IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 00126

BETWEEN	NEVILLE WILLIAMS	CLAIMANT
AND	JANINE FENDER	1st DEFENDANT
AND	CARLTON HENRY	2nd DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	3rd DEFENDANT

Mr. André Earle and Miss Anna Gracie instructed by Terry Ann Jeffery of Rattray Patterson Rattray for the Claimant

Miss Akilah Anderson instructed by Knight Junor and Samuels for the 1st Defendant

Miss Tasha Manley instructed by the Director of State Proceedings for the 2nd and 3rd Defendants

Heard: October 4, November 6, 7, December 17, 2008, January 7, and July 1, 2009

Malicious Prosecution (whether Complainant can be considered Prosecutor)
False Imprisonment
Negligence (whether Claim for Negligence against Police Officer can be sustained)

Sinclair-Haynes J

On November 5, 2000, Mr. Neville Williams (claimant) attended the Irish Town Police Station as a result of receiving certain information. There he was identified by Miss Janine Fender (first defendant), as the person who had assaulted her with a hard object and raped her the night before.

Consequent upon Miss Fender's allegations he was arrested by Detective Constable Carlton Henry, now Detective Sergeant (second defendant) for the offences of Rape and Assault Occasioning Bodily Harm. He was handcuffed to a chair at the station for about half an hour. Mr. Williams was remanded in custody at the Constant Spring Police Station and the Remand Centre for four months before he was granted bail.

Whilst on bail he was ordered to report to the Irish Town Police Station on Mondays, Wednesdays and Fridays.

There was a Preliminary Enquiry into the matter and he was committed to stand trial for the offences for which he was charged. He was tried and convicted of the offences on the 27th day of May 2001.

On May 28, 2001, he was sentenced to seven years imprisonment for the offence of Rape and to three years for the offence of Assault Occasioning Bodily Harm. Both sentences were to run concurrently.

Whilst he was incarcerated at the General Penitentiary, he was stabbed on his arm and bitten by a fellow inmate. He was in constant fear for his life. He lost contact with his girlfriend and infant daughter because his girlfriend stopped visiting him. His time behind bars was torturous and horrifying.

Mr. Williams steadfastly maintained his innocence, and an application for leave to appeal his conviction was made on his behalf. It was refused. He expressed his willingness to undergo DNA testing in order to prove his innocence.

Contact was made with the Police Forensic Laboratory on May 20, 2003 for DNA testing. Mrs. Andrea Bickhoff-Benjamin, his then attorney, was informed by Miss Sheron Brydson, Government Forensic Analyst, that the DNA tests were carried out before on the

samples that were taken from Miss Fender and Mr. Williams. Miss Brydson also informed Mrs. Bickhoff-Benjamin that the results of those tests had been available since January 2001.

The assistance of the office of the Director of Public Prosecution's (DPP) was sought to obtain the results. On June 11, 2003, Mrs. Bickhoff-Benjamin received from the Director of Public Prosecution's office, faxed copies of documents entitled "DNA Typing Results" and "Estimates of Probabilities" which were dated January 8, 2001.

As a result, an application for leave to appeal and notice of the grounds of appeal were filed in the Court of Appeal.

The appeal was heard on November 23, 2003. The court granted an application to admit further evidence and, as a result, the evidence of Miss Sheron Brydson was heard on the "DNA Typing Results" and "Estimates of Probabilities." She told the court that the DNA profile derived from the samples taken from the panty was different and did not match the DNA profile taken from the underpants. Consequently, Mr. Williams' conviction was quashed and a verdict of acquittal was entered on November 5, 2003. The decision was unanimous. He was released from the General Penitentiary having served three years of his sentence.

Miss Paula Llewellyn, Senior Director of Public Prosecutions, as she then was, represented the office of the DPP in an interview on the television programme, **"Impact,"** on which she expressed sympathy for Mr. Williams and stated that the incident was regrettable and that the DPP's office took full responsibility.

On January 14, 2005, Mr. Williams instituted proceedings against Miss Janine Fender (first defendant), Constable Carlton Henry (second defendant) and the Attorney General (third defendant). The Attorney General is sued pursuant to the provisions of the Crown Proceedings Act. Mr. Williams seeks Damages for Malicious Prosecution, False Imprisonment, Aggravated Damages, Exemplary Damages and Interest.

Mr Williams' Version

Mr. Williams now resides in Canada. He contends that at the time of his arrest, he worked in construction and as a mechanic; and Miss Fender was not a student as she stated but an occasional worker. He asserts that since 1999 the relationship between himself and Miss Fender has been acrimonious because Miss Fender assaulted his heavily pregnant girlfriend and he retaliated by hitting her with a stick.

He contends further that:

i) Miss Fender concocted the identification evidence to the effect that he assaulted her with a hard object and raped her on the night of November 5, 2000;

ii) whilst at the station, she reminded him that she had told him that she was going to f... him up;

iii) she knowingly gave false evidence with the intention that Mr. Williams would be prosecuted for the offences;

iv) she was involved in a relationship with Sergeant Henry;

v) Sergeant Henry was aware or should have been aware of the fact that Miss Fender's evidence was concocted. Without regard to his responsibilities and obligations as a police officer, he continued with the prosecution of Mr. Williams with the knowledge that he would be convicted for the offence.

As a consequence, Mr Williams:

1. was wrongfully imprisoned and deprived of his liberty;
2. suffered injury to his character and his reputation;
3. suffered considerable mental and physical pain and anguish;
4. has been put to considerable trouble, expense and inconvenience; and
5 has sustained loss and damage.

The claimant further contends that Sergeant Henry was negligent in the conduct of his investigation in that he:

a. neglected and/or refused to enquire into and/or retrieve the results of the DNA testing;

b. failed to perform his investigation to the standard required of an Investigating Officer;

c. failed to enquire into and/or obtain the vaginal swab of Miss Janine Fender; and

d. failed to adequately investigate the complaint made by Miss Fender.

Consequently, he:

i) faced the fear and anxiety of a groundless prosecution and conviction against him;

ii) suffered grave financial constraints in paying for the services of an attorney in a lengthy court battle and an Appeal;

iii) lost contact, as a result of his incarceration, with his daughter and has not to date been able to find her; and

v) was deprived of his liberty for three years.

Miss Janine Fender's Version

Miss Janine Fender insists that she was raped and assaulted by Mr. Williams and refutes Mr. Williams' claim that he worked as a mechanic and in construction. She insists that she was at the material time a student of Excelsior. She denies that she had a relationship with Sergeant Henry. She asserts that she used a stone to hit his girlfriend but the girlfriend was not heavily pregnant. Mr. Williams boxed her but he later apologized and the relationship between them has since been amiable.

She is adamant that she never knew Detective Sergeant Henry before and that she had no knowledge of DNA results being withheld. She strenuously denies that she ever told Mr. Williams in the presence of Sergeant Henry she was going to "f... him up."

Sergeant Henry's Version

Sergeant Henry repudiates the claim of Mr. Williams that he acted maliciously/or without reasonable and probable cause or negligently. He also trenchantly denies that he had a

relationship with Miss Fender. He denies hearing Miss Fender use the words attributed to her by Mr. Williams.

Submissions by Mr. Andre Earle on behalf of the Claimant

Mr. Earle submits that the arrest and detention of Mr. Williams without bail were unreasonable and without legal justification. He relies on **Peter Flemming v Sergeant Myers and The Attorney General of Jamaica** (1989) 26 JLR 525. He submits that the claimant has satisfied all the ingredients of Malicious Prosecution. He has proven that:

a. he has been prosecuted on a criminal charge by the defendant before a competent court;

b. the proceedings against him were terminated in his favour;

c. the defendant did not prosecute the claimant to further the ends of justice, but maliciously and with improper motives. He relies on **Kenneth Morgan v The Attorney General of Jamaica** suit no. CL 1995 M/070; and

d. there is an absence of reasonable and probable cause for the proceedings. He submits that the fact that the DNA results were available from as early as January 8, 2001 meant that the continued prosecution was both without reasonable and probable cause and was carried on with an improper motive. He relies on **Dallison v Caffery** [1964] 2 All ER 610 in which Lord Denning MR (as he then was) at page 618 stated the duty of prosecuting authority as follows:

> *"If he knows of a credible witness who can speak to the material facts which tends to show the prisoner to be innocent, he must either call that witness himself or make the statement available to the defence. It would be highly reprehensible to conceal from the court such evidence that such witness can give."*

He further submits that the principle is extended to the police force because the DPP acts on the advice of investigators of the police force. The principle may also be applied to evidence that if tendered would be wholly exculpatory.

It is his submission that the claimant has suffered damage as a result, and he relies on **Mullings v Morel Hall and Pinnock** [1993] 30 JLR 278 at page 279.

