

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO: C.L. P – 191 OF 1998

BETWEEN	ERRINGTON PELLINGTON	CLAIMANT
AND	SGT. BASIL MAITLAND	1 ST DEFENDANT
AND	CONS. A. SHAKES	2 ND DEFENDANT
AND	DET. CONS. PERCIVAL ANDERSON	3 RD DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	4 TH DEFENDANT

CONSOLIDATED WITH CLAIM NO: C.L. P-240 OF 1998

BETWEEN	ERRINGTON PELLINGTON	CLAIMANT
AND	CONS. A. SHAKES	1 ST DEFENDANT
AND	DET. CONS. PERCIVAL ANDERSON	2 ND DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	3 RD DEFENDANT

Mr. B. Samuels and Ms. Akeela Anderson, instructed by Knight, Junor, Samuels for the Claimant.

Ms. Annaleisa Lindsay and Ms. Kalaycia Clarke instructed by the Director of State Proceedings for Defendants.

Heard on December 13, 14, and 15, 2006 and March 30, 2007

ANDERSON J.

In this consolidated suit, (C.L.P. 191 of 1998 and C.L.P. 240 of 1998) the Claimant Errington Pellington claims against the defendants, (Maitland, Shakes and Anderson) members of the Jamaica Constabulary Force, for Assault and Battery, False Imprisonment and Malicious Prosecution. For the purposes of the judgment, I shall refer to Sgt. Basil Maitland as the First Defendant, Constable Shakes as to the Second Defendant and Detective Constable Percival Anderson as the Third Defendant. Where necessary, the Attorney General of Jamaica, who is made a party by virtue of the Crown Proceedings Act, is referred to as the Fourth Defendant.

As originally filed in the separate suits, the claim in relation to the assault and battery (C.L.P 240) arises by reason of the fact that the Claimant received a gunshot wound. That claim is specifically directed against Constable Shakes and Detective Constable Percival Anderson. The Claimant alleges that he has suffered the following particulars of injury as a result of the shooting:

- a) Permanent Paraplegia
- b) Urinary Tract Infection; and
- c) Bed sores.

The claim in relation to the torts of False Imprisonment and Malicious Prosecution is directed at the 2nd and 3rd Defendants along with the 1st Defendant. It is alleged that the 1st Defendant “maliciously and without reasonable cause, caused and/or procured the Plaintiff’s arrest” by the 2nd and 3rd Defendants. The Claimant’s statement of claim also alleges that the 2nd and 3rd Defendants held the Claimant under police guard at the Kingston Public Hospital from October 22, 1995 until in or around December 1995 thereby wrongfully imprisoning him and depriving him of his liberty. The statement of claim further alleges that the 2nd and 3rd Defendants also “maliciously and without reasonable or probable cause, maliciously prosecuted the Claimant on charges of Illegal Possession of Firearm and Robbery with Aggravation and that, on or around November 12, 1997, the charges were wholly dismissed in the Gun Court in Kingston, when the Crown offered “no further evidence” against the Claimant.

The Claimant also claims to be entitled to exemplary and/or aggravated damages because of the alleged conduct of the said police officers in denying him the opportunity to get medical attention in a timely manner; slapping the Claimant several times while he was in hospital; failing to follow the rules in relation to treatment of sick prisoners and manhandling the Claimant who was paralyzed in hospital.

The 22nd day of October, 1995 is a day that the Claimant will not forget as long as he lives. It was on that day, at about 3:00 a.m., that he received a gunshot wound to his chest which has left him permanently paralysed from the waist down, and incapable of discharging in the normal way, some of his bodily functions. The Claimant alleges that he was assaulted when he was shot by the Second and/or Third Defendants. It should be

noted that in fact, the Claimant being shot, would amount to a battery being committed upon him.

In matters such as this, the evidence proffered and accepted by the court is critical for the Claimant must establish, on a balance of probabilities, that the elements of the tort alleged have been made out. Given the nature of the evidence which has been adduced in this case, it is very much an issue of the credibility of the witnesses. However, it is, as always, important to bear in mind the general rule of law that he who alleges must prove.

