JA 3, DL, GGH, RM

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

file
SET 3
COPY 1

A.586/85

BETWEEN GEORGE ALEXANDER HOWLEY of Auckland, Barrister

Plaintiff

AND HER MAJESTY'S ATTORNEY-GENERAL for and on behalf of the Minister of Police

Defendant

Hearing: 25 and 26 August 1988

Counsel: Mr P. B. Temm, Q.C. for Plaintiff
Mr J. A. Laurenson for Defendant

Judgment: 16 JAN 1989

JUDGMENT OF WYLIE, J.

The plaintiff, an Auckland barrister, sues the Attorney-General on behalf of the Police for unlawful arrest, unlawful imprisonment and trespass to his vehicle. He claims $10,000 for the arrest, $10,000 for imprisonment, $1,000 for trespass and $10,000 by way of exemplary damages.

The events giving rise to the claims took place in the early hours of 12 January 1985 in Parnell Road, Auckland. The previous evening the plaintiff had been working late at his Chambers in the city. He left there at a time which must have been close to midnight. Before going to his home in Epsom he

wanted to call on a friend, a restaurant proprietor in Parnell, whom he expected to find still at his premises. He drove through the Auckland Domain. There was an electrical storm at the time. He drove up to the front entrance of the War Memorial Building where he parked and remained for some time observing the sheet lightning. There were other people parked around him apparently similarly engaged. When he had seen enough he drove off out of the Domain towards Parnell Road. His vehicle was an almost new van. During the day he had been carting some building materials in it, but because of its newness he had draped some blankets from the inside of the roof to provide protection to the windows and interior generally. He had left the blankets there as he was intending to cart more building materials the following day. As he was moving away from his parked position he noticed a police car driving round a roadway in the Domain below the War Memorial Building. It followed him to Parnell Road. When the plaintiff reached his friend's restaurant he saw that the lights were out and his friend's car not in the vicinity. He assumed his friend had gone. As he did a U-turn to go back up Parnell Road to go home he realised that the police car was requesting him to stop which he did. Woman Police Constable Lidgard alighted from the police car and approached the plaintiff. In what I accept was a brusque manner she told the plaintiff to get out of his car. Whether she said this by way of command or request does not much matter. There is only the plaintiff's direct evidence on the point, he saying that she simply said, "get out". Constable Lidgard has since left

the police force and now resides in Australia and did not give evidence. Her report made on the day of the incident to the sergeant in charge of her section was produced by consent. In it she said that she asked the driver if he would get out of the van and come to the side of the road so that she could talk to him. Whatever the exact words used, it is clear that her manner got the incident off to a bad start and the plaintiff bridled at her attitude. He refused to get out of his car unless she gave some good reason. He asked why he had been stopped. She replied that there had been a lot of burglaries in the area, to which the plaintiff asked what that had to do with him. There were some further unproductive exchanges. Then Constable Williams, the driver of the patrol car, also came over to the defendant's vehicle and, according to the plaintiff, very rudely ordered him out of his car. Again the plaintiff said he was not getting out of his car until he knew what it was they wanted and he again demanded to know why he had been stopped. He said that the police constable told him that the police did not have to give reasons for stopping people and they could stop him if they wanted to. There was more talk of burglaries in the neighbourhood. The plaintiff says he specifically asked the constables if they thought he had committed a burglary or was a receiver. The constables said they had no such belief. The plaintiff then said that he was going to leave, but says he was told by Constable Williams that he could not, and when he asked why was told "because I say so". By now the plaintiff was upset and, I suspect, also voluble. At some point the