Submission on behalf of First Defendant by Miss Akilah Anderson

Miss Anderson submits that the claimant is not an honest and credible witness. It is her submission that Mr. Williams posited various theories to explain or indicate the malicious intent of the defendants. There were four Amended Particulars of Claim filed on his behalf. He admitted signing all four. She submits that paragraph 5 of the first three Statements of Claim all stated that in or around October 2000, the claimant and the first defendant had a dispute and thereafter he abruptly ended their relationship.

His Particulars of Claim also stated that the first defendant hurled expletives at him and threatened to injure him. She submits that that theory was presented to indicate or substantiate the presence of malice on the part of the first defendant when she complained to the police about being raped by him. She submits that his Witness Statement which was filed on December 7, 2008 stated that he was not involved in any relationship with Miss Fender and makes no reference to ending any relationship nor does it refer to any threat to him by the first defendant.

She submits that his explanation, under cross-examination, that when he used the word 'relationship' in his Particulars of Claim he did not mean an intimate relationship was a departure from the clear inference to be drawn from his Particulars of Claim. She submits that his evidence that he never told his attorney-at-law that he was ever involved with Miss Fender is not to be believed because he read and signed the pleadings they prepared on his behalf. She further submits that the claimant revealed for the first time in his evidence-in-chief that he held the view that Miss Fender and Sergeant Henry shared an intimate relationship and conspired against him.

The amendment of the Particulars of Claim, one year after, to include a claim that Miss Fender and Sergeant Henry had an intimate relationship, is evidence of his lack of credibility. Further, he has presented no evidence to support his claim. In the circumstances, she submits

that his claim that they shared an intimate relationship should be rejected as support for a claim of malice on the part of either of them.

She submits that the court should find that Mr. Williams is a dishonest witness and reject his evidence that he saw Miss Fender and Sergeant Henry driving around the community in the daytime. The court should reject his evidence that he would see Sergeant Henry driving in one direction with her and then returning without her hours later.

She submits that Miss Fender was 17 years old at the time of the rape and she was a student who would have been absent from the area from 8:00 a.m. - 4:00 p.m. on week-days.

Re DNA

Miss Anderson further submits that Miss Brydson told the Court of Appeal that the results did not match but she gave no further evidence to state what the possible impact of that might be. She gave no evidence to that court as she did to this court clarifying that the results would have had to have been (B) compared to a control sample (swab) in order to give a conclusive result. The statement of Miss Brydson to this court is now better informed by the passage of time and a deeper understanding of how to correctly analyse the data obtained by the DNA testing.

She submits that it may have been irresponsible and even misleading to present the result and analysis of the DNA testing at the criminal trial as there was insufficient scientific explanation of the meaning of the data findings. No control sample (swab) was available to facilitate a proper and accurate comparison. In a case of this nature, vaginal swabs are more amenable to DNA testing than smear.

She further submits that the court is left without assistance and without a full explanation and understanding of these different factors and in the circumstances Mr. Williams has not proven his case.

It is her submission that the court ought not only to examine whether the DNA result should or should not have been presented and by whom, but also the possible effect of its evidential value if it was presented.

Further, she submits that the fact that Mrs. Andrea Bickhoff-Benjamin, who was a member of the claimant's defence team at the criminal trial, felt at that trial that there were sufficient issues to be explored without reference to forensic evidence indicates that there were in fact several other cogent issues taken into account there. Mrs. Bickhoff-Benjamin's evidence was that the defence was of the opinion that they had a strong case.

The fact that there was a witness, Auldine Clarke, who spoke to the issue of hearing Miss Fender address someone, whom they both saw on the night of the incident, by one of the names attributed to the claimant, in light of his alibi defence strengthened an argument that the admission of a DNA test may have had the same result. She submits that there was no collusion between Miss Fender and Mr. Clarke and that she identified her assailant by the name Didly.

If the court finds that the claimant was wrongly identified by Miss Fender, she was at the very least an honest but mistaken witness. The claimant has failed to prove on a balance of probabilities that she deliberately and wrongfully identified her assailant.

She submits that the medical report, dated November 10, 2001 indicates laceration to the face which is consistent with the stone throwing claim and lacerations to her back, thigh and vagina which indicate evidence of recent sexual contact.

Miss Anderson further submits that Miss Fender was a rational witness of truth. The court should therefore accept her evidence that she spoke to Mr. Williams occasionally. The court, she submits, should reject his evidence that he never spoke to her at all and find that that assertion by Mr. Williams is simply to support his claim that she did not identify her attacker.

Submissions of Miss Tasha Manley on behalf of Sergeant Henry

Miss Manley submits that the claimant has failed to establish liability on the part of Detective Sergeant Henry with respect of the torts of false imprisonment, malicious prosecution and negligence.

She submits that the claimant must prove both lack of reasonable and probable cause, and malice. She contends that the views expressed by Forte JA in **Flemming v. Myers** [1989] 26 JLR 526 regarding the interpretation of Section 33 of the **Constabulary Force Act** did not lay down any established principle of law. That view was not based on the material facts of the case which were necessary for his decision. The view of the court cannot be justified as it offers less protection to police officers than they have at common law. This approach is inconsistent, she submits, as the legislature by virtue of section 33 intended to give additional protection to police officers.

She further submits that the claimant has failed to prove that:

a. the law was set in motion against him by Sergeant Henry on a charge of criminal offence;

b. he was acquitted of the charge or that otherwise it was determined in his favour;

c. the prosecution set the law in motion without reasonable and probable cause;

d. in so setting the law in motion, the prosecution was actuated by malice.

She contends vigorously that Sergeant Henry cannot he held liable as a Prosecutor. It is the person who makes the accusation who is to be regarded as having instituted the proceedings in the sense required to establish the tort. She relied on **Tewari v Singh** (1908) 24 TLR 884 and the House of Lords' decision of **Martin v Watson** (1996) AC 74.

She further submits that the prosecution did not end in the claimant's favour. According to her, an appeal is not a prosecution and therefore not the termination of a prosecution.

Prosecutions end in the Circuit Court and in the instant case it did not end in the claimant's favour. She relies on **Herniman v Smith** [1938] AC 305.

Her Submissions re Reasonable and Probable Cause

She submits that Sergeant Henry had reasonable grounds to believe that the claimant was probably guilty of the offence of rape. He arrived at those grounds after due enquiry. The grounds were as follows:

1. Miss Fender made a report and gave a statement that she had been raped by Mr. Williams;
2. Miss Fender's statement indicated that she knew the identity of her attacker;
3. the medical examination of the medical officer who examined Miss Fender stated that there was injury to her face, thigh, back and vagina; and
4. statements were taken from two other persons, Auldine Clarke and Sybil Fender which supported her complaint of rape.

The fact that Miss Fender indicated that she knew the person who raped her, together with the further enquiries he made were sufficient to ground an honest belief in the claimant's guilt. She submits that **Barbour v The Attorney General Trinidad and Tobago** TT (1981) CA 36 Suit No Civil Appeal No 28 of 1979 (Unreported) is analogous. It is her submission that any prudent and cautious police officer placed in Sergeant Henry's position would have been led to the conclusion that Mr. Williams was probably guilty of the crime imputed.

She also submits that Sergeant Henry as Prosecutor was not under a duty to ascertain whether there was a defence or enquire into the whereabouts of Mr. Williams. His duty was to determine whether there was reasonable or probable cause for the prosecution. The belief in the existence of such facts would justify a prosecution of Mr. Williams at the time of the offence. It was not for him to consider the defendant's defence. She relies on **Halsbury Laws of England** fourth edition volume 45 paragraph 1354.

Further, she submits that, based on the nature of the complaint made to him and the medical evidence, Detective Sergeant Henry not only had reasonable and probable cause, but was obliged to arrest and charge Mr. Williams.

She submits that the fact that he was prosecuted by Counsel from the DPP, was committed to stand trial and at his trial he was convicted justifies the assertion that he had reasonable and probable cause for both initiating and carrying on the prosecution. She relies on the observations made by the learned authors of **Halsbury Laws of England** 4th edition volume 45. She relies also on **Mohammed v. Taylor** TT (1994) High Court No. 5 2410 of 1987 (Unreported) and **Windsor v The Attorney General** TT (1996) High Court No. 1692 of 1990 (Unreported).

She contends forcefully that the claimant has failed to adduce cogent or supporting evidence to substantiate his claim that Sergeant Henry:

1. falsely and maliciously gave evidence that he investigated the accusation laid against the claimant when he did not;
2. deliberately and wrongfully withheld the result of a DNA test; and
3. had an intimate relationship with Miss Fender.

It is her submission that the evidence adduced shows that Sergeant Henry fully and diligently investigated the allegations against the claimant.

Her Submission re Malice

Miss Manley relies on her submissions regarding the presence of reasonable and probable cause. She further submits that the claimant has not adduced any evidence to support his claim that Sergeant Henry's prosecution of him was actuated by malice. There is no evidence of any ill-will or argument between the claimant and Sergeant Henry prior to the incident. The claimant's evidence is that he had an altercation with Miss Fender. There is nothing to support

the allegation that Sergeant Henry was involved in an intimate relationship with Miss Fender. That would be the only evidence which would provide a basis for malice. However, such evidence is incredible and ought to be rejected. He never saw the person who drove her outside of the car, so he cannot be sure that that person was Sergeant Henry. Further, he has not provided any witness from the community to support his allegations.