The Claimant, Mr. Pellington, gave two (2) witness statements, the first one given on January 14, 2005, and the second on November 10, 2006. In the first witness statement the Claimant avers that having been at a dance at the House of Leo Entertainment Centre on Cargill Avenue in the Parish of St. Andrew, he left the dance at around 1:00 a.m. on the morning of 22nd October, 1995. He said as he was walking along Cargill Avenue, a group of "about seven men" approached him and held him up with knives and stole from him two (2) gold chains, six rings and a gold bracelet. He said the men pulled him on to Balmoral Avenue, and on reaching the intersection of Balmoral and Skibo Avenue, they threatened to "kill him". Suddenly, an unmarked car (which he later determined to be a police vehicle) approached the intersection, "while the men were hauling me onto Skibo Avenue". He said he heard several gun shots being fired and he immediately fell to the ground at which time, he realized he had been shot. He was in excruciating pain, and his lower body felt very heavy. He said he then heard a police officer, whom he later learnt was Constable Anderson, the 3rd Defendant, saying he should be shot as he was not dead. He said he "then realized that these men were the men who came up in the unmarked car and were, in fact, police: I then noticed that a number of police had arrived at this time. I was lying on the ground for about twenty-five (25) minutes".

He said that thereafter, he was thrown into the back of a police jeep and taken to Half-Way-Tree Police Station. That he remained there for about two hours and was then taken to the Kingston Public Hospital. He was operated on at the Kingston Public Hospital and remained there for about five months before he was discharged and sent home. He was paralyzed from the waist down and he had complications which necessitated his visiting

Kingston Public Hospital for further treatment. He also suffered a punctured lung and had surgery for damage to his urinary tract and is now sexually impotent.

In his second witness statement given shortly before the commencement of this trial, he for the first time specifically named Constable Shakes and Detective Constable Percival Anderson as being the ones who “assaulted me by shooting me”. That witness statement is sufficiently short to be reproduced in full and I set out below paragraphs 2-6 inclusive:

2. That I refer to suit no 240 of 1998 and wish to state that on the 22nd of October, 1995 the first and second named Defendants assaulted me by shooting me and I was hospitalized and placed in custody, that is, I was under police guard at the Kingston Public Hospital from the 23rd of October 1995 until the 22nd of January 1996 and I was treated as prisoner being imprisoned to my bed at the said Kingston Public Hospital by armed police, 24 hours per day.
3. That the said defendants charged me for the offences of Illegal Possession of Firearm and Shooting with intent in the Criminal Court known as the Gun Court and I attended Court for two (2) years on several occasions in a wheel chair and the case was finally tried on the 9th February, 1998 whereby the Learned Trial Judge, Mr. Justice Clarke, found me “not guilty” at the end of the trial and I was wholly discharged from the case.
4. That at no time was I acting with anyone who fired any gun at the police or was with anyone who was armed and fired at the police and the whole allegation of me being in illegal possession of fire arm and me shooting at the police was an unkind fabrication against me which was an act of cruelty on their part in that I was wrongly shot, injured and paralyzed and they added to this injustice by maliciously lying and making up a case in the gun court against me.
5. That I was humiliated and felt a deep sense of shame in my community and I felt that as a direct result of this case maliciously fabricated by the police against me, following my being shot and crippled by the police, I was being seen by members of my community as a gun man and a criminal who was shot while committing a crime with an illegal fire arm.
6. That I had to pay my lawyers \$150,000.00 dollars for defending me in the case however from moving up and down I have lost the receipts I paid him from.

