IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. C.L. 1993/Mc 105

BETWEEN	GYIAN McCALLA (an infant by Dotilda Martin his Guardian and Next Friend)	CLAIMANT
A N D	SCARLETT BIGGS	1ST DEFENDANT
A N D	THE ATTORNEY GENERAL	2ND DEFENDANT
A N D	EARL PLANTER	3RD DEFENDANT

Mr. Raphael Codlin instructed by Raphael Codlin & Co. for the Claimant. Dotilda Martin present
Mr. Garfield Haisley instructed by the Director of State Proceedings for 1st and 2nd Defendants

Heard: 28th February and 3rd March 2005

MANGATAL, J

1. Two applications were heard by me on the 28th February. One was an application on behalf of the 1st and 2nd Defendants for the following relief:-

(a) That paragraphs 2, 4, 5, 7, 8,11, 12, 13, 14, 15, 16, 17, 19 and 20 and Exhibits DM1 to DM 16 of the witness Statement of Dotilda Martin be struck out.

(b) That the Claim be struck out against the 1st and 2nd Defendants.

(c) That the trial date of 7th and 8th March 2005 (next week) be vacated.

(d) Costs.

2. The other application was on behalf of the Claimant seeking the Court's permission to amend the Statement of Case by adding as paragraph 6 the following:-

"6 . That in or about September 1991 the First Defendant in May Pen in the parish of Clarendon wrongfully and intentionally assaulted and beat the Claimant, thereby causing him to suffer injury, loss and damage."

3. **The Application to Amend**

The Application is to add a paragraph 6 which deals with assault allegedly carried out by the First Defendant, a police officer, on the Claimant in or about September 1991. Mr. Codlin argued that the amendment dates back to the date of the Writ and that the endorsement on the Writ spoke about assault and battery. Although the sequence in which I heard these two applications was strike out first, and amendment second, upon reflection, it seems logical to deal with the application to amend first. Mr. Haisley opposed the application. The Endorsement on the Writ, which Writ was fliled on 2nd April 1993, only speaks to an incident of assault and battery on 3rd April 1992. The Writ was amended June 2 1993 and there was still no mention of any assault incident in September 1991. Even if in the original Writ of Summons an incident in September 1991 had been pleaded it would at that time have been statute barred by virtue of the Public Authorities Protection Act. Prior to a 1995 amendment that Act required law suits in respect of, amongst other matters, acts done in pursuance, execution or intended execution of public duties to be brought within one year of the alleged act. It is common ground that the 1st Defendant was acting in the course of his duties as a police officer at the time of the incident alleged in April 1992 and the proposed amendment appears to be predicated on the same basis.

4. This incident which Claimant is seeking to add occurred over 14 years ago and was statute barred for over 13 years. Paragraph 20.6 of the C.P.R. deals with the circumstances in which amendment can be granted after the end of a relevant limitation period and this has to do with correcting a mistake as to the name of a party. There is no way that that section can apply to the present case. Mr. Codlin sought to take some of the sting off of the statute-barred nature of the claim by saying that the charging of the 1st Defendant with assault and the letters from the police and Police Public Complaints Authority amount to admissions. There is no admission of anything, admission would have to come from the Defendants and as to what views other persons formed can in no way assist the Court with the task at hand. Certainly this does not affect the Defendant's clear right to rely upon the relevant limitation period.

5. **The Application to Strike Out**

Broadly, Counsel for the 1st and 2nd Defendants Mr. Haisley grounded his Application to strike out significant portions of Dotilda Martin's witness statement on Rule 29.5(2) of the C.P.R 2002 which states:-

> "The Court may order that any admissible, scandalous or otherwise oppressive matter be struck out of any witness statement."

6. The application as regards paragraph 2 of the statement was on the basis that it concerns the 3rd Defendant, who had played no role in the matters alleged against the 1st and 2nd Defendants and was irrelevant and inadmissible on that basis. The 3rd Defendant was never served with this Claim.

Paragraphs 4 and 5 was on the grounds of inadmissibility and irrelevance, concerning incidents other than the one particularized in the Claim and the letter referred to in paragraph 4 does not speak to any particular police officer.

Mr. Haisley submitted that malice would have no relevance because at the Case Management Conference (C.M.C.) the Court struck out the claim for malicious prosecution and so what remains is a claim for false imprisonment and assault.

Paragraphs 7 and 8 were objected to on the ground that they contain inadmissible hearsay, since Miss Martin was not present when the alleged incidents between Gyian McCalla and the 1st Defendant occurred. Paragraph 11 was also objected to, and paragraph 12 was objected to on the grounds of inadmissibility and irrelevance. Paragraphs 13, 14 and 15 were objected to on grounds of being inadmissible hearsay and the purported statement of the Claimant is unsigned. Paragraph 16 and 17 were irrelevant, and inadmissible as well as the exhibit argued Mr. Haisley. Paragraphs 19 and 20 were objected to on the grounds of irrelevance and inadmissibility.

7. Mr. Haisley further submitted that even if the paragraphs regarding malice were allowed to remain, if the Court strikes out the paragraphs containing inadmissible hearsay, then the Claimant will have no case. The trial is fixed for next week and without evidence or information as to what happened that day, the Claimant cannot prove his case.

8. Mr. Haisley also submitted that the Claim should be struck out on the basis that the Claimant has never attended either the C.M.C. or pre-trial Review, whether on previous dates or when the matter came up before me.

9. Mr. Codlin in response referred to his written skeleton submissions and bolstered those arguments with oral submissions of his own. He firstly submitted that s.29.5(2) is a power which is exercisable only by a trial judge and not a Judge in Chambers. As a broad submission he contended that any defect in the pleadings, including witness statements can easily be cured by having regard to the overriding principle set out in Rule 1.1 of the C.P.R. 2002. He also submitted that there is an abundance of evidence which raises triable issues and ought to be given substantial consideration.