She further submits that the facts of what happens in a rape case are within the exclusive knowledge of the complainant. Sergeant Henry consequently had no discretion in the matter. He was obliged to investigate and proffer a charge where he honestly believed that Mr. Williams committed the offence alleged. She relies on **Gilinski v McIver** (1962) AC 726.

She submits that Sergeant Henry takes legal advice from the DPP or the Clerk of Court. The DPP confirmed that the charges should be proffered. In the circumstances, the officer cannot be said to have acted maliciously in instituting the proceeding. She relies on **Mohammed v Taylor** TT (1994) HC 4 Suit No. S-2410 of 1987, **Windsor v the Attorney General** TT (1996) HC 176 Suit No. 1692 of 1992 and **Henry v Tracey** 1997 Consolidated Suits Nos. C.L. 1992/H107, C.L. 1992/H107, C.L. 1992/W114, C.L. 1991/R145.

Her Submission re False Imprisonment

Sergeant Henry, she submits, was under a duty to arrest Mr. Williams. She relies on her submission regarding reasonable and probable cause.

Is Mr. Williams a Dishonest Witness?

Has Mr. Williams' credibility been impugned so as to render him an unreliable and incredible witness?

It is Mr. Williams' testimony that the use of the word "relationship" did not mean "intimate relationship." They both lived in the same community and he would see her from time

to time. The use of the words "ended the relationship" in the Statement of Claim never meant he ended an intimate relationship with her.

He denies that he told his lawyer that they were in an intimate relationship and refutes the suggestion that he changed his story to say that he had a fight with Miss Fender because it was a better explanation to the police.

It is his evidence that at his trial he told the court that Miss Fender had a fight with his girlfriend and she was carrying 'vindictive' feelings for him. He never mentioned the relationship between Sergeant Henry and her because he was not asked. He later told the court he could not remember if he told the court at his trial that Miss Fender and Sergeant Henry were in a relationship nor could he remember if he told the court that he saw them driving together.

Is Mr. Williams a dishonest witness who has merely posited various theories to indicate the malicious intention of the defendants as is submitted by Miss Anderson?

Miss Fender admits that there was indeed an incident between herself and Mr. Williams. Her version is that she used a stone to hit Mr. Williams' girlfriend, 'Bobbet,' and he boxed her. She told the police that as a result of that incident they stopped 'hailing each other.' Their evidence diverges as to whether the girlfriend was heavily pregnant and whether he boxed her or used a stick to hit her.

Miss Fender subsequently altered her statement to the police when she testified that they resumed speaking to each other. Although Mr. Williams did not elaborate at his trial as to why he said she had vindictive feelings for him; his story is not a fabrication. Indeed Miss Fender regarded the incident with his girlfriend as significant because she thought it important to inform the police of that incident and the fact is that as a result of that incident they had stopped speaking to each other.

His Further Amended Statement of Claim, dated November 6, 2006, stated that the second defendant informed him that the underwear was taken to conduct a DNA test. However, it is his evidence that his underwear was requested by Sergeant Henry to be tested at the laboratory. It is also his evidence that it was Mrs. Bickhoff-Benjamin who visited him in prison and explained the meaning of DNA testing to him. The Amended Statement of Claim was signed by him and he admitted reading it but having heard and observed him as he testified I do not believe that he told his attorneys that Sergeant Henry informed him that the underwear was for DNA testing to be done. Mr. Williams is not an educated man. He was not even aware of the existence of such a test before he was informed by his attorney. I find that he told his attorney that the underwear was taken to be tested. I find that it was the attorney who later discovered that a DNA test was done, who drafted the Amended Statement of Claim in such a manner.

Mrs. Andrea Bickhoff-Benjamin testified that, while conducting the trial on behalf of Mr. Williams, they never thought that DNA evidence would have been necessary because they had a strong case.

Mr. Williams testified at his criminal trial and to this court that Miss Fender in the presence and hearing of Sergeant Henry made the following statement, "Is long time I tell you me ah go f... you up." Is Mr. Williams being truthful or is it an embellishment intended to buttress his claim of malice?

It is Miss Anderson's submission on behalf of Miss Fender that his evidence that Sergeant Henry and Miss Fender were involved in a relationship should be rejected as a recent invention since it was not raised at his trial, and his Particulars of Claim was amended to include it.

The question is whether Mr. Williams has deliberately lied about Miss Fender's involvement with Sergeant Henry in an effort to eke out a case of malice against them or whether he honestly held that view.

Has the Claimant Satisfied the Ingredients of Malicious Prosecution?

Whether the Claimant must establish both Malice and Reasonable and Probable Cause against Sergeant Henry

I will at this juncture consider Miss Manley's criticisms of Forte JA's enunciations in **Flemings v Sergeant Myers and the Attorney General** (1989) 26 JLR 526 at p 534.

Section 33 of the **Constabulary Force Act** states as follows:

> *"Every action to be brought against any Constable for any act done by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant."*

The use of the conjunction 'or' leads to the ineluctable conclusion that the words 'maliciously' and 'reasonable and probable cause' are applied disjunctively. In the circumstances, the claimant is not required to prove both malice and absence of reasonable or probable cause against Sergeant Henry (because he is a police officer).

Whether the Prosecution Terminated in Mr. Williams' Favour

Lord Atkins' statement in **Herniman v Smith** (1938) AC 305 makes short shrift of Miss Manley's submission that an appeal is not a prosecution and therefore not the termination of a prosecution because prosecutions end in the Circuit Court.

At p 315 he said:

> *"... one Rickard, was charged with conspiracy to defraud ... They were charged before the justices at Edmonton ..., committed for trial to the Central Criminal Court, tried there before the present*

Recorder, and convicted and sentenced each to twelve months imprisonment. On appeal to the Court of Criminal Appeal the court set aside the conviction, being of the opinion in the case of Herniman that there was not a sufficient case to go to a jury, and that in all the circumstances it would be safer that the conviction against Rickard should be quashed as well. In these circumstances it was not disputed, and in my opinion could not be disputed, that the proceedings had terminated in favour of the present plaintiff so as to satisfy that essential element in an action for malicious prosecution."

(See also **Halsbury's Laws of England,** 4th edition, volume 45 p 615 para 1350)

Was Mr Williams Maliciously Prosecuted?

Malicious Prosecution is an abuse of the process of the court by wrongfully setting the law in motion on a criminal charge (see **Rawlins Jenkins** (1843) QB 419).

In **Martin v Watson** (1995) 3 All ER 559, Lord Keith approved of the statement of the learned authors of **Clerk and Lindsell on Torts** as to the ingredients of the tort of malicious prosecution. At page 562 he stated:

*"It is common ground that the ingredients of the tort of malicious prosecution are correctly stated in **Clerk and Lindsell on Torts."** (16th edition, 1989) p 1042 para 19-05*

"In an action of malicious prosecution the plaintiff must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the plaintiff."

The words of Hawkins J in **Hicks v Faulkner** have been considered by Lord Atkins in **Herniman v Smith** AC (1938) at p 306) as the best statement of the issue of want of reasonable and probable cause:

"I should define reasonable and probable cause to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true would reasonably

lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

The meaning of malice is nicely defined by Cave J in **Brown v Hawkes** [1891] 2QBD 718. At p 722 he stated:

"Malice, in the widest and vaguest sense has been said to mean any wrong or indirect motive; and malice can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor."

Mr. Justice Gault in **Gibbs and Others v. John Mitchell Rea (Cayman Islands)** [1998] UKPC 3 (January 29, 1998), further elucidated the definition of malice:

"Malice in this connection does not necessarily connote spite or ill-will. It is sufficient if a defendant is shown to have used the machinery of the courts for an improper purpose not in the contemplation of the authorising statute."

Was it Miss Fender who Prosecuted Mr. Williams?

Can Miss Fender be regarded as having set the law in motion against Mr. Williams?

The head note of the House of Lords case of **Martin v Watson**, (1996) AC 74 encapsulates the House's position on the matter:

"A person who in substance was responsible for a prosecution being brought against the plaintiff was liable to the plaintiff for malicious prosecution if the other essentials of the tort were fulfilled. The mere fact that a person gave information which led to their bringing a prosecution did not make the person the prosecutor, but if that person falsely and maliciously gave a police officer information indicating that some person was guilty of a criminal offence and stated that he was willing to give evidence in court of the matters in question it was proper to infer that he desired and intended that the person named should be prosecuted. Where the circumstances were such that the facts relating to the alleged offence could be within the knowledge only of the complainant as was the position in the case of the defendant, then it was virtually impossible for the police officer to exercise any independent discretion or judgement, and if a prosecution was

instituted by the police officer the proper view was that the prosecution had been procured by the complainant. The fact that he was not technically the prosecutor should not enable him to escape liability where he was in substance the person responsible for the prosecution having been brought."