In the course of amplifying his witness statements, the Claimant alleged that the men by whom he was held up did not have any guns and that the only persons who he saw with guns that morning were the police. He also said that he did not have a gun and that there was no "shoot-out". He also gave evidence about the cost of the motorized wheel chair which had been purchased by his relatives on his behalf and of how the relationship with his former girl friend ended about three years after his injury, as he had become impotent. Under cross examination from Ms. Lindsay of the Attorney General's Office, he admitted that when he fell to the ground he could not see who was firing the shots by which he was purportedly injured. He also agreed that at the end of his time as a patient in the hospital, on or about January 21, 1996, when he was discharged, he was sent home. He said that at that time he had to employ a nurse's aide to care for him at a cost of \$2,000.00 per week, which cost was borne by his relatives. However, for these services like for the cost of the wheel chair, he had no receipts or statement of the payments. The Claimant also conceded that despite his claim that he had been falsely imprisoned up until the time when he left the hospital, he had come before the courts and been granted bail before January 21, 1996, although he could not remember when this was. He also agreed that he knew of a report made to the police by two persons on the morning in question which report stated that they had been robbed by the Claimant, and that these persons had purportedly positively identified him, and another report that he had fired on the police party.

The Claimant insisted that the men who allegedly held him up were armed only with knives as far as he could see, and that they ran on seeing the approaching car. That even as they ran, several shots rang out loud and fast and that is when he got shot.

The account of the events of that fateful morning as recounted by the witness for the Defendants is quite different from that recounted by the Claimant. Sgt. Basil Maitland, the First defendant, testified that he and Det. Corporal Percival Anderson were on patrol in an unmarked police vehicle at about 3:20 a.m. on the morning of October 22, 1995. He said he was the driver and they came to a stop at the intersection of Balmoral and Skibo Avenues'. He said that at the intersection he saw a group of about six men come

around the corner from Skibo onto Balmoral Avenue. The men were to the right side of the police vehicle. He said that one of the men shouted "Everything all right officer." He said before he could respond "or do anything" the man pointed a gun at us and fired a shot which shattered the windscreen. He said that others of the group of men started firing at them in the car while running in different directions. He claimed that he saw when a man, later identified as the Claimant, ran in front of the car "while firing at us." He said he attempted to come out of the car but was shot in his lower back. There was an exchange of gunfire between Detective Corporal Anderson and himself on the one hand, and the group of men, on the other; which continued for about ten (10) minutes. When the shooting ended, he said he was able to exit the car and he told Anderson, that he had been shot. Assistance was summoned and when it came, other officers assisted Maitland by taking him to hospital. While at the Kingston Public Hospital receiving treatment, the Claimant was also brought in for treatment, and he identified the Claimant to Detective Corporal Williams as one of the men who had fired at himself and Anderson earlier. This he said was done in the presence of the Claimant. He further averred that the area where the incident occurred was well lit by street lights and other lighting. He said he reported the shoot out to Det. Corporal Williams and he later learned that the Claimant had been charged with the offences of shooting with intent, illegal possession of firearm and robbery with aggravation. Maitland said, however, that he was not the person who had laid the charges. He acknowledged that he had testified at the Claimant's trial in the Gun Court in 1998 and that the Claimant was acquitted of all charges. He also averred that when he was returning fire from the group of men, he was doing so in self-defence and in fear of losing his life.

The evidence of the Third Defendant who was the other person in the un-marked police car on the morning in question was in similar terms to that of Maitland. Anderson said that after coming out of the car and observing the damage on the un-marked police vehicle, he ran to the Half-Way-Tree Police Station for assistance and then returned to the scene. He said that while some officers took Mr. Maitland to the hospital, others assisted him in searching the area. While doing so, he saw the Claimant lying about two (2) or three (3) chains from the damaged vehicle. He said he "immediately recognized

him” as one of the men who had opened fire at himself and Mr. Maitland and also as the man who had run in front of the police vehicle while firing at us. He said he recognized him by his black cap with white markings, his black shirt and dark coloured trousers. He accordingly identified the Claimant to Det. Sgt. Williams as one of the men who had fired at him earlier. According to his recollection, when he saw the Claimant lying on the ground he appeared to be unconscious and he (the Claimant), was placed in the back of a police jeep by police personnel. He said that he had also made a report of the shoot out to Det. Sgt. Williams. He further acknowledged that the Claimant was charged with certain offences; that he, Anderson had testified at his trial in the Gun Court, and that the Claimant had been acquitted. Like Maitland, Anderson claimed to have fired in self-defence and in the lawful execution of his duties.

