

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. CL T 095 OF 1999

BETWEEN	OWEN THOMAS	CLAIMANT
AND	CONSTABLE FOSTER	FIRST DEFENDANT
AND	ATTORNEY GENERAL OF JAMAICA	SECOND DEFENDANT

Mrs. Sharon Gordon-Townsend for the claimant

Mr. Peter Wilson instructed by the Director of State Proceedings for the defendants

November 9, December 9, 20, 2005, and January 6, 2006

FALSE IMPRISONMENT, ASSAULT AND BATTERY

SYKES J

1. On August 9, 1997, about 5:00 pm Mr. Owen Thomas, the claimant, was taken to the Linstead Police Station. He had no injuries of any kind. By 9:00 pm, Mr. Thomas was a patient at the Linstead Hospital. The report from the hospital is clearly inadequate but from the history presented and their examination, the medical staff thought it prudent to have Mr. Owen Thomas x rayed. Fortunately, after his discharge, Mr. Thomas went to Dr. Sandra Nesbeth who recorded the following injuries:

- a.** blood shot eyes;
- b.** severe headache;
- c.** right eye partially closed, bloody and swollen;
- d.** the temporo mandibular joint could only open partially and was very painful to open fully and chew;
- e.** eye was painful to light (photophobia);
- f.** right cervical muscle painful – with moderate whip lash;
- g.** renal angle (kidney area) tender;
- h.** finger swollen and cannot extend or bend completely.

2. She expressed the opinion that the injuries were consistent with severe forceful blows to different parts of the body and were not likely to be permanent.

3. Dr. Nesbeth adds a further report, which says that the right leg was swollen, painful with multiple bruises on the front. She adds that Mr. Thomas was assessed daily for a week and during that time, he improved but still suffered headaches and pain in the shoulder, neck, jawbone and right knee. After that week, he was seen weekly. She ends by saying that he had fully recovered from his pains and bruises.

4. How did Mr. Thomas come by these injuries? Mr. Thomas blames Constable Allan Foster, the first defendant. Constable Allan Foster denies this and says he does not know how the claimant came by his injuries. Corporal Hinds who testified for the defence does not know either. There is no record from the police station indicating anything about the state of health of the claimant. Mr. Thomas said that while he was being taken from the holding area to the cells, he was beaten and kicked all over his body by Constable Foster. At some stage during the beating, the Constable said, "You did deh a fi yu yaad a Tima but now yu a deh fi mi yaad! Ah eight years mi inna de force and yu go dis mi!" Tima refers to Time and Patience District where the claimant lives with his wife. At the end of the beating, the police officer placed him in a cell and invited the prisoners to administer further beatings. The claimant testified that one prisoner, acting upon the invitation of the officer, delivered one blow. Thankfully, the other prisoners persuaded the Constable's accomplice against that ill-advised course of conduct. The ultimate plan of Constable Foster is obvious; it hardly needs stating. He was undoubtedly trying to incite the prisoners to beat the claimant. This would have provided an explanation for the injuries without the risk, to himself, of any liability. Had the prisoners obliged, what we would have is a situation in which the injuries inflicted by the police officer would have been camouflaged by the injuries inflicted by the prisoners. It seems that the Constable might have had an eye on any possible criminal prosecution against him. No doubt, this was a tremendous bit of Machiavellian foresight by the police officer. The tribunal of fact might have entertained reasonable doubt about who caused the injuries. Prince Nicoló Machiavelli would have blushed with envy at the scheme hatched by Constable Foster. Why would the Constable behave in this manner? The answer comes in the next section.

The evidence

5. Mr. Foster is a taxi operator. On Saturday, August 9, 1997, at about 4:00 pm, he drove with his wife to Linstead Square in the parish of St. Catherine in his blue Lada station wagon. He had intended to begin plying his route at that time while his wife would take another taxi home. On reaching Parade Street, he saw a line of taxis and he stopped behind the last one. All the taxis moved forward except the one that was immediately in front of him. He manoeuvred around that car and tried to park in the space immediately in front of the car but there was insufficient space so the rear of his car protruded into the road. He said the Constable came to him and uttered, "Gi me yu driver's licence and yu documents." According to Mr. Thomas, he told the officer that he drove around the car because no driver was in it. He said that police officer then walked away and stood some distance away with his back to Mr. Thomas. Mr. Thomas said he reversed and went to King Street. At King Street he saw no parking space. He then decided to go home.

