IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 02530 OF 2008

BETWEEN CONRAD GREGORY THOMPSON CLAIMANT

AND ATTORNEY GENERAL FOR JAMAICA DEFENDANT

Ms. Althea McBean, instructed by A. McBean & Company for the claimant.

Ms. M. Chisolm & Ms. A. Whyte, instructed by The Director of State Proceedings for the defendant.

Alleged Assault & Battery by the Police- Gunshot Injuries - Claim for False Imprisonment – Claim for Malicious Prosecution – Exemplary & Aggravated Damages.

Heard March 1, 2 & May 31, 2011.

Coram: F. Williams, J (ag).

Background

1. This claim, from any perspective, arises from a most unfortunate incident:- (a) if the claimant is to be believed, he was the victim of a most vicious assault at the hands of misguided and overzealous policemen, who shot him several times; delayed taking him to the hospital and prosecuted him on false charges; (b) on the other hand, if the policemen involved are to be believed, the claimant was shot in the lawful execution of police duties and properly prosecuted, and, in the result, the claimant has fabricated this entire case against them.

Summary of the Claimant's Case

2. The claimant was, on the 11th of May, 2003, when the incident occurred, a bus conductor, aged around 21 years. Some time between 5:15 and 5:45 that morning, whilst he was asleep in his one-bedroom, rented apartment at Red Ground District, St. Andrew, he was awakened by the police kicking off his door and entering his apartment. Thereafter, he was thrown from the mattress on which he had been asleep and, as he lay on the floor, was shot several times with a pistol by Det. Sgt. Linval Henry, (who, he testified, reeked of alcohol). He was taken outside and shot again – this time with a rifle, by Det. Cpl. (now Det. Sgt.) Richard Smith. He was wrapped in a blanket and dragged to a police car some distance away.

3. Thereafter, he was taken to the Kingston Public Hospital, but not before the police car in which he was being transported stopped for some time (he says more than half an hour) at the Constant Spring Police Station and then at a bar where the police occupants of the car, had drinks.

4. At the hospital he was discovered to have been alive by a porter and underwent emergency surgery. Whilst in the hospital, he was never under police guard. He was discharged from the hospital and went to stay at his mother's home in, St. Andrew on or about May 23,, 2003.

5. On May 27, 2003, the police went to his mother's home, searched it and detained him, taking him to the Stony Hill Police Station. He was taken there, he was told (and this is admitted in the defence) to face an identification parade in relation to the offence of robbery. On three occasions this identification parade was scheduled to be held, but was not held – supposedly because of the non-attendance of the witness (es) in relation to the robbery.

6. On June 4, 2003 an application pursuant to section 286 of the Judicature (Resident Magistrates) Act was filed and made on his behalf and it was ordered that he be charged or released by June 5, 2003.

7. He was charged on that day with two counts of shooting with intent and illegal possession of firearm with respect to the incident on May 11, 2003; and taken before the High Court Division of the Gun Court on June 6, 2003. He was, on June 12, 2003, able to take up an offer of bail that was made to him on his first court appearance on June 6, 2003.

8. Paragraphs 24 and 25 of his witness statement (which are *in pari materia* with paragraphs 22 and 23 of his Particulars of Claim) are of sufficient importance to be set out in full:-

> "24. During the trial of the said charges, it was revealed from the cross-examination of Detective Corporal Richard Smith that a handwritten statement of his dated June 2, 2003 which was

originally submitted to the Court by him and served on my Defence Counsel in 2003, was a different statement and related an inconsistent version of the events in question from the handwritten statement of his dated June 2, 2003 that was on the court file at trial in 2006. The latter statement was not a further statement but intended to be a substitute for the one submitted three (3) years prior.

25. On the 7th day of March, 2006 I was acquitted of all charges after a no case submission was upheld by the Learned Trial Judge."

9. He claims damages for the gunshot injuries and consequential pain and suffering and loss of amenities; as well as damages for malicious prosecution and also for false imprisonment – he having been falsely imprisoned (he contends) from approximately 5:45 a.m. on May 11, 2003 for some three (3) hours; and from approximately 3:00 p.m. on May 27, 2003 to June 12, 2003 – a total of approximately sixteen (16) days and three (3) hours.