The other witness on behalf of the Defendant’s was Detective Sergeant Williams. He testified that on the morning in question, he had seen Officer Anderson come into Half-Way-Tree Police Station and reported that he had been engaged in a shoot out. He said he rushed to the scene where he saw the un-marked police vehicle with gun shot holes to the roof and right door and he saw blood inside the vehicle. He confirms that Maitland was bleeding from a wound to his lower back; that he, the witness, along with other policemen searched the area, and that while they were searching, they came upon a man, later identified as the Claimant lying on the ground a few chains from the damaged police vehicle. He said that Det. Corporal Anderson identified the Claimant as one of the men who had fired upon himself and Mr. Maitland. He appeared to be unconscious and was placed in the back of a police jeep, taken to Half-Way-Tree Police Station and thereafter to the Kingston Public Hospital.

Sgt. Williams also testified that while he was at the station, two (2) persons, Gregory Grant and Wayne Lewis who were at the station to report a robbery which, they alleged, had taken place on Cargill Avenue when a group of men had robbed them of jewelry and cash, identified the Claimant as one of that group. He said he collected statements from both men, and that based upon those statements, the damage done to the police vehicle, the fact that Det. Sgt. Maitland had been shot and the positive identification of the

Claimant by Grant and Lewis and the other police officers, he charged the Claimant with the offences of illegal possession of firearm, shooting with intent and robbery with aggravation: It was his evidence that when he charged the Claimant he had no reason to doubt the reports made to him and he believed them to be true and that the claimant was in fact responsible for the offences charged. He also gave evidence at the trial of the Claimant in the Gun Court, at which he was acquitted.

It is clear that what the court is faced with are two conflicting accounts of what took place that fateful morning. On the one hand is the account of the Claimant which, in summary, is that the police without warning, fired upon a group of persons who were already running away from them. On the other hand, is the evidence of the police that they were fired upon and engaged in a shoot-out with a group of men, one of whom was the Claimant who was later charged for certain offences but was acquitted.

In order to succeed in his claims, the Claimant must establish that the elements of any of the torts of assault, battery, false imprisonment and malicious prosecution, have been made out. It will be appropriate to consider the submissions in relation to the various claims.

I believe that the issues which arise to be determined in this case may be summarized as submitted by the Defendants' counsel. Those issues may be stated as follows:

1. Whether the Claimant was shot by the police officer(s) and if yes, whether the Claimant has proven that the police were acting maliciously or without reasonable or probable cause.
2. If the Claimant was shot by the police officer(s), whether the evidence shows that the police officers were acting lawfully and in self defence when they discharged their firearms;
3. Whether the Claimant has proven that the police had no reasonable or probable cause or acted maliciously in detaining the Claimant, and the period of time that the Claimant was in fact detained;

4. Whether the Claimant has proven that the police had no reasonable or probable cause or acted maliciously in prosecuting the Claimant for the various offences; and
5. If the Claimant is successful in his claims, whether he should be entitled to aggravated and/or exemplary damages.

Assault

The Claimant's various heads of claim are set out in the statements of claim in the now consolidated action as articulated in the separate suits filed. The evidence in support of these claims is given in his two (2) witness statements, as well as some amplification of the witness statements in relation to damages. The Claimant says, in the first witness statement, that he "suddenly heard several gunshots being fired" and he "fell to the ground at which time I realized that I had been shot". This witness statement places this incident at "the intersection of Balmoral and Skibo Avenues". There was nothing in that statement, implied or expressed, that indicated that the Claimant knew how, or by whom, he was shot. It should also be noted that in the statement of claim filed in Suit C.L. P. 240 on December 17, 1998, the Claimant had averred that he had been shot at the intersection of Cargill and Bradley Avenue, Kingston 10, in the Parish of St. Andrew. In the second witness statement, (given, as defendants' counsel correctly points out, after all the witness statements were filed and served on his attorneys) he averred that he was shot by the "first and second-named defendants" (namely Constable Shakes and Detective Constable Percival Anderson). There does not appear to have been any amendment of the pleadings to bring them in line with the witness statement. Moreover, the evidence of both Maitland and Anderson, (which I accept as true) is that at the time the incident occurred, the two officers in the un-marked car were Maitland and Anderson.

