

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 01096

BETWEEN	GREG MARTIN	CLAIMANT
AND	DET. SGT. HALLIMAN	FIRST DEFENDANT
AND	THE ATTORNEY GENERAL OF	SECOND DEFENDANT
	JAMAICA	

IN OPEN COURT

Sean Kinghorn and Dale Staple instructed by Kinghorn and Kinghorn for the claimant

Marlene Chisholm and Garcia Kelly instructed by the Director of State Proceedings for both defendants

**FALSE IMPRISONMENT – MALICIOUS PROSECUTION – ASSAULT AND BATTERY
- VINDICATORY DAMAGES – EXEMPLARY DAMAGES – AGGRAVATED
DAMAGES**

June 2, 3, 9 and September 19, 2011

SYKES J

[1] On November 3, 2002, at the Norman Manley International Airport, Mr. Greg Martin, a thirty three year old barber, who was bound for Heathrow, London, was removed from a line of passengers, by Detective Inspector Ethel Halliman-Watson, who was a Sergeant at the material time. He was on his way to visit his father in the United Kingdom. The Detective Inspector asked him to give a urine sample which, when tested, is said to have returned a positive test for cocaine. Thereafter, Mr. Martin was taken to the Kingston Public Hospital ('KPH') where he was handcuffed to a bed and given daily doses of laxatives from November 4 to November 12, 2002. Eventually, on November 18, 2002 he was charged with the offence of possession of cocaine, dealing in cocaine, attempting to export cocaine and conspiracy to export cocaine from Jamaica, despite the fact that no cocaine was ever recovered. On April 15, 2004 verdicts of acquittal were entered on the first three charges. More accurately, the prosecution case collapsed well before it got to the end. A 'no order' was made in respect of the conspiracy charge on June 3, 2004. Mr. Martin has now brought a claim asking for damages for false imprisonment, malicious prosecution and assault and battery. He is also seeking aggravated, exemplary and vindictory damages.

The EMIT Machine

[2] This urine sample given by Mr. Martin was analysed by the police officer with the aid of an EMIT machine. EMIT is the acronym for Electro Magnetic Imaging Technology. According to the defendants, once there is a positive reading, then it

is a basis for saying that the person from whom the sample was taken has ingested cocaine. This was the case theory of the defendants at the end of their examination in chief. However, under cross examination the theory underwent modification. It turned out that a positive test meant either that Mr. Martin was cocaine user or he was carrying cocaine in his body at the time the test was done. It was in these circumstances that Mr. Martin came under suspicion for using his body to transport cocaine from Jamaica to the United Kingdom.

[3] The evidence from the Detective Inspector is that she and other police officers were trained in the use and care of the EMIT machine. It was specifically designed to detect cocaine. The machine operates in this way. The machine has to be calibrated at least once every twenty four hours. If this is not done then if an analysis is sought from it, the machine indicates that the result is invalid. The officer indicated that each night, at the end of the day's operation, the machine is switched off. On the following morning, the machine is turned on and at the same time the two reagents used to test urine samples are taken from the refrigerator. The machine and the reagents are allowed to stand for half an hour at room temperature. At the end of half an hour, the reagents are poured into their respective containers and placed into the machine. When this is done, a button marked 'calibration button' is pressed. This activates the internal mechanism of the machine which begins the process of calibration. A bit of paper is produced by the machine. On this paper are three significant markers. These are negative, cut off and positive. These markers have numerical values. This is the significance of the markers: any urine analysis that produces a value between

the lowest negative value and cut off marker is regarded as a negative reading which indicates that the suspect did not ingest cocaine. If the reading is between the cut off value and the highest positive value, then that is interpreted that the person may have ingested cocaine.

[4] In answer to the court, the officer indicated that the actual numerical values are not constant from day to day. For example, if on June 1 the lowest negative value was 100, when the machine is calibrated on June 2, the lowest negative value may be 120. The cut off marker would be higher on June 2 than it was on June 1. The whole range would shift upwards. What this meant, according to the officer, was that there would be an increase in the numerical value of the cut off marker and the highest value would be higher on June 2 than it was on June 1. The officer said that, in her experience, the movement in values was always upward and never downwards. In practical terms, this meant, based on the express testimony of Detective Inspector, that on June 1 there may be a positive reading but on June 2, urine with the identical chemical composition may be shown to be negative because what was once in the positive range on June 1 would now be in the negative range on June 2 as a result of the upward shift in values of the bands. If this testimony is correct, then obviously, any positive reading is an indicator of the possible presence of cocaine in the stomach of the suspect but it is not a very strong indicator.

At KPH and the medical evidence

[5] Mr. Martin was taken to the Kingston Public Hospital ('KPH') where he was x-rayed by the medical staff there. The defendants say that opaque objects were seen in the x-ray of Mr. Martin's stomach. There is no evidence that the x-ray enabled anyone to distinguish between cocaine packets and a recently consumed meal. All this was taking place either just before midnight on November 3 or the early hours of November 4, 2002. Mr. Martin was eventually assigned a bed on Ward 2A. He was handcuffed at the airport and other than when he was being attended to by the medical staff at KPH, Mr. Martin was in handcuffs. At KPH, he was handcuffed to the bed to which he was assigned. Mr. Martin was under police guard from his arrival at KPH until his discharge on November 12.

