

# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2016: No. 199

**BETWEEN:**

**DWIGHT LAMBERT**

**Plaintiff**

**-and-**

**MINISTER RESPONSIBLE FOR TELECOMMUNICATIONS**

**Defendant**

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**Before:**

**Hon. Assistant Justice Bell**

**Appearances:**

**Mr Peter Sanderson, Benedek Lewin, for the Plaintiff  
Mr Michael Taylor, Attorney General's Chambers, for  
the Defendant**

**Date of Hearing:**

**29 April 2019**

**Date of Judgment:**

**21 August 2019**

## **JUDGMENT**

### **Introduction**

1. This matter arises out of an Originating Summons filed by the Plaintiff claiming that the offences contained in sections 3 and 3A of the Obscene Publications Act 1973 ("the 1973 Act"), and with respect to which the Plaintiff was charged and prosecuted, breached certain constitutionally protected rights in the Bermuda Constitution Order 1968 ("the Constitution"). The Plaintiff claims redress under section 15 of the Constitution for the infringements of his constitutional rights ("the Constitutional Action")

2. The Constitutional Action was dealt with in two parts – with the question of the constitutionality of the offences under the 1973 Act considered first, to be followed by the question of quantum of any redress for constitutional infringements at a separate hearing should that be necessary.
3. The learned Mr Justice Hellman heard the first part on the 6<sup>th</sup> November 2017 and delivered his judgment on the 24<sup>th</sup> November 2017 (“the Hellman Judgment”). The learned Judge determined that the Plaintiff’s constitutionally protected rights had been breached and granted him the following Declaration:

*“Pursuant to section 15 of the Constitution that as at the date of his prosecution the offences involving obscenity contained in section 3 and 3A of the 1973 Act breached the right to a fair hearing in section 6 of the Constitution and the right to freedom of expression in section 9 of the Constitution in that a person thinking of committing an action which was potentially criminalized by either of those sections could not reasonably have foreseen whether the definition of obscenity in section 2(1) of the 1973 Act covered articles portraying sex in a manner which was explicit but was without any additional features which would render the activity portrayed degrading or dehumanizing.” (para 69)*

4. No appeal was taken in respect of the Hellman Judgment and Declaration that the Plaintiff’s constitutional rights had been infringed.
5. This hearing concerned the second part of the Constitutional Action, namely the determination of the quantum of any redress to the Plaintiff arising from the breaches of the Plaintiff’s constitutional rights.

## **The Constitutional Rights**

### **Right to a Fair Hearing**

6. Section 6 of the Constitution provides for the secure protection of law, and contains provisions which address the protections available to persons who are charged with criminal offences to be afforded a fair hearing. It provides:

*“6(1) if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law;*

*(2) Every person who is charged with a criminal offence –  
(a) shall be presumed to be innocent until he is proved or has pleaded guilty;*

*(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;*

....

*and*

*(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, ...”*

7. The Hellman Judgment fully canvassed the law on obscenity and the learned judge was particularly concerned to determine whether obscenity is defined with sufficient precision in section 2 of the 1973 Act.
8. Mr Justice Hellman adopted the reasoning of the European Court of Human Rights in *Muller v. Switzerland* [1991] 13 EHRR 212, itself in the context of a complaint that the appellant’s conviction for obscenity under the Swiss Criminal Code infringed on the protected right of freedom of expression under Article 10(2) of the European Convention. The ECHR held: “*whether an article is likely to be held obscene must be reasonably foreseeable*” (Paragraph 53, Hellman Judgment).
9. Mr Justice Hellman found that it was not reasonably foreseeable to the Plaintiff that the importation of the DVDs, the material in relation to which he was charged, would fall within the definition of obscenity. (See paragraph 61, Hellman Judgment)
10. As Mr Justice Hellman found, in paragraph 68 of the Hellman Judgment: “*What [the Constitution] requires is that any such definition is sufficiently clear that a person should know whether they are at risk of being prosecuted and convicted for an offence in relation to obscene material*”.