Summary of the Defendant's Case

10. Three witnesses gave evidence on the defendant's behalf:- they were : Detective Sergeant Phillip Dodd who was the investigating officer in the cases brought against the claimant; Detective Sergeant Richard Smith and Detective Sergeant Linval Henry.

11. The evidence of Det. Sgt. Dodd is, for the most part, formal – in that he speaks to receiving the file containing statements concerning the charges brought against the claimant and of later arresting and charging the claimant, based on those statements.

12. The evidence of Det. Sgts. Smith and Henry go more to the substance of the matter. In summary, their evidence is that they went to the claimant's home with a search warrant pursuant to police investigations into cases of armed robbery that had been occurring in the general area.

13. There was an exchange of gunfire between them and occupants of the house in which the claimant lived. A dreadlocked occupant of the house escaped into nearby bushes by firing at the police whilst running away. The claimant was shot and injured and a home-made firearm, which fell from his hand, was seized.

14. A request was made for the claimant to have been placed under police guard; however, no one knows why this request was not complied with. It was made of an inspector of police who was not called to give evidence.

15. The claimant was put before the court on the charge of shooting with intent at the police. He was acquitted of all charges on a no-case submission. However, they maintain that the claimant was injured in a shoot-out with the police on the day in question and a firearm recovered.

16. At paragraph 10 of the defence, the defendant admits in large part what the claimant contends in paragraphs 24 and 25 of his witness statement (and paragraphs 22 and 23 of his Particulars of Claim), concerning the switching of a statement on the file relating to the shooting charges. Paragraph 10 of the defence reads:-

> "10. Save that it is denied that the latter statement was intended to be a substitute fro (sic) the one submitted three years earlier, Paragraph 22 of the Particulars of Claim is admitted".

17. This paragraph is most instructive, as, although it denies that the second statement was meant to be a replacement for the first, it does not deny what; perhaps, is the most important part of the claimant's contention about the second statement, which is that it :

> "... was a different statement and related an inconsistent version of the events in question..."

Issues for Resolution

18. The central issue in this case is that of credibility of the witnesses. Is the claimant to be believed; or are the witnesses for the defendant, on the other hand, more credible? And, at the end of the day, if the claimant's account of the incident and subsequent events is found to be more credible on a balance of probabilities, is there sufficient evidence to substantiate his monetary claims?

The No-case Submission

19. The success of the no-case submission is one matter that is worthy of some consideration. As is well known, such a submission is usually based either on **Lord Parker's Practice Direction** [1962] 1 All E.R, 448; or the ruling in **R v Galbraith** (1981) 73 Cr App Rep, 124. In **Galbraith**, the English Court of Appeal (at page 127) gave guidance on how the question of a no-case submission should be approached as follows:-

> "(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence: (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a

jury properly directed could not properly convict on it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

20. In practical terms, what this means is that the judge who upheld the no-case submission made on behalf of the claimant on the shooting charges, would have been firmly of the view that at the end of the Crown's case, the evidence before him was of so tenuous a nature that no jury properly directed could have convicted on it. In other words, the case against the claimant was exceedingly weak – even flimsy. This was a case in which there were three police witnesses – one the investigating officer, and the other two being witnesses as to fact. It is either that there must have been a very great divergence between the testimonies of the two witnesses as to fact; or the switching of the statements must have had the greatest negative effect possible on the Crown's case; or both. Whatever the circumstances might have been, at the end of the day, the prosecution lost the case on its own evidence.

21. Although the standard of proof used in a criminal case is different from (and in fact higher than) the standard of proof used in a civil case, the switching of a statement in a related case, (to remove and replace the original one with a later, inconsistent one) is, in the court's humble view, an occurrence that must negatively affect the credibility of the defendant's case in the civil matter, and that of its witnesses who gave witness statements and *viva voce* evidence to advance it. The civil and criminal cases are but limbs of the same factual tree. What credible reason could there possibly have been for the substitution of one statement with another inconsistent one? If the first one was largely accurate, should the second one have been just a further statement to correct minor mistakes? Regrettably, no answers to these questions emerged during the course of the trial.