[6] Dr. Basil Babolal, a medical doctor, attached to the KPH testified on behalf of the defendants. He said that he viewed the docket of Mr. Martin. He also reviewed Mr. Martin's charts including the x-ray film, treatment charts and nurses notes. The doctor testified that the first dose of magnesium sulphate, a laxative, was given to Mr. Martin on November 4, 2002 at 1:00 pm and then again at 10:00 pm.

[7] Dr. Babolal attended upon Mr. Martin on November 5. According to the doctor there was no report of any bowel movement on the part of Mr. Martin despite the administration of three dosages of magnesium sulphate, on November 5, at 6:00 am, 2:00 pm and 10:00 pm. Apparently, the magnesium sulphate was unable to

accomplish the desired result. Dr. Babolal ordered that liquid paraffin be given three times daily.

[8] Before going on, it is important to note that up to November 5 the doctor reports that there was no report of bowel movement. The court understood that he meant no report from Mr. Martin or indeed the medical staff. By contrast, if the Detective Inspector is correct, then there was, at the very least, evidence of bowel movement having regard to her evidence on what she saw when she arrived at the hospital on the afternoon of November 4. There is no evidence that the Detective Inspector spoke to the medical staff about her observations or even enquired of them whether Mr. Martin had had a bowel movement. In addition, the Detective Inspector stated that she did not send any of the clothes or bed clothes which she said contained evidence of bowel movement to the Forensic Laboratory for examination to see if traces of cocaine were present.

[9] On November 7, the x-ray was repeated. Dr. Babolal reports that Mr. Martin indicated that he did not have any bowel movement. This, apparently, caused the doctor to do a rectal examination of Mr. Martin. This examination revealed a hard non-compressible mobile mass. Dr. Babolal did not remove it. In cross examination, the doctor indicated that he could move his finger around the mass but decided against removal because it might be traumatic to the patient. More laxative was recommended. Mr. Martin was given paraffin three times on November 7. Significantly, the result of the November 7 x-ray was not stated in evidence.

[10] The cocaine hunt continued on November 8, 9, 10 and 11. On November 8, Mr. Martin was treated twice with magnesium sulphate and paraffin. November 9 saw two more administrations of magnesium sulphate. November 10 saw one dose of magnesium sulphate. According to the doctor, there were no reports of bowel movement on the part of Mr. Martin. On November 11, the x-ray was repeated. He was finally discharged on November 12 – thirteen administrations of laxative later – into the custody of the police. Again, there was no evidence of the result of the November 11 x-ray.

[11] The doctor testified that in the normal course of events one would expect a bowel movement within four hours of the administration of a laxative. He also said that he would expect that any person administered laxatives would expel any substance from their body, by the latest, three days after the laxative was administered.

[12] On being discharged on November 12, Mr. Martin was taken by the Detective Inspector to a police station on the basis that checks were being made to see if his passport was genuine. The passport turned out to be genuine. He was kept in custody until November 18 when charges under the Dangerous Drugs Act were laid against him.

Reasonable suspicion

[13] The police officer indicated that Mr. Martin's urine sample returned a positive reading. This, if true, it will be recalled meant that Mr. Martin was a suspected carrier of cocaine. In the language of the police, Mr. Martin was a

suspected body packer. Clearly, based on this, the police would be entitled to conduct further investigation. This was done. Mr. Martin was taken to the KPH.

[14] The medical evidence concerning Mr. Martin's stay at KPH has already been reviewed. However, there is an important aspect of the case that has to be examined further for the purpose of indicating what further conclusions, if any, may be drawn from the evidence. Based on the doctor's evidence that by three days, after the administration of a laxative, any foreign matter in the stomach ought to be expelled then the expectation was that any foreign object in Mr. Martin's stomach ought to have been expelled by November 7. There is no medical evidence to suggest that Mr. Martin was unusual or so different from other patients that the laxatives administered could not induce expulsion of any foreign object. Also, there is no evidence that the x-rays done on November 7 and 11 revealed any abnormalities or any opaque objects.

[15] Miss Marlene Chisholm submitted that the police officer was justified in maintaining her suspicion from the night of November 3, after the positive reading from the EMIT machine throughout the entire period until Mr. Martin was discharged from the hospital on November 12. It was further submitted that once Mr. Martin went to the hospital then the medical staff were the ones to indicate when it would be appropriate to discharge Mr. Martin. The Detective Inspector could not have intervened in the medical process and had to await the decision of the hospital in that regard. Therefore, the police officer is not liable for any false imprisonment. The court does not accept this submission in total. It has to be qualified.

[16] The case of ***LittleJohn v South Wales Police*** [2008] EWHC 301 (Admin) is helpful. Mr. LittleJohn was taken by the police to a hospital where he was admitted. The basis for this was that it was suspected that Mr. LittleJohn had ingested drugs. He was taken to the hospital in order for the drugs, if any, to be retrieved. The medical evidence indicated that after three days of laxatives, any ingested drug should be expelled from his body. After fifteen days there was no bowel movement. The hospital to which he was taken initially and another hospital where he overnighted after being discharged from the first hospital indicated that his continued stay in the hospital could not be justified on medical grounds and so neither institution would keep him. The police declined to release him and he thereafter sought a writ of habeas corpus to be issued so that the lawfulness of his detention could be enquired into. The court ordered his release. What is important about the case, despite the fact that statutory provisions which were discussed have no counterpart in Jamaica, is its approach to the relationship between seeking to recover drugs with the assistance of medical professionals and the liberty of the subject.