question of liquor was raised. The plaintiff says that he was accused by Constable Williams of being drunk, but the constable says that he merely asked him whether he had been drinking that night. The plaintiff told the constable that if he thought he had been drinking it was his duty to give him a breath test whereupon Constable Williams went to the police car with the intention of getting a breath testing kit. He was unable to find one. By this time the plaintiff had alighted from his vehicle and the constable was apparently satisfied that he had not been drinking. Indeed it is the plaintiff's evidence, which I accept, that not only had he not been drinking that night, but that he never drinks alcohol. There was also some discussion about a search of the van which initially the plaintiff refused to allow. Later however, he invited the constables to look in the back of his van where they found nothing suspicious. At some stage in the discussion the plaintiff had given to Constable Lidgard his driving licence as evidence of his identity. She had taken it to the police car and had radioed the Central Police Station to have a check made through the Wanganui computer. A few minutes later the plaintiff went over to the police car and requested his licence back which Constable Lidgard refused to give him, saying that she still needed to check on it. The plaintiff then said that he was leaving and that if they wanted him he was going to the Central Police Station. He drove off down Parnell Road probably about 200 yards, thought better of his intention to go to the police station, and decided to return to recover his licence. On arriving back at

the still stationary police car he again requested his licence. It was given to him, he returned to his car, and was about to drive off. Just at that moment Constable Lidgard received radio advice that the computer search had revealed the plaintiff to be a disqualified driver. Constable Williams immediately went to the plaintiff's car, put his hand through the window and removed the keys. He told the plaintiff of the information received which the plaintiff hotly denied. The plaintiff told him that if he was a disqualified driver the constable had a clear duty to arrest him. The plaintiff says the constable told him he was going to do just that. The constable denies this and says that the plaintiff said he considered himself to be under arrest. The constable says that he considered whether he should arrest the plaintiff, but was not clear that he should do so, being in some doubt in view of the plaintiff's denials and the plaintiff's possession of his licence, which should have been surrendered if he was disqualified. The plaintiff says he was ordered to get into the police car, which after locking his own vehicle, he did. The constable says it was then his intention to return to the Central Police Station with the plaintiff in order to sort matters out. The plaintiff says that as he was seated in the rear seat of the police car he heard a radio message that the constable should exercise caution because the particulars that the control room had for the disqualified driver did not correspond with those of the plaintiff. As soon as he heard this the plaintiff says he told the police officers that they now knew he was not a disqualified driver and that he was

leaving. He attempted to get out of the car, but Constable Lidgard told him that he was not going anywhere, she closed the car door on him and according to the plaintiff, reached in and locked it from the inside. The police car then proceeded back to the Central Police Station. The plaintiff says that before they had reached the bottom of Parnell Road he again heard a radio message that the particulars of disqualification related to a person called "Howell". He again remonstrated with the driver saying that they now knew very well that he was not a disqualified driver and demanded to be returned to his car. He asked if he was under arrest and Constable Williams replied in the affirmative. Constable Williams' account differs somewhat. He says the two messages casting doubt on the disqualification were not received until after the police car was on its way to the police station and in particular the second message was not received until the car was in the region of the intersection of Anzac Avenue and Symonds Street. A transcript of messages passing between the patrol car and the control room was produced showing the timing of those messages. This shows that the first information given to Constable Lidgard as to disqualification was after 1.19 a.m., Constable Lidgard asked for a check at 1.21 a.m. and two separate messages, separated by a repeat request, first advising that the disqualification related to one Howell and later advising caution because of the apparent error were given between 1.22 and 1.23 a.m. On the basis of those times I am satisfied that the evidence of the plaintiff as to the sequence of events is correct. There could hardly

have been time between 1.19 and 1.23 a.m. for all that happened if the second message was received as late in the journey as Constable Williams says. Constable Williams also says that the plaintiff came back in the police car to the Central Police Station of his own accord and that he had made no effort to leave or get out of the car. However, in both constables' reports to their sergeant on this matter mention was made of Constable Lidgard having closed the door on the plaintiff when he attempted to leave the car, and Constable Williams agreed in cross-examination that his account made at the time was more likely to be correct. I am satisfied the plaintiff's attempt to leave the car was prompted by the first of the two messages.