### **Freedom of Expression**

11. The learned judge also considered whether the rights protected by section 9 of the Constitution, concerned with protection of the freedom of expression of individuals, had been breached. Section 9 provides, so far as relevant:

*“9(1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes ...freedom from interference with his correspondence...*

12. The learned judge determined that whether offences contained in section 3 and 3A of the 1973 Act offend section 9 also depends on whether obscenity is defined with sufficient precision in section 2 of the 1973 Act (see paragraph 53). The learned Judge determined that the Plaintiff's constitutional right to freedom of expression under section 9 had been breached by the state's actions (Paragraphs 61 and 69). The wrongful interference can be summarized as the interference with the delivery up of the Plaintiff's DVDs by HM Customs, followed by the subsequent decision to prosecute the Plaintiff for the importation of same.
13. I do not repeat the Hellman Judgment, which is adopted in its entirety, but will refer to it and its findings throughout this judgment determining the quantum of constitutional redress to be awarded to the Plaintiff.

## History

14. The factual background is set out in the Plaintiff's Second Affidavit and also summarized in the Hellman Judgment. It extends back to 2005 when the Plaintiff purchased for his personal use what he understood to be legal DVDs which depicted homosexual pornography. The DVDs were confiscated by HM Customs and he was told by a customs officer that the DVDs fell within the definition of obscene under the 1973 Act and to look up the Act online. He did so, "*but could not find any definition of what was obscene*". After some communications with HM Customs he, "*was given the ultimatum of give up my claim to the DVDs or face prosecution for importation of obscene materials*". The Plaintiff states, "*I refused to back down, knowing I would be prosecuted, sacrificing my reputation and risking imprisonment as I strongly believed that I had to take a stand against bigotry and to stand up for my rights to my own property*" (Paragraph 4).
15. The Plaintiff was indeed prosecuted for three counts of importing into Bermuda obscene articles (the DVDs). It is not disputed that the subject DVDs were for his own personal use and showed sexually explicit activity by adults. There was no allegation that the DVDs contained depictions of violence, nothing which was degrading or dehumanizing, and no material which depicted child abuse or child pornography within the meaning of the Criminal Code or within section 2(3) of the 1973 Act (See paragraph 58 as read with paragraph 56 of Hellman Judgment).
16. The Plaintiff sets out in his affidavit the stress, humiliation, loss of dignity and embarrassment he suffered in the lead up to and during the trial. I address this further in the discussion on quantum.
17. In 2007 the Plaintiff was acquitted in the Magistrates' Court of three counts of importing into Bermuda obscene articles contrary to section 3(1)(a) of the 1973

Act. I did not have the benefit of a copy of the judgment of the Magistrate, but as reported in the newspaper article exhibited to the Second Affidavit of the Plaintiff, the acquittal was based on the learned Magistrate finding that the prosecution had not established that the effect of the DVDs, “*taken as a whole, is to outrage contemporary standards of decency or humanity accepted by the public at large in Bermuda*” (See p. 11 “DL1”).

18. Some years after his acquittal the Plaintiff brought an action before the Supreme Court seeking damages for alleged negligence and breach of duty under the 1973 Act against the Broadcasting Commissioners and the Director of Public Prosecution for bringing the prosecution. The learned Chief Justice Kawaley struck out the action as being unsustainable causes of action, but in his judgment suggested that an action for relief under section 15 of the Constitution might be explored (Paragraph 17 of his ex tempore judgment).
19. The Plaintiff thereafter issued the Originating Summons which started the Constitutional Action, in which he sought various heads of relief against the Defendants in the previous action. That summons was also subject to a strike-out application and the strike out application succeeded in part. The constitutional claims against the Defendant survived and were ultimately successful before Mr Justice Hellman when he delivered his judgment on the 24 November 2017. The learned judge found:

*“that as at the date of the Plaintiff’s prosecution it could not reasonably be foreseen whether the definition of obscenity in section 2(1) of the 1973 Act would cover category (iii) material, including the material in relation to which he was charged. The offences contained in sections 3 and 3A of the 1973 Act were at the time, and to that extent, inconsistent with the right to a fair hearing in section 6 of the Constitution and the right to freedom of expression in section 9 of the Constitution”* (Paragraph 61).