[17] The court noted that where the police receive a report that a person had ingested drugs, then the police have two legitimate interests. One is seeing to the health of the person because of the serious health risk to the person. The other is the deterrence of drug trafficking which can be furthered by recovering the drugs and prosecuting the person for any criminal offence that arises from the ingestion of the drugs. This court accepts these principles and will apply them to this case.

[18] The court also observed that the police are entitled to act on medical advice and if that advice is that a person who ingested drugs should be referred to a hospital then the police could do so. However, the court did say that where the medical evidence does not justify continued detention then the person cannot be held. As Walker J, the third member of the court, stated, "It has long been a principle of the common law that any detention of the individual must be lawful" (see para. 34).

[19] The reasoning of the case is helpful because it emphasises that those who detain must make the case for the lawfulness of the detention. In the case before the court, Mr. Martin did not request any medical treatment. He did not complain of any ill feeling. When he was taken to KPH it could only be on the basis that the police officer was concerned about the risk to his health and recovery the drugs, if any, for evidential purposes.

[20] It is said that Mr. Martin signed a consent form which has not been produced before the court. Since Mr. Martin had neither complained of ill health nor voluntarily sought medical treatment from the KPH medical staff, the consent - if given voluntarily and was fully informed - could only be in respect of such medical procedures as were necessary to retrieve the drug. The medical evidence is clear: after seventy two hours, unless there is a contrary indication, there would be no medical reason for Mr. Martin to be detained whether at KPH or elsewhere on the ground that he was a suspected cocaine trafficker. This means that the two legitimate grounds on which the Detective Inspector could have held Mr. Martin were exhausted. There was no risk to his health and there

was no evidence that he was a body packer acting in breach of the criminal law. This being so, Mr. Martin ought to have been released from the hospital. No further laxatives ought to have been administered in the absence of clear medical reasons for doing so.

[21] In this entire episode, the hospital was enlisted in the search for drugs. While the court accepts that the police and the medical staff would have a legitimate interest in preventing Mr. Martin from becoming ill from his alleged drug ingestion, that interest cannot confer on either of them the right to detain a person in hospital beyond what was medically necessary. Mr. Martin's continued detention beyond the three days was not justified. There was no medical basis for it. Mr. Martin was not complaining of any malady that required hospitalization. From all the evidence, it is clear to the court that Mr. Martin was at the hospital at the direction of the police and kept there because the police officer had asked the staff to remove the drugs. There was no evidence that Mr. Martin was free to leave the hospital and go about his business.

[22] It is the view of the court that the KPH staff would have had two roles. They would be concerned about the health of Mr. Martin having regard to the report they undoubtedly received from the police and so to that extent would be justified in treating Mr. Martin provided he consented. The second role would be that of assisting the police in their investigations. There is no reason why the actions of the medical staff, certainly, after November 7 should not be attributed to the police officer. She made them her agents in her quest to find this cocaine. The medical staff had no reason to detain Mr. Martin beyond November 7 and

any detention must necessarily have been at the behest of the police who would have told the staff that Mr. Martin was suspected of cocaine trafficking the evidence of which was in his body. After November 7, KPH became the 'holding cell' for the police. The initial three days of laxatives, in the view of this court, would not precipitate tortious liability because the state would have had a legitimate interest in preserving the health of Mr. Martin, since there was indeed prima facie evidence that he might have ingested cocaine. The issue of whether a person can be forced to undergo medical treatment without an order of the Supreme Court was not canvassed.

[23] The court concludes that the administration of laxatives after three days would constitute an assault and battery. The court wishes to observe that the in cases like this the medical staff need to have clear protocols so that when there is no longer any medical reason to keep the person at the hospital, then the police need to be informed and they must remove the person from the hospital ward. This is what happened in *LittleJohn*. The hospital staff in that case made it very clear to the police that they would not be party to an unlawful detention once the medical grounds for detention were exhausted.

[24] Miss Chisholm places great emphasis on the consent form which was said to have been signed by Mr. Martin. The court will deal with this aspect of the matter in more detail. The evidence also is that Mr. Martin was not told by the police officer that he had the right to get legal advice prior to signing this consent form, assuming of course he did sign the form. Assuming Mr. Martin signed the consent form, can it be said that that consent was free and voluntary and given

with full knowledge of its implications? Did he know, for example, that within four hours and at a maximum of seventy two hours after administration of a laxative that there would no legitimate medical basis to continue the laxatives? Did he know that he had the right to refuse any laxatives unless there was a court order to that effect? The court wishes to note that this consent form has not been presented to the court so that its actual contents were not disclosed. The court cannot assume that the form permitted the hospital to do what it did. This was a document in the possession of the hospital and there is no evidence that Mr. Martin was furnished with a copy.