On arrival at the Central Police Station the plaintiff demanded to speak to the sergeant on duty, Sergeant Watt. He told Sergeant Watt he was under arrest, at which the sergeant refused to discuss the matter until he had been briefed by the constables. The plaintiff was placed in a waiting room while the sergeant spoke with the constables. The plaintiff said that he waited 10 to 15 minutes, but that it seemed much longer. He was apprehensive as to what the constables were telling the sergeant and that he would be arrested and kept there for some length of time. When Sergeant Watt came into the room the plaintiff asked him if he was under arrest and said he was surprised to be told that he never had been under arrest, but the sergeant asked him to wait a little longer while further enquiries were made. The plaintiff was

unwilling to do this and the sergeant offered to drive him to his car. It then occurred to the plaintiff that the constables must have given the sergeant an incorrect version and he insisted that at least one of the constables be brought into the discussion so that he could confront him. Constable Williams was brought in and the plaintiff retold his account of the incidents, but the constable denied any arrest and continued to maintain that the plaintiff had come to the police station voluntarily. Eventually the sergeant returned the plaintiff to his car in Parnell in the course of which they had a sensible discussion about the matter and the sergeant expressed his apologies to the plaintiff. Subsequently there was an internal enquiry by senior police officers as a result of which the plaintiff received a letter acknowledging that he had grounds for complaint and expressing the apologies of the police for the incident.

I am satisfied on the evidence that the version of events given by the plaintiff which I have summarised above is substantially true, and where his account as related above differs from that of the police constables I prefer his evidence. That is not to say that I have accepted everything that the plaintiff has said. I think it is clear that his estimate of the time of these events is wrong. He thought that they commenced at about 11.45, but on the basis of the timed messages they probably commenced something like an hour later than the plaintiff says. The constables maintain that they commenced about 1.00 a.m. The plaintiff also said in the

course of his evidence that when he was first being questioned by the constables he gained the impression that they were waiting for him to do something to give them an excuse either to arrest or attack him and he was fearful of what they might do. No mention of this was made in his written complaint during the course of the internal enquiry, and although he says he mentioned the matter to the officer who interviewed him in respect of that enquiry the officer concerned has no recollection of it. It was not pleaded. I do not suggest that the plaintiff is lying on the matter, but I think the fear which he now professes to have had is probably the reconstruction after almost three years, of a general apprehension, but not at the time of physical attack, which he no doubt held exaggerated by subsequent imaginings as to what might have been. Inevitably too, after such a lapse of time, there were a number of inconsistencies in the plaintiff's evidence, but none which has caused me to doubt the essential veracity of what he has described. I have to say that I found the evidence of Constable Williams less than convincing. Understandably after the lapse of time his recollection of events was somewhat blurred, and as became apparent on his cross-examination, also inaccurate, allowing the greater credibility to his written report made on the day. To his credit Constable Williams acknowledged that he was not proud of the incident. He felt it would not happen again and that he had learnt considerably from it. Both constables were relatively young and inexperienced, having been in the force for only about two years. I think it is

obvious that this matter got out of hand and beyond their experience to deal with. They were confronted by a senior barrister, who with some justification took umbrage at being stopped and questioned for no good reason and in a manner which he found offensive. However, in fairness to the constables, I think it also has to be said that the plaintiff himself did nothing to help the situation. He became agitated, as he did not attempt to deny. I hope he will not take it unkindly - he may even regard it as a compliment - if I say that he is a better advocate than a witness. His account of events from the witness box was not as lucid and coherent as one might have expected and he seemed unable to discipline his responses or to refrain from getting into argument with counsel during cross-examination. When he was free from the constraints of the Court surroundings I can well appreciate the difficulties which the constables experienced in trying to deal with the matter. So, in my view, there were undoubtedly faults on both sides. That however does not justify unlawful arrest, imprisonment or trespass.