22. Another question that arises from the history of the matter and the charges brought against the claimant is this: why was it necessary to delay the charging of the claimant with the offences of shooting with intent at the police and illegal possession of firearm until a court order mandated that he be either charged or released that very day? How could charging him with these offences have affected the holding of any identification parade in connection with the alleged robberies? Apart from a charge of murder, rape and carnal abuse, what could be more serious and demanding of an early prosecution than a charge of shooting with intent at the police? Regrettably, no answers to these additional questions emerged during the course of the trial.

23. Additionally, how could Det. Sgt. Smith assert (as he did in re-examination) that he gave only one statement to the investigating officer, against the background of the clear words of the pleadings and the unchallenged evidence of the history of the matter before the Gun Court? Regrettably, the court was not impressed with the defendant's witnesses as being witnesses of truth.

The Claimant's Case

24. The claimant's case is not free from some difficulty: - there are a number of inconsistencies that arose between his oral evidence and that contained in his witness statement. For example, (i) in his witness statement he states that he was shot three times by Det. Sgt. Henry and twice by Det. Sgt. Smith; whereas in his oral evidence he testifies to being shot four times by Henry and once by Smith –albeit the total number of times (five) that he says he was shot does not differ between the two – his oral and written testimony.

25. This, however, must be viewed in some four separate contexts: - first, his evidence is that shortly before returning home before the incident, he had been consuming alcohol at a party. It is not impossible, therefore, that he was under the influence of alcohol at the time of the shooting. Second, whichever account of the shooting is to be believed, the experience must have been a most traumatic one for him – but the more so if his account is true. Third, some eight years have passed since the incident, so that the court has to bear in mind that his memory of the events might have diminished as a result of the passage of time. Fourth, although he said in evidence that he had read

over his witness statement before giving his evidence, this is what he says about himself and his abilities in reading and writing:-

> "I don't read and write so well. I am not a bright reader but I can help myself, but not so well. I barely can "scrips" out mi name".

This bit of evidence from the claimant about himself ties in with the court's own assessment of him and his abilities in that regard. It is somewhat strange, therefore, to find, for example, a statement expressed in the following language in his witness statement (paragraph 15):-

> "15. When we got to the Kingston Public Hospital a passing porter saw my body in the police car and raised the alarm for me to be quickly taken out of the car for life saving treatment, which eventually involved the removal of bullet fragments and surgical suturing of the numerous scars associated with the multiple gunshots".

26. It is the court's opinion that a man of the simplicity and limited academic development of the claimant could never have uttered the fore-going words contained in his witness statement. Words and phrases such as "removal of bullet fragments"; "surgical suturing"; and "numerous scars associated with the multiple gunshots" would be to the claimant like a foreign language to the uninitiated. It is apparent that the words

of a very simple man have been "translated" into a form that was perhaps perceived by the "translator" to be more appropriate for and more easily-understandable to the court. Apparent also is the very real possibility that accuracy might have suffered in the process of "translation". Additionally, and in any event, the medical evidence supports the claimant's contention that he received five gunshot wounds.

27. It is against the background of all these considerations that any inconsistencies in the claimant's evidence must be viewed. Having approached the matter thus, it is the court's view that he has (with one reservation) presented a credible case that has not been damaged much (if at all) in cross-examination. The court finds him to be, for the most part, a witness of truth. The court's reservation about parts of his evidence mainly centre on those parts of his claim for damages and the *sequelae* of his injuries, which largely are without any or any sufficient supporting evidence.

28. Having regard to the totality of the evidence, the court finds, on a balance of probabilities, that the claimant's case is generally more credible than the defendant's case. It may now be best to look at the individual elements of the claimant's claim to see how each of these should be treated.

Malicious Prosecution

29. The elements which it is necessary for a claimant in an action for malicious prosecution to successfully prove, are well known and have correctly been re-stated by both parties in their written submissions as follows:-

1. That the law was set in motion against him on a charge for a criminal offence.

2. That he was acquitted of the charge or that it was otherwise determined in his favour.

3. That when the prosecutor set the law in motion against him, he was actuated by malice or acted without reasonable and probable cause.