[25] I will deal further with the absence of legal advice before Mr. Martin was said to have signed the consent form. Mr. Martin was taken to KPH on suspicion of being a drug trafficker. The preamble to the Judges' Rules 1964, which have been adopted and applied in Jamaica, expressly states that the Rules do not affect the following principle:

*That every person at **any stage** of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so.(emphasis added)*

[26] There is no question that Mr. Martin was taken to KPH as part of a police investigation into possible drug trafficking activities. The Judges' Rules mandate

that he should have been allowed to seek legal advice. There is no evidence that Mr. Martin was told that he may consult an attorney at law. There is no evidence that permitting Mr. Martin to consult an attorney would have caused unreasonable delay or hindered the investigation or affect adversely the administration of justice. The Detective Inspector indicated that as far as she was concerned it was not the practice to permit persons suspected of committing drug offences to have duty counsel assigned to them under the legal aid system. This court was not pointed to any provision that excluded the operation of the Judges' Rules to drug trafficking cases.

[27] In this case, between the removal of Mr. Martin from the airport and his alleged signing of the consent form, he was not provided with counsel or afforded the opportunity of seeking independent legal advice and neither was he told of his right to have access to counsel. This state of affairs severely undermines the value and worth of any consent that Mr. Martin may have given. The medical evidence presented to the court did not indicate that there was any threat to Mr. Martin's health that would have trumped the requirement to afford him the opportunity to seek legal advice if he wished. Different considerations may apply if there was evidence that based on the evidence, medical intervention was necessary as a life saving measure or as a prophylactic against serious injury to the body. The court concludes that in all the circumstances of this case, if Mr. Martin signed an appropriately worded consent form, that consent was not fully informed and therefore any consent given is not of much value. To be taken to a hospital by the police for the express purpose of recovering drugs allegedly in

one's body, without the opportunity to consult a lawyer, without a full explanation of one's rights, this court without clear and irrefragable evidence that there was fully informed consent, that is to say a full and clear explanation of all that was involved including the possibility of administration of drugs to one's body, cannot conclude that there was free, voluntary and informed consent to the medical procedures. This was a criminal investigation and so the defendants needed to establish that the rights of Mr. Martin were fully respected and explained.

Amendment of particulars of claim and vindictory damages.

[28] During the trial, the claimant applied to amend his particulars of claim in order to attempt to secure an award of what are known as vindictory damages. The application was opposed by Miss Chisholm on two bases. First, she said that this claim was statute barred and could not now be added. Second, the amendment involved a claim for breach of constitutional rights and therefore the special provisions for seeking constitutional redress should be invoked.

[29] The court disagrees with Miss Chisholm. In respect of her first objection, the court agrees with Mr. Kinghorn when he said that there is a distinction between claiming an additional remedy which arises on the statement of case and making a new claim. He submitted that he was not making a new claim but simply asking for additional relief based on allegations made during the limitation period for the common law actions of assault and battery, false imprisonment and malicious prosecution.

[30] The cases of ***Judith Godmar v Ciboney Group Limited*** S.C.C.A. 144 of 2001 (delivered July 3, 2003) and ***Gloria Moo Young v Geoffrey Chong*** (2000) 59 WIR 369 decided under the Jamaican (Civil Procedure Code) Law, have established the distinction between giving more details about one's claim and making an entirely new claim after the limitation period. The court accepts that the application to amend, in the case before the court, is not raising new matters that were unknown to the defendant. What has happened here is that the claimant is seeking to take advantage of a relatively new head of damages called vindictory damages. It should be noted that the amendment in this case is not making new allegations; it is simply identifying the allegations on which the claim for additional relief is being sought.

[31] The point then is that once the pleadings set out the allegation of the claimant, the fact that a particular relief was not claimed at the outset is not necessarily a bar to seeking it later.

[32] In relation to the second objection, the court relies on the Privy Council's advice in ***Merson v Cartwright*** (2005) 67 WIR 17. Sawyer J made an award of vindictory damages in a common law action for assault, battery, false imprisonment and malicious prosecution as well as a breach of the claimant's constitutional rights. The Court of Appeal reversed her Ladyship on the basis that she was guilty of double counting and thus over compensated the claimant. The Board reversed the Court of Appeal and upheld the award. Interestingly, the Constitution of the Commonwealth of the Bahamas has a similar proviso to that of section 25 (1) of the Jamaican Constitution which, in substance, says that a

constitutional remedy ought not to be granted if adequate means of redress exist otherwise. The Board referred to one case in which vindictory damages had arisen where the claim was brought under the constitution without any reliance on the applicable common law torts (***Attorney-General v Siewchand Ramanoop*** (2005) 66 WIR 334). On reading the advice in ***Merson***, there is nothing in their Lordships advice that is capable of being interpreted to mean that a claim for damages for breach of the constitution cannot arise in common law tort claims for false imprisonment, assault, battery and malicious prosecution. The inevitable conclusion from ***Merson*** is that it is now possible to claim, in a common law action, (stating the principle very narrowly) for false imprisonment, assault, battery and malicious prosecution, damages for breach of constitutional rights. This position was taken by P.A. Williams J in the case of ***Nicole-Ann Fullerton v The Attorney General Claim No. 2010HCV1556*** (delivered March 25, 2011).

