

**REPUBLIC OF TRINIDAD & TOBAGO**

**IN THE COURT OF APPEAL**

**CvA No. 52 of 2001**

**IN THE MATTER OF THE CONSTITUTION OF  
TRINIDAD AND TOBAGO**

**AND**

**THE MATTER OF THE GUARANTEES OF FUNDAMENTAL  
HUMAN RIGHTS AND FREEDOMS PART 1 OF THE  
SAID CONSTITUTION**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL  
HUMAN RIGHTS AND FREEDOMS PURSUANT TO SECTION  
14 OF THE CONSTITUTION AND ORDERS 55 OF THE  
RULES OF THE SUPREME COURT**

**BETWEEN**

**SIEWCHAND RAMANOOP**

**APPELLANT**

**AND**

**THE ATTORNEY GENERAL OF  
TRINIDAD & TOBAGO**

**RESPONDENT**

**CORAM:**

**S. Sharma, C.J.  
M. Warner, J.A.  
W. Kangaloo, J.A.**

**APPEARANCES:**

***Dr. F. Ramsahoye, S.C., Mr. A. Ramlogan, Mr. K. Neebar appeared on  
behalf of the Appellant***

***Mr. B. Busby, Ms. J. Baptiste appeared on behalf of the Respondent***

**DATE DELIVERED:**

**21<sup>st</sup> March, 2003**

## **JUDGMENT**

**Delivered by M. Warner, J.A.**

1. The facts are summarised in the judgment of the learned Chief Justice, and I respectfully adopt them. The principal question which arises on this appeal is whether the appellant is entitled to an award of **'exemplary damages.'** Bereaux J. granted declarations, that the appellant's rights under sections 4 (a), 4 (b) and 5 of the Constitution had been infringed, but he held that exemplary damages were not available to him in an application brought under section 14 of the Constitution.

2. I take the view that when a court makes a finding of liability on the part of a litigant, and ultimately makes an order, one of the objectives must always be to **'deter,'** however the order is expressed. I have no doubt therefore, that in the development of **'constitutional jurisprudence,'** a court at first instance will be acting well within its power by awarding an appropriate sum which would include and discourage future breaches, of the same kind. However, I am not satisfied that the law in its present state allows the court to incorporate a **punitive element,'** which is an essential characteristic of an award of **'exemplary damages.'**

3. In examining the concept of exemplary damages, I cite a short passage from the judgment of the majority delivered by Lord Nicholls of Birkenhead in **A v Bottrill [2002] 3 WLR 1406 at 1408,** a case determined in the Privy Council from a decision of the New Zealand Court of Appeal –

***“the pros and cons of exemplary damages have been much debated. The debate still continues.”***

4. **Historical Overview**

In England, exemplary damages were first awarded to mark the court's disapproval of intemperate governmental action. In **Huckle v Money [1763] 95 ER 768** the plaintiff was taken into custody by the defendant ‘a King's Messenger’ upon a ‘***nameless warrant***’ on suspicion of having printed a publication which the government wished to suppress. The court held that it was a most daring attack on the liberty of the subject and a ***“glaring case of outrageous damages in tort and which all mankind must think so, to induce a court to grant a new trial for excessive damages.”***

5. In **Wilkes v Wood 1763 Lofft 1** the actual perpetrators were sued in trespass after they entered the plaintiff's home on a general warrant of arrest. In this case exemplary damages were awarded against the Secretary of State. These two cases were cited by Lord Devlin in **Rookes v Bernard [1964] A.C.** at pages 1221 to 1222.

6. Thereafter, the law developed to the extent that awards were made in most torts, but not in contract. (See McGregor on Damages Sixteenth edition, para. 431).

7. In 1964, in **Rookes v Barnard [1964] AC 1129** Lord Devlin, delivered a single judgment of the House of Lords. He reviewed the concept and sanctioned such an award in three situations only –

- (1) for oppressive arbitrary or unconstitutional conduct by servants of government.

- (2) where the defendant's conduct had been calculated to make a profit.
- (3) where it was statutory.

8. Later, in **Cassell & Co. v Broome [1972] A.C. 1027** the House refused to accept the criticisms of the Court of Appeal in **Rookes v Barnard**. In this connection Lord Hailsham had this to say –

***“We cannot depart from Rookes v Barnard here. It was decided neither per incuriam nor ultra vires this House; we could only depart from it by tearing up the doctrine of precedent, and this was not the object of this House in assuming the powers adopted by the Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234.”***

9. Senior Counsel for the appellant cited the case of **Thompson v The Commissioner of Police [1997] 2 All ER 762** where the court set guidelines for juries as to the appropriate sums to be awarded in civil actions against the police. He drew attention to the increased level of awards in actions of this nature. Its applicability to the present facts must however be examined.