4. That he suffered damage as a result.

30. In light of the court's acceptance, on a balance of probabilities, of the claimant's account of how the incident occurred, it naturally follows that the claimant has successfully proven these just-mentioned elements. All that remains is a quantification of the appropriate award of damages under this head.

31. Counsel for the claimant has submitted that the sum of $1,000,000 would be a reasonable award under this head. This proposal, however, was not accompanied by the citing of a precedent in which a similar award was made. On the other hand, counsel for the defendant has submitted that the sum of $400,000 would be more appropriate, citing two cases in support. These cases are: - (i) **Devon White v The Attorney General** (Claim no. HCV 787 of 2006 – delivered on April 2, 2009); and (ii) **Maxwell Russell v The Attorney General and Corporal McDonald** (reported in Volume 6 of Mrs. Ursula Khan's compilation, **Recent Personal Injury Awards,** at page 204.

32. In the court's view, the **Devon White case** bears considerable similarity to the instant case. In that case the claimant was shot three times by the police and prosecuted for a period of some three years on charges of shooting with intent, illegal possession of firearm and ammunition, and shop-breaking and larceny. The charges were subsequently dismissed after he attended court some 21 times. The award that was made then updates to some $459,394.80. The **Maxwell Russell case** involved a prosecution for approximately one year. The award in that case amounts to some $351,340.02 in today's money.

33. Accepting the submissions of counsel for the defendant, the court will make an award under this head of $400,000.

False Imprisonment

34. Counsel for the defendant has submitted that the court should only make an award under this head if it is of the view that the agents of the Crown acted without reasonable and probable cause. However, in light of the court's earlier finding on the issues of credibility and liability in favour of the claimant, the court could not find that reasonable and probable cause existed for them to have arrested the claimant on May 27, 2003. There simply is, in the court's view, no evidential basis for the making of such a finding. Mention was made of a search warrant in the name "Gregory". This was not tendered into evidence. Who is to say that that Gregory is the same person as the claimant? What is the real name of the man who fled the house that morning? Was a statement

ever collected from the person who it is said should have attended the identification parade, but failed to do so? If so, was there some description or any details that would have made it likely that the claimant was the Gregory for whom the police went in search? It seems to the court that under this head as well, in light of all the unanswered questions that have arisen of the defendant's case, the sole remaining question is that of quantum.

35. It was submitted on behalf of the claimant that a sum of $850,000 would be appropriate. This is based on an adjustment of the awards in the cases of **Keith Nelson v The Attorney General** (Suit # C.L. N – 120 of 1998; delivered on April 20, 2007), and **Allan Currie v The Attorney General**, (Suit # C.L. C 315 of 1989; delivered August 10, 2006). On the other hand, the defendant's submission is that the award should be for a period of 11 days (that is from May 27, 2003 to June 6, 2003, when he was offered bail), and the sum of $670,000 for those days would be adequate. The consequences of his inability to take up his bail until June 12, 2003, it was submitted, should not be borne by the defendant.

36. The court finds itself unable to agree with this last submission. In the court's view the false imprisonment and the malicious prosecution in this regard are inextricably intertwined. If he had not been detained and then prosecuted on a false charge, he would likely have continued to enjoy his liberty. The defendant must be held responsible for all the consequences of that detention, malicious prosecution and the resultant false imprisonment. In the court's view, the claimant must be compensated for all the days he

remained in custody. An award of $850,000 would appear to the court to be a reasonable amount under this head.

Exemplary Damages

37. In actions including a claim for exemplary damages, the discussion as to whether damages under this head should be awarded usually begins with, or at some point features a consideration of the House of Lords case of **Rookes v Barnard** [1964] A. C. 1129. In that case Lord Devlin stated (at page 1226) as follows: -

> "...where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if his power is much greater that the other's, he might, perhaps, be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different, for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".