From the foregoing it will be noted that in the statement of claim in suit C.L. P 240 which was filed on December 17, 1998, the Claimant averred that Shakes and Anderson were the ones who shot him while his first witness statement filed January 14, 2005, seems to suggest that the Claimant was not only unaware, but was in no position to have determined, who shot him. This claim is however repeated in the witness statement of November 2006. Further, it is noted that while the Claimant says he was shot by two

police officers, the medical evidence was that he had only received one gunshot wound. The claimant has, in my view, failed to prove, on a balance of probabilities that he was shot by both policemen, or indeed by either of them and the claim for assault and battery must fail. I should also, en passant, remind the claimant's counsel that while there is a claim for assault, there is no claim for a battery being committed upon the Claimant. It is trite law that an assault is some action by the tortfeasor which puts the Claimant in apprehension of a battery being committed upon him. On the other hand, a battery is a direct application of force threatened by the assault. Battery is not mentioned by the Claimant in either of his statements of claim. But even if the shooting was done by the policemen, the court would still have to decide whether the shooting took place that in circumstances which made it not actionable.

Counsel for the Defendants submits: "It is a defence to a claim for assault and battery that the defendant was acting in reasonable defence of himself or another person". Counsel cites the judgment of Jones J. in **Michael Smith v The Attorney General**, delivered February 17, 2005. That case has some similarities with the instant case. There the claimant alleged that he was a passenger on a bus when two men came on the bus and tried to rob passengers. The claimant in that case claimed that an unarmed plain-clothes police officer accused him of being one of the robbers and shot him. In Michael Smith, Jones J. stated: "It is a defence to a claim of assault and battery that the defendant was acting in reasonable defence of himself or another person". The evidence of the police officers is that there was a shoot-out. Both Maitland and Anderson are consistent that they were shot at by men in the group on whom they had come into contact. The Claimant, on the other hand, can only be sure of one thing: that he did not have a gun. He had no way of knowing for sure whether the men who he claimed had robbed him, were armed. The evidence of Sgt Williams also corroborated the evidence of Maitland and Anderson as to the bullet holes on the vehicle when he arrived at the scene of the shooting. Both Maitland and Anderson were consistent in their position that they when they fired their weapons, they were doing so in self defence and being in fear of their lives.

Section 33 of the Constabulary Force Act states that in any action against an officer of the constabulary force, it must be expressly alleged that the act was done either maliciously or without reasonable or probable cause and that, at the trial, it shall be the duty of the Claimant to prove these averments. In Andrews v the Attorney General [1981] 18 J.L.R. 434, McKain J. held that the duty of the police is, inter alia, the apprehension of wrong doers with a view to bringing them to justice. Police are also empowered to carry firearms and to use them when necessary in the apprehension of suspected wrongdoers and protecting themselves from serious attack from any quarter. If the court accepts as fact that there had been a shoot out and even accepts that the Claimant was unarmed as he claims, the Claimant would be in no better position than the plaintiff in Byfield v The Attorney General for Jamaica [1980] 17 J.L.R 243. In that case, the plaintiff was accidentally shot on August 23, 1976 when a Constable Boyd discharged his firearm in the plaintiff's yard. The constable and another were on foot patrol when they were shot at by a man and three others who fled. They pursued these men who then ran onto the plaintiff's premises. The gunman fired again at the constable. When he turned to fire again, each constable fired a shot at the gunman. Constable Boyd was not aware of the presence of the plaintiff at the time of the shooting and both officers acted in self defence. It was held that the constable was justified in discharging his firearm; i.e. self defence, nor was he in breach of his duty of care. Therefore, both claims of assault and negligence fail. In a case where the constable fired to avoid being shot by the gunman, "detached reflection cannot be demanded in the presence of an uplifted knife".