[33] Lord Scott, in ***Merson***, made it clear that vindictory damages were not to be awarded as a matter of course. Such claims should only be made if the circumstances of the case make it appropriate (see para. 18). The unstated corollary is that, if claimed, no such award should be made unless it is appropriate.

[34] What are vindictory damages and what is its purpose? From the case law, it is damages awarded for breaches of the person's constitutional rights and are awarded where the appropriate common law action does not provide a remedy for all that is alleged to have happened to the claimant. There may well

be cases where the offending conduct overlaps with the common law but has features which do not fit neatly into existing common law torts. It is not intended to be punitive (see **Merson** [18]). Therefore they are not awarded on the same basis as exemplary or aggravated damages. The purpose of these damages is to make it plain that a constitutional right has been infringed and an award of vindictory damages recognises the infringement and vindicates the claimant (see **Merson; Ramanoop; and Innis v Attorney General of St. Christopher and Nevis** (2008) 73 WIR 187). These three decisions of the Privy, on appeal from (a) the Commonwealth of the Bahamas; (b) The Republic of Trinidad and Tobago and (c) St. Christopher and Nevis, have placed it beyond question that such damages exist and can be awarded in common law actions. The final point that needs to be made here is that although the cases involve conduct by the state there is no reason to restrict such damages to unlawful state action because constitutional rights can be infringed by private citizens.

[35] Mr. Kinghorn submitted that \$3,000,000.00 should be awarded under this head. The court is not of the view that any award should be made under this head because the awards under other heads are sufficient to compensate Mr. Martin for his ordeal. According to the authorities, this award should only be made if events have occurred which do not fall comfortably within one of the established torts. The court agrees with Mr. Kinghorn that this approach indicated by the Board should not be interpreted in a mechanical way but nonetheless it must be remembered that constitutional remedies are not awarded as a matter of course.

Exemplary and aggravated damages

[36] Exemplary damages, in this jurisdiction, are restricted to wrongs done by employees or servants of the state. The conduct must be, to use the time honoured language 'oppressive, arbitrary or unconstitutional.' Its main purpose is to punish and not merely compensatory. It should only be awarded if the infringement has been established and the sum awarded for compensation is insufficient to mark the disapproval of the conduct of the infringer. The means of the parties while irrelevant in compensatory damages are quite relevant in aggravated damages.

[37] Aggravated damages are awarded on the basis of the manner in which the offender committed the tort, that is to say, 'the insolence or arrogance by which it is accompanied' (see Lord Devlin in ***Rookes v Barnard*** [1964] A.C. 1129, 1229). The insolence and arrogance of the tortfeasor are likely to result in the feelings of the victim being bruised with consequential injury to the claimant's feelings and dignity. Aggravated damages compensate for this state of affairs.

[38] In all the circumstance of the case, the court will not make any award under these heads. The court finds that Mr. Martin was exaggerating when he claimed that he was punched and beaten by the police before he was taken to KPH. The court noted that Dr. Babolal did not give any evidence indicating that Mr. Martin had ever complained of being beaten and receiving injuries from the

beating. If Mr. Martin was beaten as severely as he claimed, it would be surprising that the medical examination failed to show any evidence consistent with a severe beating.

False imprisonment

[39] On the issue of false imprisonment, the court accepts that the EMIT machine returned a positive result which indicated that Mr. Martin may have had cocaine in his stomach at the time the urine test was administered. This certainly justified detaining him for further investigations. Additionally, as stated above, there was the possible risk to Mr. Martin's health and this risk justified the KPH staff acting to remove the packages. However, based on the evidence of Dr. Babolal it is very difficult to justify Mr. Martin's detention after November 7, 2002. On the doctor's own evidence it is not readily apparent why additional course of laxatives were being administered after November 7 in light of the fact that three days had passed.

[40] Miss Chisholm sought to say that the Detective Inspector ought not to be held accountable for the continued detention because she left it to the best judgment of the medical staff at KPH to determine how long Mr. Martin should be detained. The court does not accept this view. First, the context of Mr. Martin's arrival and admission as a 'patient' was not normal. Mr. Martin did not turn up, voluntarily, as a person seeking medical assistance. He was taken there at the behest of the Detective Inspector who was seeking medical assistance to recover evidence which she thought was - quite literally - inside Mr. Martin. This meant

that the hospital staff were part and parcel of the investigative process. They were 'recruited' by the Detective Inspector to search for cocaine. The fact that the search required medical expertise does not make it any less a search being conducted by the police. In other words, the only reason why this aspect of the investigation was not done by the police officer was because she did not have medical expertise. Second, it is clear that Mr. Martin was not free to go about his business. The hospital staff did not have Mr. Martin there on his own volition. He was brought there as a suspect in the custody of the police. This was not the usual consensual doctor/patient relationship. Mr. Martin did not make any health complaint to the police or the hospital staff in the period when he was taken from the airport and the time he was admitted to the hospital. Third, Mr. Martin made no complaint that required the administration of laxatives. It was the specific report of the Detective Inspector to the hospital staff that led directly to the administration of laxatives to Mr. Martin. Fourth, on the evidence of the Detective Inspector, she did not keep in contact with the medical staff after she took Mr. Martin there on November 4. As far as the hospital staff were concerned, Mr. Martin was a prisoner in the custody of the police. This being so, it would have been quite odd if the hospital were to say to Mr. Martin that he was free to go anytime he wished. Had the Detective Inspector discussed the matter fully with the medical personnel, quite likely she would have been told that after three days any foreign matter in Mr. Martin's stomach would be expelled. Her omission to inform herself adequately resulted in Mr. Martin being in custody longer than was necessary and was without lawful justification. The court concludes that he was