38. The categories of cases in which an award of exemplary damages might be made were, in that case, also set out as follows:-

> "(1) oppressive, arbitrary or unconstitutional action
>
> by servants of the government;
>
> (2) wrongful conduct which has been calculated by
>
> the defendant to make a profit for himself which may

well exceed the compensation payable to the plaintiff; and

(3) where such an award is expressly authorized by statute."

39. In keeping with the court's earlier finding of liability in favour of the claimant, a finding of oppressive conduct on the part of the police in this case is a natural corollary. Again, it is only the question of quantum of damages that needs to be addressed.

40. For the claimant, the sum of $1,500,000 was advanced as being fitting for this case. This was arrived at, using as a general guide a case in which an award for general damages was equaled by an award for exemplary damages, each being in the sum of $3,500,000. That case is the first-instance judgment of **Maurice Francis v District Constable Owen Thomas & The Attorney-General**, reported at Volume 4, page 127 of Mrs. Khan's **Recent Personal Injury Awards** (which was appealed). The court's researches indicate that on appeal the sum of $3.5 million was reduced to $100,000 for both exemplary and aggravated damages. On the other hand, for the defendant, using the case of **Maxwell Russell**, it was submitted that the sum of $400,000 would be reasonable, if the court should be minded to make an award under this head. No award should be made, however, as the claim was, although included in the prayer, not specifically pleaded in the body of the Particulars of Claim.

41. In this regard the court would adopt and apply the approach taken by Sykes, J (ag), [as he then was] in the case of **Leeman Anderson v The Attorney-General & Christopher Burton** (Suit No. C.L A 017 of 2002, delivered on July 16, 2004). At page 11 of that judgment, in relation to the Civil Procedure Rules and their effect on actions, the learned judge said:

> "It would seem that under the new rules a failure to state in the claim form the facts being relied on to ground the claim for exemplary damages may not necessarily be fatal provided that the claimant makes it clear in the claim form that he is claiming

> exemplary damages. Because of the restricted categories in which exemplary damages can be awarded and certainly in the case of servants of the Crown the witness statement should make the basis of the claim for exemplary damages obvious to all who read it. The purpose of particularizing is not an end in itself but a means to an end, namely, advanced notification of (a) the the claim for exemplary damages and (b) the facts being relied on to ground the claim. This same principle can be applied to aggravated damages."

42. He concluded, at page 12 of the judgment:

> "The witness statement of Mr. Anderson made it very clear what he was complaining about and I would have been prepared to hold that the defendants had notice of the claim for exemplary damages as well as the facts being relied if it had happened that the statement of claim had only the claim for exemplary damages but did not plead the facts being relied on."

43. In the instant case, too, the witness statement gives a clear indication of the substance of the claimant's claim and the basis of that part of his claim for exemplary damages.

44. In the court's view, an award of $700,000 would be fair and reasonable in the circumstances. It is based on the sum awarded in the **Maxwell Russell** case adjusted (but not updated exactly) from the $400,000 awarded on January 18, 2008.

Aggravated Damages

45. The claimant seeks the sum of $1,500,000 under this head, again citing no authority. For the defendant, in the main, the same submissions were advanced as those urging the court not to make an award of exemplary damages. However, if the court should choose to make such an award, the sum of $200,000 would be reasonable. (Again, this figure is exactly that made on January 18, 2008).

46. In the court's judgment, the appropriate award is one of $250,000, using the adjusted (but not updated exactly) award in the **Maxwell Russell** case as a general guide. The factual basis of the award includes the dragging of the claimant in the blanket by his feet, in the apparent belief that he was dead; the delay in taking him to the hospital and other similar facts.

General Damages

47. The court considers an appropriate award under this head to be $3,000,000. This figure has been arrived at based on a consideration of Exhibits 2 and 3 (the medical reports); and a consideration of the authorities cited by the claimant's attorney-at-law and the defendant's attorney-at-law. These cases are, for both the claimant and defendant: (i) **Hopeton Wauchope v The Attorney-General**, reported at Volume 5 of **Recent Personal Injury Awards,** at page 193, the award in which amounts to some $2,988,956.20 today; and (ii) **Renford Barrack v Oral Israel v The Attorney-General**, reported at Volume 6, page 152 of **Recent Personal Injury Awards.** That award amounts to some $2,661,520.60 today. The only other case cited by the defendant was the **Maxwell Russell case**, with an updated award for general damages for pain and suffering and loss of amenities of some $702,680.