In that case, the defendant complained to the police that the plaintiff had indecently exposed himself to her. As a result, the plaintiff was arrested and charged. The prosecution offered no evidence at the hearing and the charge was dismissed. The plaintiff then sued the defendant for malicious prosecution. The judge found that the defendant had maliciously made a false allegation against the plaintiff. The judge also held that the defendant was the prosecutor and was actively instrumental in setting the law in motion against the plaintiff. The defendant appealed on the ground that the person who made a false allegation to the police with the intention that the police should act against the accused did not set the law in motion and was not the prosecutor for the purposes of the tort of malicious prosecution. The plaintiff also appealed to the House of Lords.

There were no reported English decisions in which the defendant in an action for malicious prosecution had falsely and maliciously made accusations to the police which resulted in the police initiating prosecution. Consequently, Lord Keith who delivered the reasons on behalf of the House sought assistance from a number of decisions from other Commonwealth countries.

The following statements were cited by Lord Keith and adopted as valid English Law.

In **Pandit Gaya Parshad Tewari v Sardar Bhagat Singh** (1908) 24 TLR 884, an appeal to the Privy Council from India, Sir Andrew Scobel said:

"If, therefore a complainant did not go beyond giving what he believed to be correct information to the police and the police, without further interference on his part (except giving such honest assistance as they might require), thought it fit to prosecute, it

would be improper to make him responsible in damages for the failure of the prosecution. But, if the charge was false to the knowledge of the complainant, if he misled the police by bringing suborned witnesses to support it, if he influenced the police to assist him in sending an innocent man for trial before the magistrate, it would be equally improper to allow him to escape liability because the prosecution had not technically been conducted by him."

In that case, the plaintiff was acquitted as a result of false information which the defendant gave the police.

The New Zealand Court of Appeal considered the point in **Commercial Union Assurance Company of N Z Ltd v Larmont** (1989) 3 NZ LR. 187 at page 196 Richardson J. said:

"To summarize the New Zealand authorities, a defendant who has procured the institution of criminal proceedings by the police is regarded as responsible in law for the initiation of the prosecution. Expressions such as "instigate", "set in motion" and "actively instrumental in putting the law in force", while evocative do not provide an immediate touchstone for the decision of individual cases. That requires close analysis of the particular circumstances. In the difficult areas where the defendant has given false information to the police that in itself is not a sufficient basis in law for treating the defendant as prosecutor. That conduct must at least have influenced the police decision to prosecute."

At page 199, he continued:

"It does not follow that there is any call for modifying the test which has been developed in the decisions of this court for determining whether a third party is responsible in an action for malicious prosecution for criminal proceedings instituted by the police. What is required is a cautious application of that test where the police have conducted an investigation and decided to prosecute. The core requirement is that the defendant actually procured the use of the power of the state to hurt the plaintiff. One should never assume that tainted evidence persuaded the police to prosecute. In some very special cases, however, the prosecutor may in practical terms have been obliged to act on apparently reliable and damning evidence supplied to the police. The onus properly rests on the plaintiff to establish that it was the false evidence tendered by a third party which led the police to

prosecute before the party may be characterized as having procured the prosecution."

McMullin J. in the said case expressed the following:

> *"As a general rule a prosecution will be considered to be brought when the information is laid by the person who lays it. In the result, in prosecutions under the Crimes Act 1961, as was Mr. Lamont's, the police will generally be treated as the prosecutor and no action for malicious prosecution will lie against the person on whose information the police have acted. But in some cases the person who supplied the information to the police may be regarded as the prosecutor even though the information was not laid by him. A person may be regarded as the prosecutor if, inter alia, he puts the police in possession of information which virtually compels an officer to lay an information; if he deliberately deceives the police by supplying false information in the absence of which the police would not have proceeded; or if he withholds information in the knowledge of which the police would not prosecute. The matter was put in the following way by Isaacs ACJ in Davis V Gell (1924) 35 CLR 275 at 282 'For the purposes of this form of action the law looks beyond theory and regards the person in fact instrumental in prosecuting the accused as the real prosecutor. It enables the person innocently accused to treat his virtual accuser as party to the criminal charge, a circumstance bearing directly on the question of the effect in the civil action of the judicial termination of the criminal proceedings. The substance and not the legal form must in all cases govern, and while, on the one hand, a person giving information to the police is not necessarily the prosecutor yet, on the other, the mere fact that the police conduct the prosecution does not exclude him from that position."*

The American Law Institute, **Restatement of the Law, Torts** (2nd edition, 1977) p 409, para 653 dealt with the matter in this way (as follows):

> *"When a private person gives to a prosecuting officer information that he believes to be true, and the officer in the exercise of his uncontrolled discretion initiates criminal proceedings based upon that information, the informer is not liable under the rules stated in this section even though the information proves to be false and his belief was one that a reasonable man would not entertain. The exercise of the officer's discretion makes the initiation of the prosecution his own and protects from liability the person whose information or accusation has led the officer to initiate the proceedings. If however the information is known by the giver to be false, an intelligent exercise of the officers' discretion becomes*

impossible, and a prosecution based upon it is procured by the person giving the false information. In order to charge a private person with responsibility for the initiation of proceedings by a public official, it must therefore appear that his desire to have the proceedings initiated, expressed by direction, request or pressure of any kind, was the determining factor in the official's decision to commence the prosecution or that the information furnished by him upon which the official acted was known to be false."

If Miss Fender commenced and continued proceedings against Mr. Williams with the honest, but mistaken, belief that he raped and assaulted her, she cannot be regarded as the prosecutor.

However, if she deliberately, maliciously and falsely informed the police that Mr. Williams raped and assaulted her, she would have abused the process. Nonetheless, Mr. Williams has the responsibility of proving that it was the false report tendered by Miss Fender which led Sergeant Henry to institute proceedings and that she indicated her willingness to testify. If he succeeds, Miss Fender must be regarded as the prosecutor.

Has Mr Williams succeeded in proving that she deliberately, falsely and maliciously accused him? Has he succeeded in proving the essentials of malicious prosecution against Miss Fender?

In order to arrive at a conclusion, I must consider all the circumstances of the case in order to ascertain whether Miss Fender indeed used the machinery of the court for an improper purpose, that is, to hurt Mr. Williams. Close scrutiny of her evidence is therefore necessary to determine whether Miss Fender maliciously prosecuted the claimant or whether she honestly believed that he was her assailant.

Miss Fender's Evidence-in-Chief

It is her evidence that sometime after 11:00 p.m. on Sunday November 5, 2000, she was returning home from Quest Night Club. She was with Auldine Clarke, also called Blacks. They

sat on the verandah of a shop. The area was lit by light from another shop which was about 15 to 20 feet away. Someone came behind her, used an expletive and instructed her not to move. She felt something sharp in her side. The person said to Auldine Clarke, "Move p.... before me kill you." She recognised the voice to be that of the Mr. Williams who is also called Didly. Auldine Clarke ran and left her. It is her evidence that prior to the incident she spoke to Didly occasionally, about once per week although they were not really friends. According to her he lived in the community for at least five years.

Mr. Williams pulled her onto the verandah of the shop and squeezed her throat which prevented her from calling out. He poked a black object in her side as he forced her into the shop. She was unable to see the object clearly.

Her back was to him at that time and he used one hand to pull off her shorts and instructed her to remove her panty but she refused. She struggled with him and he pushed her over the railing of the verandah. She was bent over with her back towards him. As they struggled, she turned "sideways" and realized something dark was over his face. She pulled it off and realized it was a tee shirt.

He tried to hide his face but she saw that it was Mr. Williams. She held onto his plaited hair. His face was about one foot from hers when she turned around. She also saw that he wore white pants and white shoes. The light which emanated from a shop which was next door enabled her to see. She said "Didly what dis fa," as they continued struggling. He was still squeezing her throat and she felt he was trying to break her neck. He forced her legs apart and during the struggle he pushed his penis into her while he was behind her. He continued pushing his penis inside her and she continued to fight until he discharged. Where upon he said, "One more bruk man, one more bruk."

At that point, she saw her friend Auldine and called out to him. Auldine Clarke ran towards them. He was armed with two stones. Mr. Williams pulled up his pants and underwear and ran. Auldine came to her and picked up her clothes. He instructed her to go outside the shop to put on her clothes. She did. Whilst she was putting on her clothes, she saw Mr. Williams returning. He had run in the opposite direction from where he lived but in order to get home he had to pass that area. Mr. Williams threw stones at them and one caught her on the right side of her face. She sustained a cut as a result. The area where this stoning incident occurred was brighter because they were outside where the light from the other shop was brighter and she was able to see him clearly. She recognised that he wore the same dark tee shirt. She realized that it was indeed black and he also wore the same white pants and white sneakers. She saw him for about two minutes. She called out and ran away leaving Auldine and Mr. Williams.