falsely imprisoned from November 8 to November 18 when he was finally taken before the court. The three days required to expel the foreign body ran from November 4 to November 7. The reasonable grounds for suspecting that Mr. Martin possessed cocaine had been eroded. The objective evidence pointed away from criminal culpability. In coming to this conclusion, the court takes into account the x-ray allegedly done which was said to have shown that something was in Mr. Martin's stomach. Even if it is said that this provided further proof to bolster the Detective Inspector's initial view, it should have been clear to the Detective Inspector, had she spoken to the doctor, that unless Mr. Martin expelled cocaine by November 7, her case theory would be in crisis.

[41] In the preceding paragraph, the court has said that Mr. Martin was falsely imprisoned right up to November 18. The question that arises is how can this be, when the Detective Inspector has testified that Mr. Martin was being detained in order to check on the legitimacy of Mr. Martin's passport? The police offer said that the additional period detention was necessary because the inquiries concerning the passport were not completed during the detention in the hospital because the passport office had changed location and had difficulty finding the relevant record within the hospital detention time.

[42] This court has reservations about this explanation coming from the police officer. It is important to note that the Detective Inspector did not, in her witness statement, give the explanation now furnished. Her witness statement simply says, 'I also informed him that I was going to check out his passport to determine if it was authentic' (para. 20). This comes after paragraph 19 which stated that

Mr. Martin was discharged from the hospital on November 12. When paragraph 20 is read in its entirety, in the context of the whole statement, it seems that Mr. Martin was first told the reason for his further detention on November 12 and not before. In cross examination, the Detective Inspector said that she noticed, while at the airport on the night of November 3, that it appeared to her that the picture in the passport had been tampered with. This explanation was not foreshadowed in the pleading of the defendants or even in the defendants' pre-trial memorandum and definitely not in the witness statements produced by the defence. It is difficult to accept that such an explanation would not have been forthcoming earlier given that the very claim made against the defendants involved a very specific allegation of unlawful detention. In light of all this, this court, on a balance of probabilities, does not accept the explanation put forward by the Detective Inspector for the continued detention of Mr. Martin to November 18.

[43] A further reason for not accepting the explanation for the further detention is now given. Initially, the court thought and Miss Chisholm confirmed, that initial contact with Mr. Martin was a random selection. This impression was removed by the evidence of the police officer. She said that it was the suspicious conduct of Mr. Martin that drew her attention. She said that he was sweating in the air conditioned environment. She also said that as he was approaching the security check point, he was constant looking behind him and looked quite nervous. None of this is in her witness statement. Neither was it pleaded in the defence and neither does it appear in the pre-trial memorandum of the defence. Again, it could

hardly be that the police officer was not asked to explain the reasons for her detention. Given the fact that at the time of Mr. Martin's detention, the police officer was already a Sergeant of Police, the explanation for the omission to state these things in her witness statement could hardly be inexperience.

[44] It is now well established, in Jamaica, that a person can successfully establish a claim for false imprisonment even if his initial detention was lawful if it can be shown that he was held in custody for an unreasonable period of time after arrest without being placed before a court or a Justice of the Peace (***Peter Flemming v Det. Cpl. Myers and the Attorney General*** (1989) 26 J.L.R. 525). This court holds that Mr. Martin's detention was initially lawful after the positive test returned by the EMIT machine and continued to be lawful up to and including November 7. However, by November 8, his detention became unlawful and so he was falsely imprisoned. The unlawful detention continued to November 18 when he was placed before the Resident Magistrate's Court for the Corporate Area and was granted bail.

Malicious Prosecution

[45] ***Flemming's*** case has authoritatively interpreted section 33 of the Constabulary Force Act. To succeed in a claim for malicious prosecution, the claimant must prove that the prosecution was either malicious or without reasonable and probable cause. It is well established in Jamaica that a police officer, while not required to believe that person is guilty, must have an honest belief founded on reasonable grounds that the person charged or about to be

charged may be guilty of the offence charged or about to be charged (see **Flemming**). There must be the actual belief by the police officer and that belief must be reasonable. To speak only of the subjective part of the test, as Miss Chisholm has done, would have the effect of undermining a very important safeguard against abuse. The objective component is the real and effective protection against arbitrary arrests.

[46] Lord Denning's famous judgment in **Glinski v McIver** [1962] A.C. 726, 759 stated the correct approach:

Finally, even if the jury answer: "Yes, the defendant did honestly believe the accused was guilty," it does not solve the problem. Honest belief in guilt is no justification for a prosecution if there is nothing to found it on. His belief may be based on the most flimsy and inadequate grounds, which would not stand examination for a moment in a court of law. In that case he would have no reasonable and probable cause for the prosecution. He may think he has probable cause, but that is not sufficient. He must have probable cause in fact. In this branch of the law, at any rate, we may safely say with Lord Atkin that the words "if a man has reasonable cause" do not mean "if he thinks he has": see Liversidge v. Anderson.