6. While driving home and on reaching Vanity Fair District he sees Constable Foster riding on his motor cycle beside the car. The Constable signalled him to stop. This he did. Mr. Thomas continues by saying that the police officer pulled his firearm, advanced towards the car and pointed the gun in the car. Mr. Thomas said that no one else other than his wife, the police officer and he were in the vicinity where the police had stopped him. The fear of being shot in such a lonely area without any witnesses dictated that he leave. Panic stricken, Mr. Thomas floored the accelerator leaving the officer standing by the roadside. He rushed to the safety of his home and community.

7. Shortly after his arrival home, Mr. Foster appeared. A struggle ensued between them. During the struggle the Constable uttered these ominous words "Bway! Yu dis police more than one time!" At this time, Mr. Thomas' wife raised the alarm and neighbours started to gather on the scene. The soothing voice of two of the community women managed to stem the Constable's rising fury.

8. At some point, the Constable had summoned assistance. This came in the form of Corporal Hinds. The maturity of the Corporal brought back some measure of decorum to what was taking place at Mr. Thomas' house. He persuaded Mr. Thomas and his wife to enter the jeep. He took them to the police station and left shortly thereafter. Corporal Hinds was careful to point out in his witness statement that "[Owen Thomas] was handed over to

the station guard in good physical condition. At no time did I observe Constable Foster or any other police officer assault Owen Thomas." This testimony does not conflict with that of the claimant because the Corporal said that he left to resume his patrol shortly after the claimant was arrested and charged. This means that he was not present at the police station when the claimant was being taken to the cell. Mr. Thomas was charged with the offences of obstructing traffic, failure to obey a police constable and resisting arrest. He was acquitted of these charges.

9. It is important that I do not allow the subsequent beating of the claimant prevent a careful examination of the evidence to see whether the police had reasonable and probable cause to believe that offences had been committed. The fact that the claimant was acquitted of the criminal charges is irrelevant. A police officer is not required to determine guilt or innocence. He only needs 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 officer and not by subsequent events.

10. The police officer says that on the day in question he saw the car driven by the claimant with its back protruding into the road. He approached the car and informed the claimant that he was obstructing traffic. He asked for the driver's licence and motorcar documents. According to him, the driver ignored him and accelerated away. He chased the car and stopped it at Vanity Fair. As he approached the car with only ticket book in hand, the driver sped off and the chase, which culminated in Time and Patience District, resumed. At Time and Patience District he held on to the claimant. The claimant broke free and ran in to his house. By this time, a crowd had gathered and began to threaten him. This caused him to unholster his firearm. Shortly after, Corporal Hinds, whom he had radioed for assistance, arrived. The claimant and his wife were taken to the Linstead Police Station.

11. Mr. Wilson has asked me to say that the imprisonment was lawful because these offences were ones that permitted the police to take persons into custody. This submission as a plain statement is accurate but it presupposes that the factual foundation for the arrest of the claimant exists. For me to accede to this submission it would require that I accept the police is speaking the truth about the initial contact with Mr. Thomas.