20. The declaration given by the court is set out in paragraph 3 above.

### **Evidence: General Damages**

21. The Plaintiff, in his affidavit evidence set out the harm and damage he suffered as a result of the infringements of his constitutional rights. First, he sets out his experiences dealing with HM Customs who refused to deliver up his DVDs, told him that the material was ‘obscene’ and threatened to prosecute him if he continued to insist on delivery of his property. He sets out his belief that the packages were being withheld due to “*bigotry*” (Paragraphs 1-4).
22. He set out his belief that given there had never been a prosecution under the 1973 Act, that the decision to withhold the delivery of his DVDs and then prosecute

- was based on a ‘*homophobic motivation*’ which he found distressing and harmful (paragraph 7). It is implicit from his evidence that he believes that DVDs depicting heterosexual sex would not have been subject to the same treatment.
23. The Plaintiff provides compelling evidence of the immediate and continuing impact on him of the prosecution and trial. He states that the case was newsworthy and “*so my pornography habits were broadcast to the whole of Bermuda (and the wider world via the internet)*”. He reports that he found himself “*shying away from others in public, and cutting myself off from acquaintances and extended family, as I was so embarrassed at what was being made public about me*”.
  24. The prosecution, in seeking to prove its case, showed the imported material on video in open court as to which the Plaintiff states that: “*I felt like I was being skinned alive as she played DVD after DVD, revealing my most private sexual interests to the world. These were very private and intimate details of my life that I never expected to have to share with anybody. It was complete and utter public shame and humiliation. It was beyond blushing. It was like I could feel blood oozing out of my skin*” (paragraph 9).
  25. The newspaper extracts exhibited to the Plaintiff’s Second Affidavit report how the prosecution advanced its case. The prosecution produced a total of eight witnesses, including a forensic psychologist and the Director of Children and Family Services. According to the newspaper account of the judgment of Magistrate Tokunbo (page 11 of exhibit DL1), “*the psychologist’s evidence was that the contents of the material were such that its effects on sexual deviants – child molesters, rapists and the sexually violent – was to trigger or reinforce deviant behavior*”. Whatever the purpose for advancing the expert evidence given that these were DVDs for the Plaintiff’s personal use, it was unsuccessful, as the learned Magistrate found that none of the prosecution’s evidence showed that the effect of the DVDs “*taken as a whole, is to outrage contemporary standards of decency or humanity accepted by the public at large in Bermuda*” (p. 11 Exhibit DL 1).
  26. The Plaintiff reports that due to his prosecution he was shunned at work, and states that he now suffers from anxiety particularly when meeting people for the first time (Paragraph 7) He states that he felt “*shame and humiliation*” when his picture was on the front page of the newspaper.
  27. The Plaintiff recounted feeling humiliated at work (paragraphs 12 and 13) and that he was transferred “*due to the problems I had with my colleagues there*” (paragraph 14). He reports that at the funerals of two of his family members his

*“thoughts turned to wondering who in the congregation was looking at me and thinking that I was the guy importing gay porn”.*

28. The Plaintiff states: *“the incident has affected my life in so many ways, as I find I am very anxious about meeting people now. If I see somebody I know in public and they turn away from me rather than greet me, it makes me think it is because they would be embarrassed to be seen speaking to me. I am also worried when I meet new people that they might google my name and find out about this”* (Paragraph 16). He paints a vivid picture of how vulnerable he feels: *“I feel that they may as well make a naked statue of me and put it next to the one of Johnny Barnes, as I feel totally exposed.”*

### **Constitutional Redress**

29. While the Plaintiff had represented himself in the previous actions and hearings (including the hearing before Mr Justice Hellman in this Constitutional Action), for the hearing on quantum he had secured the assistance of Mr Sanderson of Benedek Lewin. Mr Taylor of Attorney-General’s Chambers represented the views of the Defendant. I am grateful to both of them for their submissions and legal argument.