She went to a nearby house where she spoke to a lady named Gracie. They had a conversation and Gracie and her boyfriend took her home. Miss Fender spoke with her mother who took her to the Gordon Town Police Station. She was bleeding from her vagina and the police informed her that they could not accompany her to the hospital. However, they sent her to the University Hospital of the West Indies (UHWI).

She went to the hospital with her mother but the doctors told her they could not see her unless a police was present. They were sent away. They returned to Gordon Town Police Station, got a letter and they returned to the hospital. She was then examined by a doctor who instructed her that she was testing for the presence of sperm. The doctor took blood from her and sutured her. She was examined by the doctor and treated before daybreak.

Upon leaving the hospital, she returned to the Gordon Town Police Station where she gave a full statement to Detective Sergeant Henry. It was dawn and she and Sergeant Henry were the only persons present. He took her to the Rape Unit and there she "made a complaint

again." Detective Sergeant Henry took her to the Government Laboratory where she gave another statement and there she left her underwear.

Assessment of Miss Fender's Evidence

The visual identification evidence of Miss Fender is tenuous. Her assailant during the rape was behind her. She was only able to view his face during the struggle, as she turned sideways. He tried to hide his face. They were struggling and he was squeezing her throat. The lighting was not very bright. She was able to see from light which came from a shop which was 15 - 20 feet away. Under cross-examination, her evidence is that the shop was about 45 feet from the verandah. The light was not as bright as it was outside because it was her evidence that while they were outside the light from the other shop was brighter "and I could see him clearly."

In the circumstances, while she was in the shop, her ability to recognise her assailant would have been made under difficult circumstances and in poor lighting. Although it is her evidence that his face was a foot from hers when she turned around and under cross-examination she claimed she saw the whole of his face and not only a part of the side, the circumstances outlined would have prevented her from having frontal view of his face. Further, he was trying to hide his face and he was still choking her.

It is her evidence that she saw him outside where she could see him more clearly as the light from the shop was brighter. Assuming she was indeed attacked, I find that she was unable to positively identify the person who raped her. Her assailant ran away and some time had elapsed before the stoning incident. In the circumstances, she would not have been able to conclude that the person, who stoned her, was the same person who raped her. He was throwing stones at her and Auldine when she saw him and one stone caught her face. It is her evidence

that she saw him for about two minutes. It is unlikely that she would have stood looking at him for such a long time while he was stoning her.

She also purported to identify him by his voice. Her assailant would have used a total of sixteen (16) words between Auldine Clarke and her. She knew him for about five years and she spoke to him about once per week. Assuming this aspect of her evidence is accepted, her voice identification of him was not as slender as her visual identification.

Assuming the complainant's identification of Mr. Williams was mistaken, that does not *per se* render her malicious. If she sincerely but mistakenly believed it was Mr. Williams who raped and assaulted her there would be no absence of reasonable and probable cause based on her evidence-in-chief. It is therefore necessary for me to examine the evidence in its totality in order to determine whether she in fact was malicious in her prosecution of Mr. Williams and whether there was want of reasonable and probable cause for her prosecuting him.

It is her evidence that she was bleeding from her vagina and she was sutured. Dr. Hanna noted that there was no blood on her underwear. She (the doctor) noted that the seat of her underwear was soaked with clear fluid. She, however, found three spots of blood on her tee shirt. Dr. Hanna in her medical report stated that there was a 1.5cm abrasion to her right cheek. It is probable that the blood on her tee-shirt came from her cheek and not her vagina since there was no blood on her blue underwear. Further, the Forensic Certificate given under the hand of Sharon Bryson stated that no blood was detected on the blue panty.

The doctor's evidence also is that she observed abrasion and bruises on her thigh, back and vaginal region. Those injuries did not require suturing nor is there any evidence that she was sutured.

There is no evidence to support her claim that blood was taken from her. If Miss Fender was indeed raped, the fact that she lied about bleeding from her vagina and being sutured is not

sufficient to find that she was actuated by malice and not truly convinced, albeit mistakenly, that it was Mr. Williams who raped her. There might be some unrelated reason for the lies.

Her Statement to the Police

On November 6, 2000, Miss Fender gave a statement to the police in which she stated that she was a student at Human Employment and Resource Training (HEART). In her evidence-in-chief, she stated that she attended Excelsior Community College (EXED). Under cross-examination she insisted that she attended EXED. At the trial of Mr. Williams it was her evidence that she attended Excelsior.

In her statement to the police, which I will examine at this juncture, it was stated that in 1999 she had an argument with Mr. Williams' girlfriend and he got involved. She referred to him as Fredricks. As a result of that argument, they stopped hailing each other.
However, some time in 2000 she saw him at a shop where he gambled and he said, "You ah gwaan like you nuh waan free up man, but man goh hold yuh dung and tek it and nuh biznis wa want happen." She laughed and continued walking. She never believed he was serious.

Her evidence-in-chief is at variance with her statement to the police regarding her speaking to him. In her evidence-in-chief she stated that they spoke occasionally, perhaps once per week, if they were in the same place even though they were not really friends. However, in her statement, she said they had stopped hailing each other. Under cross-examination, Sergeant Henry admitted that he knew they were not speaking.

Assuming Mr. Williams indeed used those words to her in the circumstances she outlined in her statement, that is, they stopped hailing each other because of the incident with his girlfriend, would not she have regarded it as serious? Would she have laughed?

A Comparison of her Evidence with the Prosecution Witnesses and Statements she made elsewhere

Was her relationship with Mr. Williams amiable or was it acrimonious?

At the preliminary examination, it was her evidence under cross-examination that she saw him often. She spoke with him the Sunday before the incident. They spoke for a while about the conference. She also said there was no problem between them. When further cross-examined, at the preliminary examination she admitted that in 1999 she had an argument with his girlfriend and he hit her as a result. She admitted that she told the police that her uncle retaliated. She also admitted that she told the police that they never hailed each other.

However, she stated that they were not speaking but after a while he began speaking to her and apologised to her. Upon being cross-examined further, she insisted that she told the police that they began speaking again after a while. She insisted that that was in her statement to the police. However, her statement to the police does not contain any statement that they resumed speaking to each other or that there was any apology from him. In her statement, she stated that they had stopped hailing each other and some time in 2000 she saw him at a shop and he made the threatening comment earlier referred to. She laughed and continued to walk because she never thought he was serious.

At the trial of Mr. Williams, she denied that they had not spoken since 1999 and insisted that they spoke at the club and they even had drinks together.

How can this be reconciled with the evidence of Sergeant Henry, whose impression of the relationship between Miss Fender and Mr. Williams came from information obtained from her statement in which she stated that since 1999 they had stopped speaking to each other?

I reject as a lie her evidence that their relationship was amiable. I find that they were not speaking to each other.

Where was she a student and was she really a student?

Mr. Williams' evidence is that at the material time they were both casual workers. She denies that he was engaged in any work he testified to, but rather he gambled and was an idler. She asserts that she was a student of EXED at the material time and she attended school from 8:00 to 4:00 p.m. every day. However, in her statement to the police she stated that she was a student at HEART. The incident occurred on November 5, 2000 and on November 30, 2000 she testified at the RM Court that she was a student at EXED. At his trial she stated that she was a student at Excelsior. Where was she a student and was she really a student?

A curious fact is that she was a student of EXED who attended school from 8:00 a.m. to 4:00 p.m., yet she was at a night-club on a Sunday night until about midnight. She was in no hurry to get home as she was, according to her statement, speaking to Auldine Clarke (Blacks) on the verandah of a shop. Whilst walking home she saw Auldine who, she said, accompanied her part of the way. He then stopped and told her he was not going any further and she could walk home by herself.

It is Auldine Clarke's statement that he could not accompany her further because he had to go to work the following morning. Further, he stated in his statement that they sat outside a shop and spoke. Is that the behaviour of a student who attended school at 8:00 a.m.?

At the trial of Mr. Williams, the judge in her summation to the jury stated that she was sitting on a wall of the shop waiting for a ride. Was she waiting for a ride? Or was she going to walk? On a balance of probabilities, was Miss Fender a student or was she a casual worker? On a balance of probabilities I find that she was not a student.

Whether there was Malice and Absence of Reasonable and Probable Cause

Closer examination of the evidence is vital in order to determine whether she had reasonable and probable cause to accuse Mr. Williams and whether she was motivated, as Mr. Williams insists, by malice.

In her statement to the police she stated:

> *I saw Fredrick come up to me (sic) he had a black object in his hand. He turned to Blacks and said p.... move before me kill yuh."*

Blacks then ran off. According to that statement, she said when he came up to her she saw a black object in his hand. However, at the Preliminary Enquiry, she testified that she heard someone come up behind her and the person said something. She recognised the voice to be that of Mr. Williams. Under cross-examination, she testified that she never saw the person approaching; she realized the direction the person came from when the person held her around her neck.

