claimant has been falsely imprisoned. It must be accompanied by conduct which meets the high standard referred to in *McGregor*.

[44] In this case, I find no conduct warranting the award of exemplary damages.

Special Damages

[45] The Claimant claimed special damages in the modest amount of EC\$8,106.94 which was particularized as follows in paragraph 15 of his statement of claim:

Hotel Accommodation	US\$900
Taxi Fare	EC\$60.00
Overseas Telephone Calls	£138.95
Physiotherapy	US\$120.00
Return Airline Ticket Antigua to St. Thomas	US\$207.00

[46] In his witness statement, the Claimant gave the following evidence in respect of special damages (all in ECD):

Loss of LIAT airfare	\$558.90
Hotel Accommodation (21 st to 27 th Nov, 1998)	\$3,320.17
Telephone	\$1,098.45
Taxi	\$60.00
Medical Expenses	\$3,069.94

[47] There is an obvious divergence, even taking into account changes in exchange rates, for the hotel accommodation, telephone charges and medical expenses. However, all of the heads now claimed were set out in the Statement of Claim.

[48] The invoices provided in respect of these heads support the following amounts:

Loss of LIAT airfare	\$558.90
Hotel Accommodation (21 st to 27 th Nov, 1998)	\$3,320.17
Telephone	\$1,098.45
	\$4,977.52

[49] There was no evidence in support of the claim for medical expenses which I therefore reject. I do accept the claim for Taxi fare for EC\$60.00.

[50] I therefore award special damages in the sum of \$5,037.52.

Orders

[51] I therefore order as follows:

1. Judgment is entered in favour of the Claimant for damages assessed as follows:
 - i. General Damages of \$50,000.00
 - ii. Aggravated Damages of \$10,000.00
 - iii. Special Damages of \$5,037.52.
2. The Defendants shall pay prescribed costs in the sum of \$9,755.63.

Damian Kelsick
High Court Judge (Ag.)

By the Court

Registrar