Section 88 (1) of the Police Act 1996, in England, provides that –

***“the chief officer of police for a police area shall be liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and accordingly shall in respect of any such tort shall be treated for all purposes as a joint tortfeasor.”***

The section therefore ensures that the principles of vicarious liability are preserved in respect of torts committed as stated before. It is also noteworthy that damages and costs are paid out of the police fund. (Section 88 (2) (4))

10. A restrictive approach, was adopted in **AB v South West Water Services [1993] 1 All ER 609** where an application to strike out a claim for

aggravated or exemplary damages for public nuisance was refused at first instance. The Court of Appeal held that exemplary damages should be restricted to torts which were recognised at the time when **Rookes v Barnard** was decided.

11. In **Kuddus v Chief Constable of Leicestershire Constabulary [2001] 3 All E.R.** a striking out case, the House of Lords held that the power to award exemplary damages was not limited to cases where it could be shown that the cause of action had been recognized before 1964 and accordingly overruled the South West Water Services case.

However, the majority favoured the retention of the categories enumerated in **Rookes v Barnard** and recognised that the House had, in **Cassell v Broome** refused to reopen the basic decision in **Rookes v Barnard**.

12. In **Kuddus**, Lord Scott expressed the opinion there was no room for an award of exemplary damages against an employer whose alleged liability was vicarious and who had not done anything that constituted punishable behaviour. He however, underscored the fact that the views he expressed should be regarded as ***'provisional'*** because the point had not been addressed by counsel.

13. **The Commonwealth**

In **Dunlea v the Attorney General [2000] 3 NZLR 1136** six appellants had brought claims against the police alleging breaches of the New Zealand Bill of Rights 1990, arising out of a search and for torts of assault, unlawful imprisonment and trespass. The majority held that an award of exemplary damages was not appropriate, as such awards should be reserved for ***'truly***

**outrageous conduct.'** The Court also observed that that was not the occasion to resolve the question whether a different approach should be adopted to fixing of compensation for a breach of the Bill of Rights, compared with the fixing of damages for a tort arising out of essentially the same facts. It is convenient to refer to the dissenting judgment of Thomas J. where he helpfully presented an overview of the approach to exemplary damages in constitutional courts in other parts of the Commonwealth. He made the following observations -

***"The Position Overseas***

***Reference to the approach adopted by the Courts to breaches of constitutional rights in various overseas jurisdictions is important, but not conclusive. It should not deter this Court from guaranteeing an effective remedy for the violation of guaranteed rights. In Canada, for example, the correct approach is yet to be settled. Surprisingly, the Canadian Courts have not yet developed rules relating to damages for breaches of the Charter, and the law is characterised by uncertainty. Many cases are contradictory. See the report to the Law Commission of Grant Huscroft and Paul Rishworth (unpublished, Jan 1996) at pp. 3-4 and 39-40. Nevertheless, damages may certainly be awarded for a breach of the Charter. See RJR-Macdonald Inc v Attorney-General of Canada [1994] 111 DLR (4<sup>th</sup>) 385 esp at p 406. The position in the United States is complicated by the fact that no actions are allowed against the state or federal governments. Action is taken against the individual perpetrator of the violation and there is an understandable fear that jury awards may prove extravagant. While in Ireland the Courts regard the common law torts as sufficient to vindicate constitutional rights (Hanrahan v Merck Sharp & Dohme (Ireland) Ltd. [1988] ILRM 629) and Judges use the theory and language of tort law, substantial damages are nevertheless awarded. The Courts' attitude is reflected in the dicta of Hamilton P in Kennedy v Ireland [1987] IR 587 at p 594:***

***"....the injury done to the plaintiffs has been aggravated by the fact that it has been done by an organ of the state which is under a constitutional obligation to respect, vindicate and defend their rights. The plaintiffs are in my opinion entitled to substantial damages and it is, in the circumstances of the case, irrelevant whether they be described as 'aggravated' or 'exemplary' damages."***

*Indian Courts have consistently held that the Indian Constitution provides a direct cause of action (Nilabati Behera v State of Orissa [1994] 2 LRC 99) and that this is to be treated distinctly from tort claims. They have awarded damages using novel principles applicable to a breach of constitutional rights rather than the formula for damages in tort. Relief to redress the wrong for the established invasion of the fundamental rights of the citizen under the public law jurisdiction is in addition to the traditional remedies and not in derogation of them. See Basu v State of West Bengal [1997] 2 LRC 1 at p 26.*

*In all these jurisdictions the Courts can and do award exemplary damages for breaches of constitutional rights. As I have indicated above (para 71), however, I would not wish to draw an analogy with exemplary damages or inject a punitive element into the determination of compensation for a breach of the Bill of Rights. Speaking of the Bill of Rights, Richardson J. made this point succinctly in Martin v Tauranga District Court [1995] 2 NZLR 419 at p 428. He said –*

*“... the objective is to vindicate human rights, not to punish or discipline those responsible for the breach. The choice of remedies should be directed to the values underlying the particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of the public interest.”*

14. What the above citations demonstrate is that although monetary compensation may be ordered for constitutional breaches, the Courts throughout the Commonwealth adopt a flexible approach. The trend appears to favour such damages as a **‘vehicle of social control.’**

15. **Trinidad and Tobago**

In **Ramnarine Jorsingh v Attorney General 51 WLR 501**, Sharma C.J. and de la Bastide C.J., as he then was, both expressed the opinion that Section 14 of the Constitution has the effect of releasing the court from the constraints of the common-law rules governing the award of damages. It was not however necessary to consider the question any further because damages were not claimed on that basis.