At the trial of Mr. Williams, the learned trial judge in her summation stated that Miss Fender's evidence was that whilst she sat on the wall, a man came from behind and held her throat. Her evidence that the person came from behind and held her throat is at variance with her statement to the police that she saw Fredricks come to her and that he 'approached' her with the black object in his hand. If the person came from behind and held her throat at what point would she have seen the person come up to her with the black object in his hand? Under cross-examination, she said she never saw the person approaching. She realized the direction the person was coming from when she was held around her neck.

The learned trial judge in her summation stated that Miss Fender testified that when he came up behind her, she "didn't exactly know it was he." But when he was finished having sex with her she pulled the mask from his face.

What was Auldine's version of the facts regarding this aspect of the evidence? He stated in his statement to the police that as they sat outside a shop (and not on the verandah as stated by Miss Fender) talking, a man ran over to where they were. He immediately got up and he heard Janine say, "Didly a weh dat fah." He, Auldine Clarke, walked a little way off because at first he thought it was her boyfriend. He stood along the road-side for about 15 minutes because he wanted to see what was going to happen to her.

His version is diametrically opposite to hers. It was of his volition that he walked a little way off. In fact, at first he thought it was her boyfriend. At the Preliminary Enquiry, it was Auldine Clarke's evidence that whilst they were outside a shed he saw a man "pounded" into her. The man came down on her, held her and she and the man wrestled. She said, "Didly what dat fah." He left the scene. It was his evidence at the Preliminary Enquiry; he said he never heard the man say anything to him. He was not instructed to move nor was he threatened.

The critical question is, did her assailant use the words, "P.... move before me kill you." If he did not, then her ability to identify her assailant by voice would have been weakened by the reduction in the number of words he was alleged to have spoken.

Did she introduce those words in an effort to bolster the voice identification evidence against Mr. Williams? Even if she did so in order to strengthen her case against him if she honestly but mistakenly believed he was her assailant, that fact would not negate reasonable and probable cause. However, if she fabricated the story against him or if she was raped and assaulted by someone who, she knew, was not Mr. Williams, then she would have had no reasonable or probable cause.

Further, in her statement, she told the police that he had his hand over her mouth, she tried to shout out but she could not. She eventually managed to remove his hand and she called

out for Blacks who came and took up some stones. At that point, Mr. Williams removed his penis, pulled up his pants and ran away.

Blacks on the other hand told the police that he stood on the roadway for about fifteen (15) minutes. Upon realizing that she was in the building, he walked towards the building and saw her crying with her hands over her face. He made no mention of taking up any stones. He told the police he tried to find out what happened but to no avail. He then heard stones being thrown in their direction and so he "walked hastily down the street while Janine (Miss Fender) went to a track." The following day he saw Janine's sister, she told him that Janine (Miss Fender) was raped.

Miss Fender on the other hand told the police that Auldine Clarke (Blacks) helped her to take up her clothes and they ran down to the square where she put on her clothes. According to her, Blacks asked her if she wanted to report the matter to the Irish Town Police Station and she told him no, she wanted to tell her mother first. While they stood in the square, Mr. Williams returned and threw stones at them. A stone caught the side of her face causing it to bleed. She ran to a house in the square and Blacks ran.

At the Preliminary Enquiry, she told the court that Mr. Williams ran away when he saw her call her friend. Blacks came and spoke to her. He took up her shorts, tee shirt and underwear. He pulled her into the light to put on her clothes. She put on her clothes in the square. Blacks, however, told the court at the Preliminary Enquiry that when he returned he asked her what the problem was but she never responded. It was his evidence that he never picked up any stone that night and he never threw any. He did not pick up her shorts or underwear nor did he pull her into any light at the square to put on her clothes.

The learned trial judge in her summation stated that Miss Fender's evidence was that one of the stones thrown by the accused caught her face. Auldine at that point said, "Hey bwoy a

soldier dis. Mine wa you eh do," and Mr. Williams responded to him by saying, "soldier mi b.... c...." She ran off and left Auldine.

At the Preliminary Enquiry, Miss Fender testified that she saw Mr. Williams throwing stones. She was able to see him because he was at the shop where the light was. She saw his face. He threw the stones about five minutes after Blacks returned. He was about 10 - 12 feet from her and she saw his face for two minutes. She testified that Blacks was with her when the stones were being thrown and when she was hit she ran and left him.

Blacks, however, told the court that he never saw the man again that night, that is, after he first saw him, and he (Auldine) moved away. He did not see the person who was throwing stones or where they were coming from. In Blacks' statement, he stated that he asked her what happened and he never got an answer. He heard stones being thrown in their direction and walked hastily away and Janine went to a "track."

It is her evidence to this Court under cross-examination that the shop, which was the source of light, was 45 feet away from the verandah, not 15-20 feet as she stated in her examination-in-chief. However, Blacks' evidence at the Preliminary Enquiry was that the spot was extra dark and so he was unable to see the person's face.

Although her account is materially different from Auldine Clarke's evidence, I cannot conclude that hers is fabricated. It is possible that she was being truthful and Auldine was not being truthful, even if aspects of her evidence were embellished. It is also possible that both were not being truthful and he was merely a witness of convenience. Closer scrutiny of the evidence is therefore necessary to determine whether her story is a concoction and she procured the use of "the power of the state" to hurt Mr. Williams.

Is her Story Consistent?

Miss Fender in her evidence-in-chief to this Court stated that while she sat speaking to Auldine someone came behind and said, "P.... hole don't move" and she felt some thing hit her side. The person began talking to Blacks and while they were talking she recognised the voice of Mr. Williams (Didly). He said to Auldine, "Move p.... before me kill you."

In her statement to the police, she stated that he came up to her with a black object in his hand and said, "P.... move before me kill you," : the accounts are different. Her statement to the police is therefore at variance with her evidence-in-chief.

In her statement, she told the police she was on the verandah of the shop and he approached her, began to remove her shorts and she said, "Yeow weh yuh a do this for." He said, "Mi nuh tell yuh say mi ah go rape yuh."

In her statement to the police, she never told the police she said, "Didly wha this fah." She told the police she said, "Yeow weh yuh a do this for." Could it be that she deliberately embellished her evidence to state, "Didly" instead of "Yeow" in order to strengthen her case against Mr. Williams? That is, she recognised that it was he, Mr. Williams, *ab ovo.* The question is whether she made any such utterance or is it an entire fabrication in light of her evidence at the trial of Mr. Williams that she "did not exactly know it was he until after he stopped having sex with her, and she removed the mask."

Her evidence-in-chief is that he told Blacks to move or he would kill him and Blacks ran. He then pulled her into the shop, that is, on the shop's verandah and squeezed her throat so she could not call out. He began taking off her clothes. He pulled off her shorts and told her to remove her panty and she refused and they struggled. During the struggle he pushed her over the rail of the verandah. She was in a bending position with her back to him. She turned "sideways" and realized his face was covered. She pulled off the cover. He tried to hide his face but she

saw it was Didly whose voice she recognised earlier. She held his hair. His face was one foot from hers at the time she turned around. It was after all that had occurred that she said, "Didly whey dis fah." They continued to struggle and he continued to squeeze her throat. Those words would have been said outside of Auldine's presence. That version is substantially different from what she told the police.

Her version to the police was that it was after he began removing her shorts that she said, "Yeow weh you ah do this fah." However, her evidence-in-chief is that it was after he had removed her shorts and forcibly removed her panty, they struggled and she pulled the tee shirt from his face that she recognised that it was he and said, "Didly wey dis fah." She did not state in her statement to the police that he used the words, "Look how long you have b.... c.... man a wait." Auldine testified at the Preliminary Enquiry that at the time he heard her say 'Didly wah dis fah 'she was fully clothed.

At the Preliminary Enquiry she told the court that he took off her tee shirt, and then he pulled off her shorts. He told her to take off her panty and she refused. He then said, "Look how long you have b.... c..... man a wait" and he pulled down her panty and continued squeezing her throat. Whilst he was taking off her clothes he was behind her. He pushed her over the railing. She fought him and he removed the object which he had put into his pocket and held it to her side again. She fought him and removed the mask, which was the tee shirt, from his face. She turned sideways; he was facing her and tried to hold his face down on her shoulder. She held onto his hair. She saw his face down on her shoulder. She said, "Didly, what dis fah," and he said, "Don't me tell you say me ah go rape you." She asked him how he knew it was her sitting there and he told her he trailed and watched her. He forcibly had sexual intercourse with her; after which he said, "One more bruk man one more bruk." She told him to stop and fought him. Finally, she saw Auldine who had run away and she called him. Mr. Williams pulled on his

clothes and ran. In that account, her ability to view the face of her assailant and thereby discern his features was impaired.