There was, for the first time, at the commencement of the trial a concession by counsel for the defendant that indeed these wrongs had occurred. This concession was made in relation to the taking of the keys from the plaintiff's car after receipt of advice that he was a disqualified driver, and it was expressly conceded that as a result there was a false arrest, false imprisonment and trespass to the vehicle. The defence thereafter regarded the trial as one relating to

damages only and in a sense that is correct. However the quantum of damages may well depend on the point at which the unlawful arrest or imprisonment took place and on the whole of the conduct of the constables throughout the incident. Counsel for the plaintiff submitted that a restraint by authority to which the plaintiff submits may be an imprisonment even though there is no actual touching and that the arrest and imprisonment happened at an earlier stage when the plaintiff was first stopped by the police, questioned and required to get out of his car. He cited a few words from the judgment of McCarthy, J. in Blundell v Attorney-General [1968] NZLR 341 at page 357:

> "... any restraint upon the liberty of a citizen against his will not warranted by law is a false imprisonment."

To put that extract in its proper perspective it is necessary to cite his immediately following remarks:

> "To establish false imprisonment actual incarceration need not be proved, but the restraint asserted must be total in the sense that it prevented all movement, and not merely in some directions. ... A minimum of force is always sufficient. Indeed there need not have been an actual touching, it is sufficient if there was a threat of force or the exercise of pressure exerted, for example, by the production of an alleged authorising warrant or the demands of a Police officer that the citizen go with him to the Police station."

As to the justification for restraint Turner, J. at page 354 said:

"For myself I entirely reject the proposition advanced by the learned Solicitor-General that a constable is in this country entrusted with a power to restrain persons against whom there is some vague suspicion that they may have committed an unspecified criminal offence, while "reasonable inquiries" are made. I know of no justification for the exercise of forcible restraint upon any citizen such as it is alleged was exercised by the constables in this case, save one - that he is arrested, or is being arrested, by a constable upon grounds justified by the law. It is not sufficient for the constable to say "I may be going to arrest you; I do not yet know; but I will restrain you in the meantime, while inquiries are made". The citizen is entitled to inquire from the constable whether or not he is arrested. If he is not arrested, he must be free to go his own way without restraint or molestation. If he is arrested, on the other hand, it must be upon grounds justified by the law. Either there must be a warrant for his arrest ..... or, if there is no warrant then justification must be shown in terms of the sections which I have quoted." (ss.31, 32, 315(2), 315(4) of the Crimes Act 1961.)

Thus if there was in fact a restraint on the plaintiff during that part of the incident which preceded the advice of disqualification and the taking of the car keys such restraint was an unlawful arrest and imprisonment. The constables at that stage did not in my view have any good cause to suspect the plaintiff of having committed a breach of the peace or any offence punishable by death or imprisonment in terms of s.315(2)(b) of the Crimes Act and no other provision of that section has any possible relevance to the circumstances here. Counsel for the defendant submitted that the constables had reasonable grounds for requesting the plaintiff to stop in Parnell Road in view of the circumstances as they saw them - the lateness of the hour, their impression, mistaken as I hold, that the plaintiff left the vicinity of the War Memorial

Museum building immediately he saw the police car approaching, and that the plaintiff's vehicle's windows were covered with blankets. This case is not about the right of the constables to stop and make enquiries of the plaintiff and I do not need to decide whether on such flimsy assumptions the constables were justified in following and stopping the plaintiff. It is significant that the constables did not suggest that they were investigating a particular crime. On the contrary it is apparent from what they said to the plaintiff as to there having been a lot of burglaries in the area that their stopping of the plaintiff was random and not related to a particular incident. No impediment should be put on the way of the police in the lawful exercise of their function. But neither should they be encouraged in the belief that it is a legitimate exercise of their function to stop and question members of the public at random or otherwise than in the course of investigation of a specific offence. There lies the way to police harassment and the ultimate police state. I do not need to decide the limits of the right to stop and question members of the public or whether those limits were breached in this case. I am concerned only with unlawful arrest and unlawful imprisonment. On the evidence here I do not think that either occurred prior to the taking of the plaintiff's car keys. If I accept the plaintiff's evidence that he was ordered to get out of his car and that he was told that he could not leave that might, in some circumstances, have amounted to such a restraint even though not a physical restraint, as to constitute unlawful imprisonment or arrest.