30. Section 15 of the Constitution provides:

#### ***Enforcement of fundamental rights***

*15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

*(2) The Supreme Court shall have original jurisdiction—*

*(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and*

*(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:*

*Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.*

31. There has not been any decided Bermuda case on how the Court is to approach the question of quantum for “redress” for infringements of constitutional rights under section 15 of the Constitution.
32. Counsel for the Plaintiff referred to the Privy Council case of *Maharaj v. A.G. of Trinidad and Tobago (No 2)* [1979] AC 385, where Lord Diplock, in delivering the majority judgment, considered the meaning of ‘redress’ in the Constitution of Trinidad and Tobago. Lord Diplock held:
- “What then was the nature of the “redress” to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which, in the Shorter Oxford English Dictionary, 3rd ed, 1944 is given as: “Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.”* (page 398 at F)
33. In that case the constitutional right which had been infringed was the complainant’s right not to be deprived of his liberty except by due process of law. Lord Diplock held *“the contravention was in the past; the only practicable form of redress was monetary compensation”* (page 398 at G). He continued: *“In their Lordships view an order for payment of compensation when a right protected under section 1 has ‘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”* (page 399 at A).
34. In this instance, the constitutional rights which ‘have been’ breached are the rights to a fair hearing protected under section 6 and the right to freedom of expression protected by section 9 of the Constitution. The only ‘redress’ now available to the Plaintiff for these infringements of his constitutional rights is monetary compensation. Furthermore, there are no other available means of redress for the Plaintiff other than under section 15 of the Constitution.
35. Counsel for the Plaintiff referred the Court to the Privy Council case of *Merson v. Cartwright* [2006] 3 LRC 264, a case on damages for breach of constitutional rights from the Court of Appeal for the Bahamas. The issue before the Court concerned the question of whether or not in awarding \$100,000 for the infringement of Ms Merson’s constitutional rights there had been duplication of the damages awarded for the nominate torts of assault and battery, false imprisonment and malicious prosecution. The trial judge awarded the appellant \$90,000 in damages for assault, battery and false imprisonment, \$90,000 damages for malicious prosecution and \$100,000 for the contraventions of the appellant’s constitutional rights.



36. Lord Scott delivered the judgment of the court and in doing so referred to the function of constitutional damages or redress as had been recently considered by the Privy Council in *A-G v. Ramanoop* [2005] UKPC 15. The Privy Council in *Ramanoop* set out certain principles applicable to cases concerned with constitutional redress in a case on appeal from Trinidad.

37. Lord Nicholls in *Ramanoop* held:

*“[18] When exercising this constitutional jurisdiction the Court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the Court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide, because the award of compensation under s. 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.*

*[19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award.*

*“Redress” in s. 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much of the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.*

*[20] For these reasons their Lordships are unable to accept the Attorney General’s basic submission that a monetary award under s. 14 is confined to an award of compensatory damages in the traditional sense”.*  
*(Emphasis added)*

38. Lord Scott in *Merson*, in adopting the above principles, held:

*“These principles apply, in their Lordship’s opinion, to claims for constitutional redress under the comparable provisions of the Bahamian Constitution. If the case is one for an award of damages by way of constitutional redress (and their Lordships would repeat that*

*‘constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course’)... the nature of the damages awarded may be compensatory but should always be vindicatory, and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount....The purpose of a vindicatory award is not a punitive purpose. It is not to teach the Executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified Executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary” (at p. 273 paragraph 18.) (Emphasis added)*

39. Notably, in *Merson*, the Court held that on the extreme facts of the case an award of \$100,000 by way of vindicatory damages (compensatory damages having been already awarded under the other causes of action) “*as high but within the bracket of discretion available to the judge*”.
40. Section 15 of the Constitution provides for redress in similar language to the Constitutions of Trinidad and the Bahamas. Accordingly, the following principles distilled from the leading cases of *Ramanoop* and *Merson* should be applied by trial judges considering the quantum of any redress for infringements of constitutional rights under section 15 of the Bermuda Constitution:
- a. Persons carrying on their life in Bermuda should be free from unjustified interference, mistreatment or oppression from the state;
  - b. If a person has suffered damage from such unjustified interference, mistreatment or oppression, that person is entitled to compensation;
  - c. The equivalent common law level of damages is a useful guide for the compensatory element;
  - d. In addition to compensation for any damages suffered, the purpose of redress is to vindicate or uphold the constitutional rights which have been infringed;
  - e. The purpose of vindication is to vindicate the constitutional rights which have been infringed not to punish the state or Executive;

- f. The vindictory element of redress may be an additional award of damages, may be a declaration, or may be both, depending on the circumstances of the case;
- g. The sum will be at the discretion of the trial judge.