At the trial of Mr. Williams, the learned judge, during her summation, stated that Detective Sergeant Henry told the court that Mr. Williams ordered her to take off her tee shirt. He took it off and he also took off her shorts. This was done while he was behind her. He then said, "Blood cloth gal, tek off yuh panty nuh yuh nuh know a long time man ah b.... c..... wait," and she responded, "A wonder who the f... a romp wid me." He eventually took off her panty. She was tying her legs to prevent him removing her panty and he said, "Open up yuh foot nuh man."

After he was finished having sex with her, he said, "One more f... ....." She removed the tee shirt by turning around, grabbing the top and pulling it off. It slid off and she held it. At that point she was able to see his face. She said, "Didly wey dis fah," and he said, "Don't me tell yuh sey me ah go rape you."

It is noteworthy that she did not tell the police that he used the words, "b.... c.... gal tek off yuh panty nuh ..." Could she have added those words to fortify her voice identification of him? Her many versions of the words used by her assailant undermine her credibility and reliability. In fact it seriously impugns her veracity.

The learned trial judge in her summation said that Miss Fender stated that from the time she removed the mask to the time he ran was five minutes and so she was able to see his face for five minutes.

However, to the Resident Magistrate she said when she called her friend he pulled up his pants and underpants and jumped down to the bottom of the shop. That suggests that he moved speedily. She therefore would not have been able to view him for five minutes. On all accounts, up to the point that Blacks came to her rescue, her back was to her assailant. It is also

her evidence that after she saw his face, he continued to squeeze her neck and they were still struggling.

At the trial of Mr. Williams, the learned trial judge in her summation stated that Miss Fender told the court that Mr Williams' response to her accusations was, "Hey gal, stop tell lie pon me" and that he asked her if he raped her. Under cross-examination, she told this court that Mr. Williams did not respond to her accusation that he raped her. According to her, he remained silent. Sergeant Henry, however, told the court that he denied the allegation more than once. It is his evidence that Miss Fender could have been within hearing distance because the area was not large. Further, he testified that it was as soon as she accused him that he responded. On that evidence, it would be highly improbable that she would not have heard his denial.

Who took Miss Fender to the Hospital and what transpired at the Forensic Laboratory?

In her statement to the police, she stated that her brother took her to the Gordon Town Police Station where she reported the matter, after which he took her to the UHWI. She was told to return to the police. She did and received a letter which she took to the hospital. There she was examined by Dr. Hanna.

In her witness statement, she stated that her mother took her to the Gordon Town Police Station. She was bleeding from her vagina. The police sent her to the UHWI, and told her they could not accompany her.

At the hospital, the doctors told her and her mother that they could not see them without the police being present. The doctors sent them away. They returned to the Gordon Town Police Station, got a letter and returned to the hospital. She was examined by a doctor and received stitches. All of that happened before the break of day.

Upon leaving the hospital they returned to the Gordon Town Police station and she gave a full statement to Sergeant Carlton Henry. Day had dawned at that time. She and Sergeant

Henry were the only persons present. He took her to the Rape Unit where she made a complaint again. He took her to the Government Forensic Laboratory at Hope Pastures where she gave another statement and left her underwear.

Under cross-examination, she said she went with her mother to the Gordon Town Police Station. She never saw Detective Sergeant Henry there. She saw two police officers. She then left with her mother and went to UHWI. She told the court that her brother drove them to the hospital. It was her evidence that the three of them went to the hospital. There she was told that she could not be examined unless the police was present. She returned to Gordon Town Police Station where she saw the same two police officers. Detective Sergeant Henry was not present. She was given a letter and she returned to the hospital with her mother and brother. She was examined by Dr. Hanna. No police was present during the examination. The doctor took her panty and never returned it to her.

Her mother left for the embassy with her brother. Her sister, Donnette, came after. She and Donnette took a bus to the Gordon Town Police Station. There she saw Detective Sergeant Henry. He wasn't alone, other police were there. The evidence in this regard conflicts with her evidence-in-chief in which she testified that they were alone. Sergeant Henry took her statement and then he took her and her sister to the Rape Unit. At the Rape Unit she gave a statement. Upon leaving the Rape Unit he took her to the Forensic Laboratory. She remained in the car whilst at the Forensic Laboratory. Next they headed straight to her house. According to her, it was evening. He left her and Donnette at their gate. As soon as they got to their house, he called them and instructed them that they had to go to the Irish Town Police Station. They went to the Irish Town Police Station.

At the Preliminary Enquiry, she stated that she was taken to the Gordon Town Police Station by her mother where she reported the matter. She was sent to the University Hospital.

She went with her mother, sister and a cousin. The doctor examined her and sent her back to the Gordon Town Police Station. The Gordon Town Police took her to the Rape Unit where she gave a statement. There the doctor at the Rape Unit took her panty, and also blood. She did a sperm test. This conflicts with Sergeant Henry's evidence that he was handed a blue panty by the sister which he placed into an envelope and took to the Forensic Laboratory and also conflicts with her evidence that the doctor at UHWI took her panty.

At the trial of Mr. Williams, the learned trial judge stated in her summation that Miss Fender told the court that her mother woke her brother and they took her to the police station and thereafter to the University Hospital. The doctor examined her and sent her to the Gordon Town Police Station where she received a letter which she took to the doctor at the University Hospital. The doctor examined her. She later returned to the Gordon Town Police station and spoke to Sergeant Henry. He spoke to her and she went to the UHWI where she was tested. She also went to the Rape Unit and the Forensic Laboratory. Sergeant Henry took her home. Some time in the evening, he returned and took her to the Irish Town Police Station. That evidence is at variance with her evidence under cross-examination.

Under cross-examination, Miss Fender stated that she saw Sergeant Henry for the first time after she was examined at UHWI. However, Sergeant Henry in his statement dated November 8, 2000, stated that she came to the station and made a report to him. He commenced investigations into the matter and took her to the Accident and Emergency Department of the Hospital. What accounts for such a discrepancy? Is there an innocent explanation?

At the hospital, Detective Sergeant Henry spoke with a sister who handed him a jar which contained smears and a plastic bag which contained a blue panty which was allegedly taken from the complainant. He took those items and Miss Fender to the Rape Unit. There he sealed and labelled the exhibits. He left her with Sergeant Gordon. Shortly after he returned and

was handed a statement which was taken from Miss Fender. He proceeded to the Forensic Laboratory with the exhibits which he handed over to the analyst. His statement is discrepant with Miss Fender's evidence. According to her, he never accompanied her to the hospital.

Under cross-examination, Sergeant Henry stated that he accompanied her to the hospital about 10:00 a.m. It is also his evidence that he was handed her panty and smears at the hospital. Oddly, however, she stated in her evidence-in-chief that he took her to the Forensic Laboratory at Hope Pastures where she gave another statement and left her panty.

Her evidence regarding how many persons accompanied her to the police station, the hospital and Rape Unit is at variance with that of Sergeant Henry. Sergeant Henry's evidence is that another police was present with him at the hospital. According to him, four persons were present: he, another officer, Miss Fender and her sister.

The pertinent question is what accounts for the discrepancies? Is it that her story is fabricated? Is it that she is being truthful and Sergeant Henry is not? Are they both not speaking the truth? Was Miss Fender raped by Mr. Williams or can the conclusion be properly drawn from the evidence that her claim is fabricated as alleged by Mr. Williams?

It is Mr. Williams' evidence that whilst they were at the police station, in the presence and hearing of Sergeant Henry, Miss Fender made the following statement, "Is long time I tell you me ah go f...you up." If she indeed used those words, on a balance of probabilities that might be evidence of malice and that she concocted the story against Mr. Williams.

Mr. Justice Gault in the PC decision of **Gibbs and Others v John Mitchell Rea Cayman Islands** [1998] UKPC 3 (29th January 1998) at para 47 said:

> *"The state of a person's mind can be proved by evidence of what he or she has said or done. It can be proved also by circumstantial evidence"*

Having heard and observed Miss Fender, I find on a balance of probabilities that she uttered the words to Mr. Williams in the presence and hearing of Detective Sergeant Henry.

Miss Fender's evidence is a plethora of inconsistencies and discrepancies. For example, at what point did she use the words, "Didly what dis fah?" At what point did she see his face? What type of relationship did she have with Mr. Williams? Was it amiable or acrimonious? Did he come stealthily behind her or did he approach them?

The numerous inconsistencies seem to me to be more than mere prevarication. They suggest that she knew that Mr. Williams was not her assailant and she was not 'fully convicted' in the circumstances that he was probably guilty of the crimes imputed. The presence of the numerous inconsistencies together with her utterance at the police station leads to the irresistible conclusion that her story is a fabrication designed to harm Mr. Williams and deceive the authorities.

I find therefore that she lied in her statement to the police, she lied at the Preliminary Enquiry to the Resident Magistrate; she lied at the trial of Mr. Williams and has persisted in her lies to this court.

I find that there was no reasonable and probable cause for her initiating and continuing the prosecution of Mr. Williams. I find also that she was actuated by malice.

Was it Sergeant Henry who Prosecuted Mr. Williams?