16. There are, it seems to me, inherent problems in applying full-scale the principles of tortious liability where there is a breach of the Constitution, because the Constitution does not create private rights giving rise to an action in tort; to the contrary, it preserves **“any other action with respect to the same matter.”** (Section 14 (1).) The Constitution gives rise to remedies in public law. Causes of action enforceable by an award of damages are created by the common law.

18. The case of **Maharaj v The Attorney General (No. 2) [1978] 2 WLR 902** remains the bedrock of the constitutional jurisprudence of Trinidad and Tobago. The meaning of **“redress”** under Section 6 of the Constitution, now Section 14 of the Republican Constitution, was addressed in that case. Lord Diplock observed:

**“Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford English Dictionary, 3<sup>d</sup> Ed. 1944 is given as ‘Reparation of satisfaction or compensation for, a wrong sustained or loss resulting from this.’”**

Lord Diplock continued –

**“In their Lordships’ view an order for payment of compensation when a right protected under section 1 ‘has been’ contravened is clearly a form of ‘redress’ which a person is entitled to claim under section 6(1) and may well be the only practicable form of redress; as by now it is in the instant case. The jurisdiction to make such an order is conferred upon the High Court by section 6(2) (a), viz. Jurisdiction ‘to hear and determine any application made by any person in pursuance of subsection (1) of this section...’ The very wide powers to make orders, issue writs and give directions are ancillary to this.” (Emphasis added)**

18. I am satisfied that nothing in Section 14 speaks to punishment. Accordingly, the award of exemplary damages cannot be **‘ancillary’** to redress which the court is empowered to provide.

19. In the case of *Attorney General of Trinidad and Tobago v Lakhan and Trinidad and Tobago Transport Specialist CvA. No. 154A of 1997 (unreported)*. Nelson J.A. observed –

***“To permit constitutional actions to be converted after liability to assessments on a common law basis may be unfair to the State. Firstly, to do so would be to ignore Section 14 (1) of the Constitution which expressly reserves to the citizen rights of action at common law. Secondly, nothing in the Constitution suggest that immured in every constitutional action is a private law action.”***

20. In my view, therefore, despite the inherently flexible nature of the court's jurisdiction, there is nothing in Section 14 which permits the award of exemplary damages.

21. The court, in its quest to make a meaningful award, should in my view bear in mind that this is not a case of vicarious liability, the tortious principle by which liability is passed on to an employer although he himself is free from blame for a tort committed by his employee. Indeed liability for exemplary damages could only be justified by reference to pleaded facts and circumstances relative to the State itself as infringer of the constitutional guarantees. Nor is it direct liability where the State has authorised or ratified the wrongful act.

22. If therefore the intention is to ***“punish,”*** then there seems to me no basis for punishing the State because the punitive purpose of an award of exemplary damages cannot be achieved.

23. *Jaroo's case*

In the case of *Thakur Persad Jaroo v The Attorney General Privy Council Appeal 54 of 2000*, the Privy Council had this to say –

***“Nevertheless, it has been made clear more than once by their Lordships’ Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy.***

.....

***Lord Diplock repeated his warning against abuse of the constitutional motion in the context of criminal cases where there was a parallel remedy in Chokolingo v Attorney General of Trinidad and Tobago [1981] 1 WLR 106, 111-112: see also his observations in Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385 399-400 and Attorney General of Trinidad and Tobago v McLeod [1984] 1 WLR 522, 530. The same point was made recently in Hinds v The Attorney General [2001] UKPC 56, where Lord Bingham of Cornhill said in paragraph 24 that Lord Diplock’s salutary warning remains pertinent.***

***There is no doubt however that a parallel remedy was available to the appellant to enable him to enforce his right to the return of the vehicle. As the Court of Appeal observed, the appropriate remedy for him to pursue at common law was an action for delivery in detinue. The question which then arises is this. Was the Court of Appeal right to hold that it was clearly inappropriate for him to proceed by way of an originating motion under section 14(1) in the circumstances?”***

24. In the instant case, the State consented to judgment. I do not therefore think that it is appropriate in these circumstances to question that stance.

25. As I have said before, implicit in all orders of the Court is a component of deterrence, I can go no further. I would have dismissed this appeal against the trial judge’s refusal to make an award of exemplary damages.

26. **Costs on assessment**

I am in agreement with the learned Chief Justice that the trial judge ought to have awarded costs fit for senior and junior Counsel.

Margot Warner,  
Justice of Appeal