The circumstances I envisage are those of a compliant or submissive person unaware of his legal rights and of the restrictions on police powers. But that was not this case. The plaintiff was an experienced lawyer, well versed in the criminal law which is evident from his questions and objections to the constables. He was not cowed into submission, he did not accept the attempt at restraint, if such it was, and he was not in fact restrained, as is apparent from the fact that he shortly afterwards got into his car and drove off without any attempt by the police constables to prevent or follow him. Even if the words of the constable were an attempt to restrain the plaintiff and not a mere bluster or bluff the attempt did not succeed and I am not satisfied that the plaintiff regarded himself at that stage as being under arrest or falsely imprisoned, as indeed his subsequent conduct showed. Thus, even though the conduct of the constables may be criticised in this period (and as I have said the plaintiff is not entirely free from blame either) I do not think any of the wrongs complained of was committed. Nevertheless that conduct is relevant to the issue of damages for the subsequent wrongs, particularly in relation to its cumulative effect on the later stress, inconvenience and humiliation suffered by the plaintiff.

I am satisfied that he is entitled to compensatory damages, including aggravated damages, for the wrongs done to him. He is also technically entitled to damages for the trespass to his vehicle, but the quantum thereof must

necessarily be minimal since there is no suggestion of any damage to the vehicle and apart from the first few moments the deprivation of use thereof was not a direct consequence of the trespass but rather a corollary of the wrongful imprisonment. It is reasonable to infer that since it was the plaintiff who locked his vehicle before getting into the police car to return to the police station the keys were handed back to him almost immediately after their removal by Constable Williams. The plaintiff, of course, suffered no monetary loss as a consequence of these events, nor did he suffer any personal injury. Paragraph 30 of his statement of claim confines the result of the unlawful actions of the defendant, apart from the unlawful arrest, unlawful imprisonment and trespass, to humiliation and embarrassment. In addition, however, it is alleged he was subjected to "high-handed and oppressive treatment at the hands of the constables who completely misused their powers" justifying a claim for exemplary damages. Confining my consideration for the moment to the basis of an award for compensatory damages the whole of the events in question occupied no more than a couple of hours. They commenced I think, a little before 1.00 a.m. The plaintiff was returned to his car in Parnell by about 2.30 and was at his home in Epsom by about 2.45. The period of actual physical restraint commenced at about 1.20 and must have concluded within an hour. During the events in Parnell Road there was a certain amount of traffic about, both vehicular and pedestrian. There was no evidence of any congregation of by-standers or of observation by passers-by, but that the

events may have been observed by a number of people is likely. The plaintiff's sense of humiliation and embarrassment is fully justified on that basis alone quite apart from his own personal feelings and his sense of outrage at what he was subjected to. That those matters should be adequately compensated is beyond question, but I do not think that they can possibly justify the amounts claimed.

In regard to exemplary damages it is now clear that in appropriate cases such an award may be made: Taylor v Beere [1982] 1 NZLR 81, Donselaar v Donselaar [1982] 1 NZLR 97. The judgments in these cases, particularly the former are illuminating on the whole topic of exemplary damages. While the outcome of the judgments is not to confine the classes of case in which exemplary damages may be awarded they do indicate that given the scope of aggravated damages the circumstances in which exemplary damages are appropriate are narrow indeed. In his judgment Somers, J. expressly confined those circumstances to those set out in Mayne and MacGregor on Damages (12th ed. 1961) page 196 as follows:

> "They can apply only where the conduct of the defendant merits punishment, which is only to be considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights."