These reasons are, I trust, sufficient to show that the question and answer as to "honest belief" should not be used in every case. It is better to go back to the question which the law itself propounds: Was there a want of reasonable and probable cause for the prosecution?
(emphasis added)

[47] This passage applies with full force to this case. Not even the most uninformed among us would think that the police had the makings of a case sufficient to place before the court. The undeniable facts before the charges were preferred against Mr. Martin were as follow:

- a. the EMIT machine, at best, provided an indication that Mr. Martin *might* have possessed cocaine and so further investigation was needed;
- b. the EMIT machine was not conclusive because a positive reading raised two possibilities: namely that Mr. Martin was either a user of cocaine or he had it in his possession at the time of the test;
- c. cocaine was never recovered from the body of Mr. Martin;
- d. the x-rays were inconclusive since an opaque substance does not mean that cocaine was present;
- e. no further forensic tests were done to determine whether Mr. Martin was a user or a possessor;
- f. there was no confession;

- g. there was no evidence that Mr. Martin conspired with anyone to export cocaine from Jamaica.

[48] This was the state of the investigation on November 18, 2002. It did not require careful analysis to know that this case was hopeless. This case was flimsy and any honest belief the police officer may have had did not exist in fact. This court finds that charges were laid without reasonable and probable cause. Indeed in light of the police officer's rank at the time, it is difficult to accept that such an experienced officer could have believed that there was sufficient evidence to place before a court. Miss Chisholm resisted this conclusion by submitting that the Court of Appeal's decision in ***The Attorney General v Glenville Murphy*** [2010] JMCA Civ 50 indicated that as long as the police officer had an honest belief in her actions then that was the end of the claim. She cited paragraphs thirteen and fourteen from the judgment of Harris JA. These are the passages cited:

The word 'reasonable', as used in section 13 of the [Constabulary Force Act] imposes a subjective as well as an objective element. It does not introduce an exclusive objective. The test for the purpose of section 13 is partly subjective and partly objective.

The issue as to the existence of an honest belief on the part of the police of the respondent's guilt, indubitably, must ground the foundation of the subjective belief. If it is found

that the police honestly believed that the respondent had molested his daughter then no liability could be ascribed to them. However, if it is established that they could not have had a genuine suspicion that he had done so, then the objective test comes into play. Consideration would then have to be given as to whether there were reasonable grounds for the police to have reasonably suspected that he had committed that offence.

[49] The ultimate logic of Miss Chisholm is to create an abuser's charter of rights. The court is sure that that is not her intention. Learned counsel seemed to suggest (and this is how the court understood the submission) that as long as the police officer makes the assertion that she honestly believed that Mr. Martin had ingested cocaine, then that is the end of the matter. The alleged belief must not be tested against the objective state of affairs which exist in any given case. The court must simply accept the police officer's assertion and since, according to Miss Chisholm's logic, there is no way to get into the mind of the police officer, the courts are stumped.

[50] Fortunately, Harris JA's dicta do not lead to this inevitable and dangerous position which would effectively undermine the liberty of the subject, one of the foundation norms of Anglo-Jamaican law. The courts have developed techniques by which an honest belief can be tested. The courts have held this: 'If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion

that the belief was not honestly held and should be rejected' (Lord Lane L.C.J. in **R v Gladstone Williams** (1984) 78 Cr. App. R. 276, 281 which was approved by the Judicial Committee of the Privy Council on appeal from Jamaica in **Solomon Beckford v R** [1988] A.C. 130). This position in **Williams** was predated by another famous case. It is the case of **Derry v Peek** (1889) 14 App Cas 337. Lord Herschell stated at page 369:

I think there is here some confusion between that which is evidence of fraud, and that which constitutes it. A consideration of the grounds of belief is no doubt an important aid in ascertaining whether the belief was really entertained. A man's mere assertion that he believed the statement he made to be true is not accepted as conclusive proof that he did so. There may be such an absence of reasonable grounds for his belief as, in spite of his assertion, to carry conviction to the mind that he had not really the belief which he alleges.

[51] This was said in the context of the tort of deceit. What his Lordship has just stated is not a legal principle but an analytical method by which an assertion by a person that he had an honest belief in something (in that case a statement made by the defendants) can be tested.

[52] At the risk of repetition, this court is saying that there must be a method or analytical device available to test whether a belief is honestly held. If there is no

method or analytical device and once an assertion of honest belief is made then it would be difficult if not impossible to reject it. From the cases of **William**, **Beckford** and **Peek**, this court is saying that the judicially accepted methodology where honest belief is raised amounts to this - the more unreasonable the basis for the honest belief the more likely it is the case that the belief was not honestly held.