48. The court has had regard to the injuries suffered in the instant case (which included 5 gunshot wounds necessitating a thoracotomy, laparotomy and left neck exploration, with repair of the left carotid artery. There is also diminished power in the right hand. No indication of his residual disability has been given and the doctor was hampered in his preparation of the final report by the docket going missing. This claimant's injuries

approximate most closely to those of the claimant in the **Hopeton Wauchope** case, hence the award.

49. In relation to his claim for loss of future earnings and handicap on the labour market, the claimant's case, in the court's finding, lacked the necessary supporting evidence – in particular medical evidence for the making of awards under these heads. Yes, he gave evidence of his efforts to work with the National Works Agency, but being unable to continue to do so; of not resuming his job as a bus conductor and so on. However, there is no medical evidence (as there ought), substantiating or lending any medical support to these claims.

Special Damages

50. There are some four items being claimed as special damages. These are: (i) $930 for hospital expenses (which was agreed, subject to a determination of liability; (ii) $800 for hospital supplies (also agreed, subject to a determination of liability); (iii) $661,400 for transportation expenses; and (iv) the sum of $3,500 per week from May 11, 2003 and continuing for loss of earnings.

51. In relation to the claim for transportation expenses and indeed all the other items of special damages that were not agreed, these damages must be specifically pleaded and properly proved. If an authority be needed for this trite legal proposition, then one such is **Lawford Murphy v Luther Mills** (1976) 14 JLR 119. The claim for transportation expenses, in the court's humble view, falls far short of crossing this threshold.

52. The main evidence as to transportation came from Mr. Derrick Watson. As Mr. Watson gave evidence, he frequently stated, for example: "...I didn't keep a track of the times I was carrying him"; "I can't tell you how much I was paid for that period of time. I never keep a count of that". He stated in evidence that he charged "about" $2,500 to take the claimant to the Kingston Public Hospital (KPH) and did so "probably" three times a week at first, then gradually less. For how long he took him three times a week

is not known. He also charged "about" $3, 000 per round trip to take the claimant to court – "whenever there is a court date. I never keep a track of the time". He stopped transporting the claimant in around the year 2006.

53. It can be seen that this evidence is wholly unsatisfactory. However, accepting that the claimant sustained serious injuries that would have necessitated extended treatment and that he would also have had to have attended court on several occasions, the court will award the sum of $50,000 for transportation expenses.

54. The state of the evidence in relation to his alleged loss of earnings is equally unsatisfactory. His evidence was that he was a bus conductor earning approximately $3,500 per week at the time of the incident. There is no supporting evidence of this or of how long, on medical grounds, he would not have been able to work. Again, doing the best it can in the circumstances, the court will award him the sum that he gave evidence that he earned at the time for a period of nine months or 36 weeks, amounting to $126,000.

56. In light of the foregoing, there will be judgment for the claimant as follows: - For -

(i) Special damages in the sum of $177,730 with interest thereon at the rate of 6% per annum from the 11th May, 2003 (the date of the incident) to the 21st June, 2006; and at the rate of 3% per annum from the 22nd June, 2006 to May 31, 2011;

(ii) False Imprisonment in the sum of $850,000 with interest thereon at the rate of 3% per annum from the 26th June, 2008 (the date of acknowledgement of service) to May 31, 2011;

(iii) Malicious Prosecution in the sum of $400,000 with interest thereon at the rate of 3% per annum from the 26th June, 2008 (the date of acknowledgement of service) to the May 31, 2011;

(iv) Assault and Battery in the sum of $3,000,000 with interest thereon at the rate of 3% per annum from the 26th June, 2008 (the date of acknowledgement of service) to the May 31, 2011;

(v) Exemplary Damages in the sum of $700,000.

(vi) Aggravated Damages in the sum of $250,000.

(vii) Costs to the claimant to be taxed, if not agreed.