### **Discussion: Quantum of Constitutional Redress**

- 41. Counsel for the parties diverge in terms of the quantum which should be awarded for the infringements of the Plaintiff's constitutional rights in this case.
- 42. Counsel for the Plaintiff provided the court with common law authorities on what they argue are comparable quantum cases at common law of intrusion on privacy, distress, hurt feelings, loss of dignity, and misuse of private information in seeking to assist the court so far as determining the appropriate quantum both for compensatory and vindictory redress.
- 43. Counsel for the Plaintiff relied on the following facts to support a substantial award of both compensatory and vindictory damages (see Plaintiff's Second Affidavit and paragraph 3.1 of the Plaintiff's skeleton argument):
  - a. The prosecution was founded on the basis that the pornography in question was homosexual pornography;
  - b. The prosecution case included:
    - i. Assertions that homosexual pornography would incite child sex offenders;
    - ii. Showing the subject DVDs in open court;
    - iii. Causing embarrassment and loss of dignity to the Plaintiff by exposing intimate and private sexual preferences of the Plaintiff;
    - iv. The extensive publicity and loss of privacy given the nature of the prosecution (inter alia the first known prosecution under the 1973 Act);
  - c. The Plaintiff in his affidavit, on which he was not cross examined, gave compelling evidence of his emotional distress and suffering caused by:
    - i. The refusal by HM Customs to provide him with his package of DVDs having determined that the DVDs sent by post and fed ex were "obscene";
    - ii. Being faced with the choice of being prosecuted or give up his right to his DVDs;
    - iii. The entirety of the court proceedings including the trial, the airing of the videos in open court, the reporting on the trial;

- iv. The Plaintiff having to canvass public opinion given the community standards test connected to the alleged offences;
- v. The ridicule and commentary he receives from members of the public in light of his prosecution;
- vi. His constant anxiety in connection with meeting people, interacting with colleagues in the work place, or attending family events;
- vii. The newspaper reports and google searches and issues with improper translations of the court proceedings.

44. Counsel for the Plaintiff relied on *Mosley v. News Group Newspapers Ltd* [2008] EWHC 1777, a case which was concerned with misuse of private information. In that case the claimant was the President of a Formula 1 governing body and the defendant was the publisher of the News of the World. In 2008, the newspaper printed an article concerning, and published on its website a secret recording of, the claimant engaged in a BDSM sex party. The claimant sued for breach of confidence and unauthorized disclosure.
45. Counsel for the Plaintiff assert that the case is useful for the purposes of considering quantum of redress because the tort of intrusion on privacy in English law is predicated on “*the right to respect for his private and family life, his home and his correspondence*” as protected by Article 8 of the European Convention on Human Rights. Counsel argues that Article 8 is analogous to section 9 of the Bermuda Constitution which protects an individual’s freedom of expression including “*freedom from interference with his correspondence.*”
46. I agree. The comprehensive analysis by Mr Justice Eady in *Mosley* on the nature of compensatory damages in privacy cases is both cogent and relevant to the question of quantum of redress for infringement of the Plaintiff’s constitutional rights in this case. He held:

[214] “...*the purpose of damages, therefore, must be to address the specific public policy factors in play where there has been “an old-fashioned breach of confidence” and/or an unauthorized revelation of personal information. It would seem that the law is concerned to protect such matters as personal dignity, autonomy, and integrity.*

[215] *It has to be recognized, of course, that at first sight these notions appear somewhat incongruous when introduced in the present context. But, as I have already said in the context of liability, one must beware of being distracted by considerations which relate purely to taste or moral disapproval. One should be careful not to dismiss matters going to personal dignity because a particular sexual activity or inclination itself may seem undignified. After all, sexual activity is rarely dignified. That is far from saying however, that intrusions into a person’s sexual tastes and privacy cannot infringe the right to dignity protected by Article 8. ...*

[216] Thus it is reasonable to suppose that damages for infringement may include distress, hurt feelings and loss of dignity. The scale of distress and indignity in this case is difficult to comprehend. It is probably unprecedented. Apart from distress, there is another factor which probably has to be taken into account of a less tangible nature. It is accepted in recent jurisprudence that a legitimate consideration is that of vindication to mark the infringement of a right: see e.g. *Ashley v Chief Constable of Sussex*... Again, it should be stressed that this is different from vindication of reputation (long recognized as a proper factor in the award of libel damages). It is simply to mark the fact that either the state or a relevant individual has taken away or undermined the right of another – in this case taken away a person’s dignity and struck at the core of his personality. It is a relevant factor, but the underlying policy is to ensure that an infringed right is met with an “adequate remedy”. If other factors mean that significant damages are to be awarded in any event, the element of vindication does not need to be reflected in an even higher award...