12. The first issue for me is whether Mr. Thomas fled the police or was it as Mr. Thomas said, a situation where the officer spoke to him and walked off after Mr. Thomas responded

to him. No evidence was led concerning the layout of Parade Street and its proximity to King Street. On the claimant's account I am not able to say whether the police officer would be able to remain where the claimant says the officer was and see the claimant when he drove to King Street. If that were possible it could explain why the police officer would be able to see him after he left Parade Street and chase him on the motorcycle. However, absent this kind of evidence the account given by the police officer seems more probable, namely, after being asked for his driver's licence and car papers he drove away. This would undoubtedly have aroused the suspicion of the police officer and justify his chase of the car. It is agreed that the claimant stopped at Vanity Fair. At this point, there would be no rational reason for the police to approach the car with his firearm pointing in the vehicle. I therefore find that the claimant was asked for his documents. He drove away. I find that the claimant accelerated away from Vanity Fair, thereby precipitating another chase that ended at Time and Patience. I am satisfied on a balance of probabilities that the police officer had reasonable and probable cause to believe the claimant had committed the first two offences with which he was charged. Regarding the third, this arose out of the tussle between both men at Time and Patience District. The officer had reasonable cause to believe that the claimant was resisting him. The chase and the struggle, I believe, only served to infuriate the Constable.

13. It is significant to me that Constable Foster agreed, in cross-examination, that he was in the force for eight years in 1997. This was the number of years that Constable Foster is alleged to have told Mr. Thomas that he was in the force. The Constable denied that he said this. The question is, if he had not told Mr. Thomas, during the beating, that he was in the force for eight years, how would Mr. Thomas come by this information? The evidence does not disclose any other source of information. This conversation in my view collapsed the defence to the assault and battery claim. Without any other credible explanation for Mr. Thomas' knowledge of the time the officer was in the force coupled with the undeniable fact that the claimant received injuries after coming into police custody leads to the inevitable conclusion that the defence of ignorance is not sustainable. I conclude that the claimant was assaulted and beaten by Constable Foster.

Assessment of damages

Damages for assault and battery

14. Mr. Wilson cited the cases of *Delroy Williams v Adina Daley* (C.L. 1991.W144), *Eric Ward v Lester Barco* (C.L. 1998/W254), *Paula Yee v Leroy Grant* (C.L. Y 011/1989) and *Kerron Campbell v Kenroy Watson and The Attorney General* (C.L. C 385/1998) on the issue of damages for assault and battery. Mrs. Gordon-Townsend distinguished them, successfully, on the basis that they did not relate to pain over the entire body. I find the cases cited by Mrs. Gordon-Townsend of greater relevance. She relied on *Hugh Douglas v Morris Warp* (C.L. 1984/D130). In that case, a police officer at the police station assaulted the claimant. He was struck with a rubber, baton and fists all over his body. The award was \$195,000 in April 1994. The current value of the award using the October CPR of 2272.4 is \$500,000. The claimant also relied on *Garfield Scott v Donovan Cheddisingh* (C.L. 1995/S217). There the claimant was in a vehicle that had overturned. He had pains, headaches, contusion on right shoulder and hip, puncture wound on left forearm, swollen, painful and tender knee. He was awarded \$300,000. The current value is \$640,000. That case however apparently took into account that at the time of the assessment the claimant had pain over lower right hip when lifting heavy objects and experienced difficulty playing football and cricket. There has to be a discount to take account of these additional facts. I am of the view that an award of \$600,000 is appropriate in the instant case.

Special damages

15. Mr. Wilson relied on the well-known case of *Lawford Murphy v Luther Mills* (1976) 14 J.L.R. 119 to say that the special damages were not properly proved. In light of three decisions of the Court of Appeal of Jamaica between 1992 and July 2005, perhaps the time has come for us to recognise that there is now, at least in Jamaica, a flexible approach to the question of proof of special damages. In *Desmond Walters v Carlene Mitchell* (1992) 29 J.L.R. 173, now commonly referred to as the pushcart vendor case, Wolfe J.A. (Ag) (as he then was) indicated that in certain types of cases, insisting on strict proof is nothing but pedantry and the court should use its experience in determining the appropriate award in the particular circumstances of the case. This was followed in 2004 by the case of *The Attorney General of Jamaica v Tanya Clarke (Née Tyrell)* SCCA No. 109/2002 (delivered December 20, 2004) where Cooke J.A. reviewed authorities in Jamaica, Trinidad