Defendants' counsel also cited the Trinidad and Tobago Court of Appeal decision in Robley v Placide [1966] 11 W.I.R. 58 in which it was held that "no legal duty to retreat could arise in circumstances where a police officer acted in execution of his statutory duty to arrest persons who were, prima facie, committing within his view, the offence of being armed with an offensive weapon". It was submitted that section 13 of the Constabulary Force Act imposes a similar statutory duty on police officers in this jurisdiction.

In Leroy Chin v The Attorney General, Suit No: C.L. C 186 of 2002, a case which I heard on October 24 and 25, 2005, the claimant was in a club in May Pen, Clarendon, when a shoot out ensued outside the club between some police officers and some gunmen. In that case there was no evidence of how the plaintiff got shot but there was a witness statement which averred that on the occasion in question, only the police were firing their guns. That statement was made by one “Miller” who had been arrested and charged with illegal possession of firearm on the basis that he was one of the men firing at the police party on the night in question. Miller said he was charged for the offence, was tried but was acquitted. As in Leroy Chin, there is no forensic evidence to link the police bullets with the Claimant’s injuries. Further, in that case, counsel for the claimant acknowledged that in order for the claimant to succeed, the court would have to accept the evidence that the police officers were the only ones firing guns. Failing that evidence, the claimant would perforce, fail. I have already indicated that the court accepts that there was a shoot out and that there is no evidence that the bullet which caused the Claimant’s injury was from a police weapon.

Thus, based upon the evidence which I have accepted, the police officers were engaged in a shoot out with a group of and armed men at the intersection of Skibo and Balmoral Avenues, and on a balance of probabilities, the Claimant was one of the group of men who so engaged the officers. But even if he was not, it is impossible to see how he can be in any better position than the innocent bystander plaintiff in Byfield, cited above since, as this court finds, the 1st and 3rd Defendants were acting in self defence and with reasonable and probable cause.

Malicious Prosecution

The tort of malicious prosecution is made out where, on a balance of probabilities, a claimant establishes that:-

- a. a prosecution has been instituted against him;
- b. the prosecution ended in his favour, that is, he was acquitted;
- c. the institution of the prosecution was done “maliciously”; and
- d. the institution of the prosecution was “without reasonable and probable cause”.

Here, there was a charge preferred against the Claimant and the prosecution ended in an acquittal. Counsel for the Defendants suggests that it seems that the Claimant is relying merely upon the fact that he was found not guilty to prove his claim. He must, however, also prove that the prosecution was malicious and without reasonable or probable cause.

Counsel for the Claimant submitted that “the basis of the Claimant’s prosecution was absent; that is, no shoot out occurred between the Claimant and the Defendants present on October 22, 1995”. He further submitted that “malice is actuated by the fabrication of statements to support the prosecution of the (relevant) Defendants’ overall account of the said incident”. Counsel cites the judgment of Forte J. (as he then was) in **Fleming v The Attorney General**. In that case, the learned judge stated that “for the purposes of malicious prosecution, malice not only covers spite or ill will but also any motive other than the desire to bring a criminal to justice”. He suggests that the motive for the prosecution in the instant case was to “cover up” for the wrongful conduct of the police in shooting the Claimant without any justification. Counsel proceeds to cite instances of what he calls the absence of physical evidence. Among these instances are the fact that there was “no medical evidence to support the allegation of a physical injury to Maitland who said he was bleeding and assumed that it was because of being shot”; “No evidence was brought to exclude the possibility that any injury that may have occurred was not caused by splinters in the car”; “no cuts on anyone’s face as a result of the shattering of the windshield”. This appears to put a duty on the Defendants to “prove a negative”, rather than for the Claimant to provide the evidence to establish the elements of the tort he claims was perpetrated against him.