I do not think there was any such conduct here. There were, I have no doubt, some aspects of the constables' conduct

which the plaintiff found abrasive and offensive, but I do not regard that as of sufficient seriousness to come within the kind of conduct meriting an exemplary award. Nor do I think there was a contumelious disregard of the plaintiff's rights. I accept Constable Williams' evidence that matters had got into a confused state as a result of the conflicting reports as to disqualification and that as a young and inexperienced constable he thought the appropriate thing to do was to go back to headquarters and sort the whole matter out. That such was an inappropriate and indeed unlawful course to take in the way he did does not of itself make it contumelious, which in this context I take to mean a deliberatly contemptuous flouting and abuse of known rights. I do not accept counsel for the plaintiff's submission that once the two constables discovered that the plaintiff was a barrister they decided to put him in his place. Counsel for the plaintiff sought to rely on a number of matters subsequent to the arrest incident as evidence of malice in the sense of improper motive going to "the aggravation of damages", by which I think he intended exemplary damages. The improper motive submitted to exist was a "single minded attempt to throw all the blame on the plaintiff in spite of the defendant's own evidence to the contrary". I will not list all the matters mentioned by counsel in this submission, but they included the failure of the defendant to make any offer of amends under s.60(2) of the Police Act after an indication from the plaintiff at the invitation of the defendant that such an offer would be considered, application to this Court seeking a stay and

reference of the issue to the Accident Compensation Corporation under s.27 of the Accident Compensation Act 1982 (which application was heard and dismissed by Chilwell, J. in June 1986), delays in relation to discovery and to the return of a praecipe to set down, persistent denial of the wrongful arrest and assertion of the plaintiff's willingness to go to the police station voluntarily right up to the morning of the trial, and the pleading of a number of denials and allegations by way of defence unsupported by the evidence ultimately given by defence witnesses. I agree that taken together all these matters suggest a less than appropriate stance on behalf of the defendant. Nevertheless a number of the matters mentioned are by no means uncommon in much of the litigation which comes before the Courts. In spite of the criticism which can be made of the defendant's approach to the case (and I expressly exonerate counsel for the defendant from any such criticism, he having had no part in the conduct of the case prior to trial) I cannot regard any of those aspects as indicating malice or improper motive. In sum I find no grounds for the award of exemplary damages.

I return then to the amount of damages to be awarded on a compensatory basis only. I do not attempt to distinguish between the arrest and the imprisonment and I have already indicated that the damages for trespass must be minimal. Counsel for the defendant referred me to a number of awards in wrongful arrest and imprisonment cases in recent years. The facts vary infinitely and it would not be helpful to review

them. They do however give a range which does offer some limited guidance. On the basis of these cases counsel for the defendant submitted that an award between $2,000 and $3,000 would be appropriate. Counsel for the plaintiff however submitted that the effects of inflation make comparison almost impossible. He also submitted that sufficient damages should be awarded to give reality to the protection afforded by the law. He submitted that the present case calls for more than a nominal amount and that the amounts claimed were reasonable. I have already indicated that the amounts claimed are in my view far in excess of what is appropriate having regard to the relatively short duration of the wrongful arrest and imprisonment. I think the suggestion of counsel for the defendant is nearer the mark, but I think it fails to give adequate recognition to the sense of humiliation and outrage felt by the plaintiff which, because of his occupation and knowledge of the law, and because of his personal characteristics, I think was probably greater than might have been the case with many others finding themselves in the same position. I think as in other areas of tort the wrongdoer must take his victim as he finds him.

I think that an overall award of $4,000 compensatory damages is appropriate and there will be judgment accordingly. The plaintiff is also entitled to costs according to scale with disbursements to be fixed by the Registrar. In relation to the motion for stay and reference to the Accident Compensation Corporation costs were reserved

by Chilwell, J. The plaintiff is clearly entitled to costs in respect of that matter which I fix at $750.

Solicitors: G. C. Gotlieb, Auckland for Plaintiff
D. S. Morris, Crown Solicitor, Auckland for Defendant

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AUCKLAND REGISTRY

A.586/85

BETWEEN GEORGE ALEXANDER HOWLEY of Auckland, Barrister

Plaintiff

AND HER MAJESTY'S ATTORNEY-GENERAL for and on behalf of the Minister of Police

Defendant

JUDGMENT OF WYLIE, J.

Reserved decision delivered by me this 16th day of January 19[illegible] at 10.15am.

Asst. Deputy Registrar

Received Copy Judgment

(Gary Gotlieb) For Plaintiff

(Meredith Connell) For Defendant