and Tobago and England. He extracted the principle that although special damages must be strictly proved and any relaxation of the rule should be carefully done, nonetheless what amounts to strict proof is determined by the circumstances of the case. He said that in appropriate cases the court could use its experience and strive to arrive at an award that meets the justice of the case. The court returned to this theme in the case of **Garfield Hawthorne v Richard Downer** SCCA No 12/2003 (delivered July 29, 2005). Harris J.A. (Ag) (as he was at the time) stated, "*judicial authorities have nonetheless shown that there can be a departure from this principle*" of strict proof of special damages (see page 11). Cooke J.A. in **Clarke** noted that despite the fulminations of Lord Goddard C.J. in **Bonham-Carter v Hyde Park Hotel Ltd** (1948) 64 T.L.R. 177 he found it possible to make an award of special damages.

16. What the three cases do not make clear is the circumstances in which the relaxation is permissible. That is the issue before me. The **Walters** case involved a pushcart vendor. In **Lawford Murphy**, the claimant was a mason but his special damages were drastically reduced. It appears that the station in life of the claimant is not a satisfactory point of distinction between the cases. The distinction may well lie in the fact that the claimant in **Murphy** worked with a construction firm that presumably was in a position to provide the claimant with evidence of his income whereas the claimant in **Walters** appeared to be a self employed pushcart vendor who did not keep records of his earning. This possible point distinction draws some support from **Clarke** the case where special damages claimed for visit to the doctor were reduced. It is almost inconceivable that a doctor would not have provided receipts to the claimant or if they were lost, that the sum could not be confirmed by an appropriate request to the doctor. In the **Hawthorne** case, the claimant was a handyman and a security guard. There is nothing in the judgment to indicate whether there was evidence available indicating whether he was an employee or an independent contractor. The significance being that if he were an employee then his employer might have been able to provide evidence of his income. I have gone at this at some length because there seems to be a school of thought that says that persons of a particular social class should not be expected to prove special damages strictly. The weakness of this approach is that it makes a broad a priori assumption about persons of a particular social class. This assumption carries with it the inherent danger of focussing too much on the class than on the particular individual who may well turn out to be a careful keeper of records but for

some reason is unable to produce receipts to support his case. It seems to me that rationality demands that the particular circumstances be examined to see if the case is an appropriate one for relaxation of the strict rule rather than base the decision on perceived habits of different social groups.

17. In the case before me, the claimant says that he pays income tax. This can only mean that he keeps reasonably accurate records, yet none was produced in the trial. The question now is whether it is appropriate to relax the rule in these circumstances where we have a record-keeping taxi operator. There is nothing to indicate whether the figure claimed for loss of income is a gross or net figure. In my view, justice demands that the claimant, in this case, strictly proves his claim for special damages if the circumstances suggest that he is able to do so. I do not share the view that judges ought to conjure up some appropriate figure in the name of justice where a claimant has a legal obligation to prove his case and fails to do so without any satisfactory explanation. The claimant may have good reason why strict proof is not possible in his case. Where this is so evidence should be forth coming to explain this. This would discourage claimants from simply selecting a figure and then hope that the judge will do "justice". Defendants expect, and rightly so, that judges will only depart from well established principle if and only if there is a sound and proper basis in law and fact for such a departure. To decide otherwise would be to introduce unwarranted laxity in this area of law. The claim for loss of earnings is disallowed. Mr. Wilson has not objected to the following (a) doctors' fees - \$2000; (b) medication - \$2,500; (c) x ray - \$3,130 and (d) the medical certificates - \$4,500. I have allowed the transportation cost of \$2,500 despite Mr. Wilson's objections. This would have been incurred during the time of Mr. Thomas' incapacity. It is well known in Jamaica that many of our transport operators do not provide receipts to passengers and the cost seems reasonable.

Conclusion

18. The claimant has failed to establish the tort of false imprisonment.

19. The defendants are liable for the tort of assault and battery. General damages awarded are \$600,000 at 6% interest from February 25, 2000 to January 6, 2006. The sum of \$14,630 is awarded as special damages at 6% interest from August 9, 1997 to January 6, 2006. Costs of \$112,000 to the claimant.