[53] This position is indeed consistent with what Harris JA. has said. A careful reading of her Ladyship's reasons for judgment shows that it was not necessary for her to elaborate on the method of arriving at the conclusion that there was no honest belief. Her Ladyship was simply stating, without reference to the judicially accepted analytical method of so arriving, the consequences of a finding that the police did or did not have an honest belief in the guilt of the person arrested. Therefore, where the honest belief rests on the flimsiest of grounds or no ground at all, one should not be surprised if the court concludes that the belief was not honestly held. In this case, having regard to the total absence of any cocaine, an inconclusive report from a machine, many doses of laxatives and no confession, it is difficult to see how the Detective Inspector (then a Detective Sergeant) have honestly believed that Mr. Martin had committed the offences of possession of cocaine, dealing in cocaine, attempting to export cocaine from Jamaica and conspiring with others to export cocaine from Jamaica?

Assault and Battery

[54] Miss Chisholm suggested that the police officer would not be liable for the administration of laxatives after November 7. This has already been dealt with and need not be repeated. The court would simply add but for the setting in train of the series of unfortunate events by the Detective Inspector, Mr. Martin would not have been taken to the hospital, he would not have been admitted and he would not have had to endure at least fifteen doses of laxatives. Thus from a causation stand point, the doctors and nurses were doing what the Detective Inspector would have done herself had she the training and competence to do so. The actions of the medical staff are her acts and she had the intention to cause the infliction of unlawful physical contact with Mr. Martin. Miss Chisholm submitted that all the laxatives were administered with the consent of Mr. Martin. This has been addressed earlier and need not be repeated here.

[55] The court has already detailed the conduct of the medical staff and sought to establish the intimate and inseparable connection between the Detective Inspector's investigation and the medical staff's administration of laxatives. The court concludes that Mr. Martin's detention up to November 7 was lawful and from November 8, his detention was unlawful. From this it follows that the administration of the laxatives from November 8 was unlawful and constituted an assault and battery.

[56] Mr. Martin indicated that he was punched about the body by the Detective Inspector while he was in hospital. He also alleged that she inserted his finger in

his anus in such a violent manner that he bled. There is no medical evidence to support this allegation and it is not challenged that Dr. Babolal conducted two rectal examinations which ought to have revealed evidence consistent with Mr. Martin's assertions. The court does not accept that the police officer engaged in any unlawful rectal examination.

Assessment of damages

[57] The court now proceeds to assess damages under the various torts. In accordance with the modern trend the assessment will be done under each head.

(a) False imprisonment

[58] There is a growing body of cases that can be called the airport drug cases where persons are taken from the international airports on the basis that they were suspected of carrying drugs. The Supreme Court has delivered judgment in a number of them. There is ***Sharon Greenwood-Henry v The Attorney General of Jamaica*** CL G 116 of 1999 (delivered October 26, 2005). The claimant was awarded \$100,000.00 for false imprisonment. She was falsely imprisoned from 8:30 pm December 4, 1998 to midday December 5, 1998. There is ***Openiah Shaw v The Attorney General of Jamaica*** Claim No. HCV 05443 of 2005 (delivered March 13, 2008). The claimant was falsely imprisoned for less than 24 hours and was awarded \$80,000.00. In ***Desmond Prescott v The Attorney General*** Claim No. 2006 HCV 0008 (delivered April 18, 2008). Mr. Prescott was falsely imprisoned for 5 hours and was awarded \$100,000.00. Finally, there is the

case of **Nicole-Ann Fullerton**. The claimant was awarded \$800,000.00 after being falsely imprisoned for approximately 28 hours.

[59] In the instant case, Mr. Martin was falsely imprisoned from November 8 to November 18, 2002 when he was placed before the court and granted bail. This is 11 days. It would seem to this court that a sum of \$1,500,000.00 would be appropriate in this case.

(b) Malicious prosecution

[60] This was a case that was eroded by the objective fact that by November 7, no cocaine was expelled by Mr. Martin. There was no basis for any of the criminal charges. There was no evidence that he conspired with anyone to export cocaine from Jamaica. In **Keith Nelson v Sergeant Gayle and The Attorney General of Jamaica** Claim No. C.L. 1998/N – 120 (delivered April 20, 2007), Brooks J awarded the sum of \$400,000 (updated to June 2011 - \$647,746.88). The claimant in that case was tertiary educated person who had to endure the humiliation of a criminal prosecution for three months. The court found that at the time of trial he was still suffering from his ordeal.

[61] In the case before the court, Mr. Martin is not a tertiary level educated man but he was subjected to a hopeless prosecution for at least nineteen months. The court is of the view that an award of \$1,500,000.00 is appropriate in the circumstances of the case.

(c) Assault and battery

[62] The assault in this case was quite serious. The continued administration of laxatives without a legitimate medical or legal basis cannot be condoned. To be forced to stay in a hospital against your will, hand cuffed to a bed and fed a diet of laxatives must necessarily be a distressing experience. An award of \$1,000,000.00 is appropriate in this case.

Disposition

[63] Mr. Martin has established the torts of false imprisonment, malicious prosecution and assault and battery. The awards are

- a. false imprisonment - \$1,500,000.00;
- b. malicious prosecution - \$1,500,000.00;
- c. assault and battery - \$1,000,000.00.

[64] There is no award of aggravated and exemplary damages. There is no award of vindictory damages. The damages awarded are at the rate of three percent from the date of the service of the claim to the date of judgment. Costs to the claimant to be agreed or taxed.