[217] If the objective is to provide an adequate remedy for the infringement of a right it would not be served effectively if the court were merely to award nominal damages out of distaste for what the newspaper had revealed. As I have said, that should not be the court’s concern. It would demonstrate that the judge had been distracted from the main task. The danger would be that the more unconventional the taste, and the greater the embarrassment caused by the revelation, the less effective would be the vindication. The easier it would be for the media to hound minorities.

[218] These are the elements which need to be recognized in an award of damages in this field, but, of course, they must be proportionate and not open to criticism of arbitrariness.”

47. Mr Justice Eady comprehensively reviewed the authorities on general damages in personal injury claims, actions for defamation and libel as well as privacy cases. He considered the heads of damage that are reflected in libel awards such as aggravation and vindication which have no direct point of comparison in personal injury cases. He found that it may be appropriate to take into account “any aggravating conduct in privacy cases on the part of the defendant which increases the hurt to the claimant’s feelings or ‘rubs salt in the wound’” (at paragraph 222). He cited with approval Lord Reid’s dicta in the context of defamation in *Cassell v. Broome* at 1085:

“It has long been recognized that in determining what sum within that bracket should be awarded, a jury, or other tribunal, is entitled to have regard to the conduct of the defendant. He may have behaved in a high-handed, malicious, insulting or oppressive manner in committing the tort or he or his counsel may at the trial have aggravated the injury by what

*they there said. That would justify going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation.”*

48. Mr Justice Eady, in concluding his analysis of the authorities, accepted that an infringement of privacy cannot ever be effectively compensated by a monetary award. The right approach, as he put it, and with which I agree and adopt, is:

*“... to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of solatium to the injured party. That is all that can be done in circumstances where the traditional object of restitution is not available. At the same time, the figure selected should not be such that it could be interpreted as minimizing the scale of the wrong done or the damage it has caused.” [231]*

49. Counsel for the Plaintiff assert that in *Mosley*, the award of £60,000 was awarded for breach of privacy which the Plaintiff asserts that using the usual practice of accounting for inflation after doubling the award amounts to approximately BD\$152,000. (Counsel for the Respondent did not take issue with the formula for conversion used by counsel for the Plaintiff)

50. *Cooper v. Turrell* [2011] EWHC 3269, was a claim arising out of misuse of private information and/or breach of confidence. The claims included damages for libel as well as a claim for breach of confidence. The breach of confidence claim concerned disclosure of private information relating to his health. The disclosure was more egregious due to the fact that the information was also subject to legal professional privilege. In that case £50,000 pounds was awarded for damages for libel and additional £30,000 for misuse of private information. As the damages for libel included damages for distress, the judge avoided double counting and noted that if he had been awarding damages for misuse of private information alone, £40,000 pounds would have been awarded for that.

51. In contrast, counsel for the Defendant argues as his primary position that there should be no damages, and as a secondary position, that any damages awarded should be nominal. Counsel for the Defendant did not dispute the evidence of general damage suffered by the Plaintiff.

52. Counsel for the Defendant contend that as there was no malice and the Plaintiff had a fair trial in which his rights were protected and he was acquitted and no public outrage has been shown that any damages and costs “*ought only to be minimal*” (Paragraph 17 Defendant’s skeleton argument).

53. Counsel referred to *Durity v. Attorney-General* [2009] 4 LRC 376, a Privy Council case on appeal from Trinidad and Tobago on damages for breach of fundamental rights under the Constitution. Counsel rely on the headnote to that

case, which summarises paragraphs 18 and 19 from the leading Privy Council case of *Ramanoop* (cited in full at paragraph 37 above). Counsel rely on *Durity* and *Ramanoop* to contend that the proper interpretation of *Ramanoop* is that without ‘public outrage’ damages should only be minimal.