The Claimant’s attorney at law, in the same way, also cites several instances of what he says are “inconsistencies” in the evidence of the witnesses for the defence. It seems that the approach taken is that of seeking to raise “reasonable doubts” about the validity of their defence, and to argue from that, that the Claimant has proven his case. Nothing, of course, could be further from the truth. I believe that one of the written submissions

exemplifies why this approach is wholly misconceived. In relation to the evidence of Det. Constable Anderson, counsel submits:

The main feature of his (Anderson's) testimony was his failure to recall or be able to particularize any essential occurrences or features of the morning of October 22, 1995. *In this respect, he can give the defendants no assistance when considering whether there was reasonable cause for shooting the Claimant*". (My emphasis)

But it is trite, as I have noted above, that he who alleges must prove. It is not for the defendants to establish that there was neither malice nor absence of reasonable and probable cause. It is for the Claimant to show that the prosecution was malicious and acted without reasonable and probable cause. The legal burden is on the Claimant and never leaves him. Moreover, it is only when he produces some positive evidence in support of his claim that the defendant is required to counter the evidence so led; at this stage, the so-called "evidential burden" shifts.

The statement of claim stated that "the first Defendant falsely, maliciously and without reasonable and proper cause, caused and/or procured the Plaintiff's arrest by the Second and Third Defendants to arrest (sic) the Plaintiff on a charge of Robbery with Aggravation and Illegal Possession of Firearm". It should be borne in mind, however, that it was Sergeant Williams who arrested and charged the Claimant. Thus, this fact alone may be sufficient to dispose of the claim for malicious prosecution as it is clear that neither the 2nd nor the 3rd Defendant arrested the Claimant, and so the 1st Defendant did not "cause or procure" any action by the "Second and Third Defendants". (According to Defendants' counsel, this should be sufficient in and of itself to defeat the Claimant's claim for malicious prosecution). Further, it was Det. Sgt. Williams' evidence that his decision to arrest and charge the Claimant was based upon the fact of the damage which he observed to the police vehicle as well as the report of two persons, Lewis and James, who had reported being robbed by a group of persons, and who purported to identify the Claimant as one of that group. The statements of the two persons who had made the

report were admitted into evidence as exhibits, not to prove their contents, but to indicate the state of mind of the arresting officer, Williams.

Counsel for the Defendants also cites the judgment of Sykes J. in Herwin Fearon v Attorney General and Brown Claim No: C.L. F-046 of 1990 delivered March 31, 2005. There, the learned judge held that:

The fact that the Claimant was acquitted of the criminal charge is irrelevant. A police officer is not required to prove guilt or innocence. He needs only to believe honestly, that the facts as he understood them, led to a bona fide belief that offences were committed. This is to be judged at the time of the alleged arrest by the police based upon the facts as known and believed by the police not by subsequent events.

Defendants' counsel also cited the case of Glinski v McIver [1962] 1 All E.R. 696 where the House of Lords held that "a prosecutor *need not be convinced of the guilt of the accused*; he need only be satisfied that there is a proper case to go before the Court. He must have reasonable and probable cause in fact, and not merely think he has". In that case Lord Denning said:

There are cases where the prosecutor is not himself personally involved but makes the charge on information given him by others. The issue again appears simple. If the information was believed by him to be trustworthy, there was good cause for the prosecution. If it was known by him to be untrustworthy and not fit to be believed, there was no cause for it. Here, again, much depends on the state of mind of the prosecutor.