10. He submitted that even if the Court were to strike out paragraph 2 of the witness statement, that would not weaken the Claimant's case.

11. As to paragraphs 4 and 5, he submitted that these paragraphs contained relevant matters, for example, if it were true that relatives of the 1st Defendant were stoning the house of the Claimant, that would show the state of mind of the 1st Defendant both before and after the incident .

12. As to paragraph 7, it was submitted that it is possible to regard the *hearsay* status as part of the *res gestae*.

13. As to paragraph 13 of the statement, Mr. Codlin submitted that if the injuries spoken about in the medical reports were sustained, and were reported to the police at all, and the police found them to be made out, they could properly form part of the complaint overall before the Court for a remedy.

Mr. Codlin referred to paragraph 22 of the Witness Statement to say that the Claimant is very ill and this he referred to as a reason why the Claimant has not been in attendance at previous hearings.

14. Mr. Codlin wrapped up his submissions on this aspect of the matter by saying

that serious issues have been raised which ought to be tried, and that they ought not to be sidetracked by mere technicalities.

15. With regard to Mr. Codlin's first submission, I am of the view that there is nothing in the rules, explicit or implicit, to limit the ambit of Section 29.5 (2) to the trial judge and I am of the view that I certainly as the Judge sitting in Chambers have the power to deal with the application to strike out the witness statement or parts of it.

16. I am of the view that paragraph 2 of the witness statement ought to be struck out as being irrelevant.

17. I am of the view that the contents of paragraphs 4 and 5 ought likewise to be struck out as irrelevant and inadmissible. Though Mr. Codlin sought to argue that they give important information as to the 1st Defendant's state of mind both before and after the incident, this is not relevant because the claim is for false imprisonment and assault as the claim for malicious prosecution was struck out. Further, as regards the claim for false imprisonment, there are no facts pleaded to ground a claim for aggravated damages so as to make any evidence of malice relevant. Indeed, almost invariably a court must exclude evidence doing no more than showing a general disposition in the person concerned to commit acts or to have the state of mind of the kind at issue. This is because the trier of fact would thereby be invited to employ an impermissible or forbidden mode of reasoning. In other words, one must not reason that because, that person has done X or had state of mind Y on previous occasions, he has done such an act or had such a state of mind on the occasion the subject of the lawsuit. See paragraphs 17-20 and 17-21, pages 370-371 of the 15th Edition of Phipson on Evidence.

18. As to paragraphs 7 and 8 of the witness statement, they clearly contain

inadmissible hearsay. Ms. Martin, Gyian's grandmother was not present at the incident and cannot be allowed to give evidence of what Gyian said happened. It is not admissible under any exception to the rule against hearsay. It goes to proof of the crux, of the matter, or central issues in the case. They cannot be said to form any part of the *res gestae*. It is to be noted that Rule 29.5 (d) deals with the Form of Witness Statements and says that a witness statement must not include any matters of information or belief which are not admissible and, where admissible must state the source of any matters of information and belief. These are Procedural Rules and do not change the substantive rules of evidence regarding hearsay.

19. Paragraph 11 contains material not borne out by the letters exhibited and deals with proving malice. However as the claim for malicious prosecution was struck out malice is not relevant.

20. Paragraph 12 contains inadmissible irrelevant material. Paragraphs 13-17 are all irrelevant because they relate to an incident not pleaded in this case and in respect of which the amendment appears to have been sought. Also, paragraphs 13-15 contain rampant hearsay.

21. Paragraphs 19 and 20 also contain matters which are irrelevant to the suit as filed.

22. Having looked at the question of amendment, and based on the views which I have expressed above, I am of the view that the paragraphs set out in the witness statement, i.e. 2, 4, 5, 7, 8, 11, 12, 13, 14, 15, 16, 17, 19 and 20 must be struck out.

23. I agree with Mr. Haisley that even if the paragraphs regarding malice were allowed to remain, once the court strikes out the paragraphs containing inadmissible hearsay, then the Claimant has no case. I also agree with Mr. Haisley that when all the

paragraphs referred to in paragraph 22 above are struck out that leaves nothing of consequence in terms of proof of a case against the 1st and 2nd Defendants. It is a sad case because something does seem to have happened to the Claimant, though at whose hands, and in what circumstances, there is nothing put forward in proof. The grandmother has tried her best, but as she was not there, and there is no statement from an eye-witness, or a witness who can speak to first-hand knowledge of the facts, the Claim must fail against the 1st and 2nd Defendants. Even if the Claimant is not in a condition to give a statement, and there is really no evidence before me in proof of that, that would not allow the Court to accept hearsay evidence on the point or to speculate as to what happened on the day in question.

24. In the result therefore, notice of Application for court orders dated 17th September 2004 filed on behalf of the Claimant seeking to amend is dismissed with costs to the 1st and 2nd Defendants to be taxed if not agreed or otherwise ascertained. I make an order in terms of paragraphs 1,2 and 3 of the Notice of Application for court orders, filed on behalf of the `1st and 2nd Defendants dated 7th September 2004 as amended as follows:

(1) That paragraphs 2, 4, 5, 7, 8, 11, 12, 13, 14, 15, 16, 17 19 and 20 of the Witness statement of Dotilda Martin and the exhibits to these paragraphs are struck out.

(2) The claim against the 1st and 2nd Defendants is struck out.

(3) The trial date is vacated.

(4) Costs to the 1st and 2nd Defendants to be taxed if not agreed or otherwise ascertained.

Permission to appeal granted to the Claimant in respect of both applications.