54. I disagree with counsel’s contention. The starting position when considering redress under section 15 of the Constitution is the compensatory element – and the common law on damages in analogous cases provides a useful guide. If the Plaintiff has suffered damage as a result of unjustified interference with his constitutional rights he is entitled to be compensated. Furthermore, as *Ramanoop* makes plain, an award of compensation goes some way to vindicating the infringed right – but may not go far enough. As the Court held in *Ramanoop*: “*the fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award.*” The factors cited as giving rise to the vindicatory element are disjunctive, the presence of any one of these can give rise to a vindicatory award. In this case, for example, it is relevant that not just one, but two significant constitutional rights were infringed. Indeed, the Plaintiff was threatened with prosecution if he continued to insist on his right to receive his DVDs.
55. So far as the suggestion by counsel that quantum of any redress should be nominal because the Plaintiff did have a ‘fair trial’, this is incorrect as a matter of fact in light of Mr Justice Hellman’s finding and Declaration that the Plaintiff’s constitutional right to a fair hearing was infringed.
56. Counsel for the Defendant also urge that the Court “*should not set a precedent by awarding damages to punish the prosecution for doing its job where no malice has been shown, it would be opening the flood gates for claims where a person is acquitted of a charge*”.
57. This argument too is misconceived. The claim for redress for infringement of the Plaintiff’s constitutional right to a fair trial is based on what has been done in the exercise of the prosecutorial power of the state itself. No malice need be established. Constitutional redress is not for the purpose of punishing the prosecution, but rather to recognize and uphold the importance of the right or rights infringed and to compensate for any harm caused by infringement. The actions of the Plaintiff in importing the DVDs did not amount to a criminal offence. Per Justice Hellman, it was not reasonably foreseeable to the Plaintiff that the purchase and importation of the DVDs would be a criminal offence, and prosecuting him therefore infringed his constitutional rights. A decision by the

state to prosecute an individual for an act which is not reasonably foreseeable to be a criminal offence at all, must be exceptionally rare. I do not accept that awarding redress to the Plaintiff will have any bearing on future criminal prosecutions, or open the floodgates, when a person is acquitted of a charge, which would have been, if proven, a criminal offence.

58. Additional arguments were made that there should be no compensation for any distress due to the attendant publicity and matters said or addressed in open court because the Plaintiff should pursue the third parties who reported on the case and/or the Court did not order the proceedings to be held in camera. It was also argued that no redress or damages should be paid to the Plaintiff because the Judgment of Mr Justice Hellmann at paragraph 61 gave guidance as to how the law could be updated, and this came about by the law being tested which is of benefit and therefore, it contended, any damages should be nominal.
59. I do not find these arguments persuasive. The Plaintiff has no recourse against the Court, or any third parties such as the press who were simply reporting accurately on proceedings in open court. In fact, the Plaintiff's only available avenue for redress is in the Constitutional Action.

### **Decision on Redress**

60. I accept the evidence of the Plaintiff that he has suffered severe emotional distress, humiliation, embarrassment, loss of personal dignity and hurt feelings as a result of the infringements of his constitutional rights. I find that his suffering was severe for an extended period of time particularly in the lead up to and during the trial. I accept that he suffers from anxiety and embarrassment to this day, and the airing in public of matters he intended to remain private can never be undone.
61. I further find that it is an aggravating factor that counsel for the prosecution, at the trial, advanced its case based on allegations that the content of the DVDs would incite sexual deviants and child molesters. I accept that these arguments were advanced without malice. This is not the test. Paraphrasing the words of Lord Reid in *Cassell v. Broome* (see paragraph 47 above) counsel have aggravated the injury by what they argued in Court. These actions certainly increased the hurt feelings, embarrassment and injury suffered by the Plaintiff. This justifies going to the top of the bracket of damages that could be fairly regarded as compensation.
62. I further find that the breach of section 9 and the Plaintiff's freedom of expression and right to freedom from interference in his correspondence was compounded by the further infringement of section 6, and his right to a fair trial. These are



significant constitutional rights and it is appropriate to recognize and uphold the importance of these rights with a vindictory award.

63. In the end, constitutional redress can only go so far – and the Court is mindful that no sum will truly compensate the Plaintiff for the distress, humiliation, embarrassment, loss of personal dignity and hurt feelings he has suffered and continues to suffer as a result of the infringements of his constitutional rights. In considering the circumstances of the case and the comparable common law measure of damages in privacy cases, I award to the Plaintiff \$125,000 in redress. \$100,000 is a compensatory award and \$25,000 is an additional award to vindicate the importance of the constitutional rights which were breached.
64. Unless either party seeks within 7 days to be heard on costs, costs on a standard basis is granted to the Plaintiff to be taxed if not agreed

Dated 21 August 2019

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KIERNAN BELL  
ASSISTANT JUSTICE