It was submitted that the evidence adduced before this court shows inescapably that the arresting officer, Sergeant Williams did have an honest, reasonable, bona fide belief that the Claimant had committed the offences in respect of which he laid charges. If the court accepts his evidence, the arresting officer was the one to whom the victims of the earlier robbery, Messrs. Lewis and James, identified the Claimant as one of the group who had robbed them; he had a personal look at the damaged police car; he had the report of the shoot out made to him by Constable Anderson and he saw Detective Sergeant Maitland bleeding from the wound suffered to his lower back. In addition, Williams in his witness statement stated that when the Claimant was found injured some chains from where the damaged police car was, he was pointed out by the 3rd Defendant, Anderson, as one of

the men who had shot at him and Maitland. It was on the basis of the facts set out above that the 3rd Defendant charged the Claimant. In addition, Det. Sgt Williams avers that at the time he charged the Claimant, he had no reason to believe that any report that he had received was false.

False Imprisonment

In any claim for False Imprisonment, the Claimant must show that his liberty has been restrained by another against his will and without lawful justification. Or as Clerk & Lindsell's Sixteenth Edition on Torts, states: "False Imprisonment is the complete deprivation of liberty for any period of time, however short, without lawful cause." The Claimant, in his first witness statement does not say that he was detained by the police for any period whatsoever, but rather said he was in the hospital for five (5) months. In his second witness statement, he says he was detained by the Defendants in the Kingston Public Hospital from October 22, 1995 until January 22, 1996 when he was released from the hospital and was sent home. However, his evidence is also clear that he was offered bail by the Court at some point before the date of his final release from hospital, although he was unsure as to when that was. It is difficult to understand how an action for false imprisonment can succeed when the claimant is not sure as to the period of his unlawful detention. The medical report tendered by the Claimant indicates he was in hospital until January 22, 1996, for the treatment of his injuries. During that time, it was confirmed that he was paraplegic. His own evidence about his being in the custody of the police officers for five months, or some period up until the offer of bail, is at best, unreliable. In any event, even if the Claimant were able to show that he had been detained, he would still need to show that the detention had been unlawful. This he has failed to do.

With particular reference to this head of claim, the un-contradicted evidence presented makes it clear that when the Claimant was seen lying on the ground by the party of police searching the area, he was in need of medical attention. Sgt Williams said the Claimant seemed unconscious and the Claimant himself says he was in great pain. That he should have been taken to a hospital was natural. That he was the subject of certain statements implicating him in certain criminal acts, also made it reasonable that he should have been

charged and, given the seriousness of the charges, placed under police guard. There was no credible evidence advanced by the Claimant that he was kept prisoner in the hospital by the Defendants or any of them, any longer than his medical treatment warranted or beyond the time when he was offered bail by the Court. It seems to me that in light of the other evidence referred to above, the credit of which the court has accepted, that any period of detention by the Defendants, if any, was lawful, in that the Claimant was being held on very serious charges, charges which were based on reasonable and probable cause, the correctness of which was honestly believed by the officers.

Having considered the claims being advanced by the Claimant and the evidence available to this court, in addressing the five issues which it was suggested above were the live issues for the purposes of determining this case, the court would give the following answers:

- A. On a balance of probabilities, the Claimant was shot by one of the police officer who were in the unmarked vehicle on the morning of October 22, 1995. However, the Claimant has not shown, as *he must do if he is to succeed*, that the officers were acting maliciously or without reasonable or probable cause.
- B. The evidence shows, on a balance of probabilities that the officers were acting lawfully and in self defence when their firearms were discharged.
- C. The Claimant has failed to prove on a balance of probabilities that the officers had no reasonable or probable cause or acted maliciously in detaining the Claimant. Nor has the Claimant proven the period during which he was detained by the Defendants.
- D. The Claimant has failed to prove on a balance of probabilities that the police acted maliciously or without reasonable or probable cause in prosecuting the Claimant for the various offences with which he was charged.
- E. With respect to the fifth issue of damages and particularly the claim for exemplary and/or aggravated damages, in light of my findings on the

substantive claims made by the Claimant, the question of damages does not arise.

I accordingly give judgment for the Defendants on the consolidated claim and award costs to the Defendants, to be taxed if not agreed.

So Ordered.