Miss Manley argues that Sergeant Henry did not prosecute Mr. Williams.

If Sergeant Henry instituted the prosecution and continued the same with the honest belief that Miss Fender's claims of rape and assault were genuine and she indicated her willingness to testify, Miss Fender must be considered the prosecutor as aforesaid. However, if he, as is alleged by Mr. Williams, was Miss Fender's paramour and was aware that her claim was false, they are joint prosecutors. If, after having instituted the proceedings, it became

manifest that her claim might be untrustworthy and he persisted nevertheless in the prosecution he would equally be considered his prosecutor, with Miss Fender, as there would be an absence of reasonable and probable cause.

Mr. Williams must establish affirmatively either malice or absence of reasonable or probable cause. It should be noted that malice might be inferred from absence of reasonable or probable cause.

Was Detective Sergeant Henry's Arrest and Prosecution of Mr. Williams Malicious?

Assuming that Miss Fender's claims of rape and assault were false and groundless, has the claimant succeeded in showing affirmatively that Sergeant Henry knew or must have known that Miss Fender had put forward false and groundless claims of rape and assault and therefore had no honest or genuine belief in the prosecution instituted by him?

Mr. Andre Earle submits that Miss Fender threatened Mr. Williams in the presence and hearing of Sergeant Henry. He submits that Miss Fender and Sergeant Henry were involved in a relationship and as a result the swab deliberately disappeared in an effort to implicate Mr. Williams.

It is Mr. Earle's submission that Sergeant Henry knew that it was standard procedure to obtain a swab. If the swab was not available, he should have directed her back to the doctor to get the swab. He further submits that Sergeant Henry is untruthful because Dr. Hanna stated that the swab was available and he was not the person who collected it. He further submits that the certificates were ready before he testified at the Preliminary Enquiry. It is his submission that Sergeant Henry was a Detective Corporal and was in the force for more than 20 years and had investigated several rape cases.

The foregoing facts, he submits, also demonstrates that Sergeant Henry was aware that Miss Fender's allegation of rape and assault were fabricated and that he carried out the

prosecution of Mr. Williams without reasonable and probable cause and/or maliciously. His intention was not to further the ends of justice. He relied on **Kenneth Morgan v The Attorney General of Jamaica** CL 1995/M076. He also relied on **Herniman v Smith** [1938] AC 305 at pg 316 – 317 in support of his submission that Sergeant Henry acted without reasonable and probable cause.

The law

The enunciations of Wooding CJ in **Wills v Voisin** (1963) 6 WIR 50 at p 57 provide guidance:

> *"Now, as to the law relating to the claim for malicious prosecution, it is in the public interest, and it is a public duty, that offenders should be brought to justice. It is the obligation, as well as the right, of every individual to set the courts in motion whenever infringements of the law occur. The burden of so doing lies especially upon police officers who are paid appointed guardians of the public peace. Nonetheless, it is entirely wrong that anyone should be subjected to legal process without reasonable and probable cause. Thus, the duty to prosecute and the right to be protected against unwarranted prosecution may often be so balanced as to make it difficult to resolve which ought to prevail. Hence, in the public interest, the law will stand by him who essays to discharge the duty against him who seeks to enforce the right, provided that in essaying to discharge the duty the prosecutor has not been actuated by malice.*

Careful examination of his evidence and the case in its totality is necessary to determine whether the circumstances are such that the conclusion can be drawn that the prosecution of Mr. Williams by Sergeant Henry can only be accounted for by imputing some wrong or indirect motive.

Detective Sergeant Henry's Evidence

Sergeant Henry in his witness statement stated that on the morning of November 6, 2000, Janine Fender attended the Gordon Town Police Station and reported that she was raped by a

man who was known to her as Didly, whom he later learned was Neville Williams. The claimant was walking and hopping and complained of feeling dizzy. He was aware that she had gone to the station the previous night and made a report but her statement was not taken because she was in need of medical attention and so she was sent to the hospital. According to him, because of Miss Fender's condition she went to the Accident and Emergency Section of the Hospital before her statement was taken. It is his evidence that he went to the hospital and spoke to a sister on duty and she handed him a jar which contained vaginal smears and a blue panty which were taken from the complainant.

After Miss Fender was examined at the hospital, he took her to the Rape Unit. Woman Sergeant Gordon recorded a statement from her. He placed the smears and panty into separate envelopes which he sealed. He and the complainant took the two sealed envelopes to the Government Analyst. The complainant was with him because she needed a ride home. Whilst he was on his way towards the Gordon Town Police Station, he received a call from the Irish Town Police Station. He went to the Irish Town Police Station and Miss Fender pointed out the accused Mr. Williams, as the person who raped her. Mr. Williams was about to respond but he cautioned him. The accused denied that he raped her. On November 10, 2000, which was the following Thursday, he collected a medical certificate from the hospital. On February 12, 2001, he collected the exhibits and certificate from the Forensic Laboratory. At the time he collected the certificate and exhibits, he was not aware that DNA tests were carried out or that DNA results were available. According to him, he did not know either of the parties before.

It is the evidence of Detective Sergeant Henry that in cases of rape, the usual procedure is that complainant is interviewed and if the officer is satisfied that a sexual offence has been committed, the complainant is taken to the Rape Unit where her statement is recorded. It is at

the Unit that arrangements are made for the complainant to be examined by one of the prescribed doctors. The Investigating Officer's duty is to collect the statements, and apprehend the suspect.

Irregularities in Procedure

The procedure employed by Sergeant Henry in the handling of the case was irregular. It is his evidence that in cases of rape the complainant is interviewed and if the officer is satisfied that an offence has been committed the complainant is taken to the Rape Unit, now the Centre for the Investigation of Sexual Offences and Child Abuse (CISOCA) where the statements are recorded by an officer attached to that Unit. The complainant is then medically examined by one of the doctors assigned to the Rape Unit. A female officer, if available, should accompany the victim to the doctor. The investigating officer's role is to read the statements and determine whether there is a suspect. If a suspect is identified, it is the responsibility of the investigating officer to apprehend the suspect. Sergeant Henry admittedly breached the procedure by taking her (according to him) to the UHWI. He claimed that it was necessary to breach the procedure because of the complainant's condition. He testified that she was walking and hopping and complained of feeling dizzy. It is worthy of note that his statement and his deposition are silent as to that remarkable observation which caused him to obviate the usual procedure.

The learned trial judge in her summation stated that Mrs. Sybil Fender, Miss Janine Fender's mother, testified that blood was pouring from Miss Fender's cheek. It was her mother's evidence at the Preliminary Enquiry that, "I check her jaw (sic) it was like it sinking and a cut was there (sic)." The doctor's evidence as aforesaid did not support Mrs. Fender's evidence. It was the doctor's evidence that she saw a 1.5cm abrasion (scratch) to Miss Fender's cheek and the surrounding area was swollen. An abrasion is a scratch not a discontinuation of the skin. There is no evidence from the doctor that the area bled. Blood certainly could not pour from a scratch. Detective Sergeant Henry would have seen a scratch on Miss Fender's face. In any

event, at that stage he did not have Mrs. Fender's statement and indeed she made no such allegation of blood pouring from her daughter's cheek in her statement.

The question is whether Sergeant Henry was justified in obviating the usual procedure with regard to victims who have been allegedly sexually assaulted.

It is worthy of note that the doctor never felt that her condition was an emergency because according to Miss Fender she was told to return to the station for the requisite letter. It is Sergeant Henry's evidence that while she was at the hospital he spoke to a sister about the case and she handed him a jar which contained the vaginal smears and a blue panty allegedly taken from Miss Fender. His evidence in that regard violently conflicts with Miss Fender's because according to Miss Fender, he never accompanied her to the hospital.

It is the doctor's evidence that swab and smears were taken from Miss Fender. It is also her record that the swab and smears were taken from Miss Fender and placed in an envelope.

His evidence conflicts with Dr. Hanna's record of who picked up the exhibits and what exhibits were picked up. Her record is that a P. Brotherton of the Gordon Town Police Station picked up the envelope.

Sergeant Henry, however, testified that he collected only the smears and the blue panty. It is his evidence that it was usual for the investigating officer to secure a vaginal swab but he could not say if this was done. Under cross-examination, he stated that he would have enquired about the swab but he could not say if he did. He later testified that he thought that he asked about the swab and the sister told him it was not available. Was the swab handed to the person whom the doctor recorded as collecting it or did Sergeant Henry collect it?

Dr. Hanna was meticulous in her recording of the matter. On the same line in which was stated "swab and smear was (sic) taken and placed in (sic) an envelope," were the words 'handed to.' She deleted the words "handed to" and inserted the words "picked up by." On a balance of

probabilities, if the doctor did not place the swab into the envelope she similarly would have deleted the word swab. It is his evidence that it is standard procedure to collect a vaginal swab in cases of rape. He has investigated several cases of rape in his twenty-six years as a police officer.

He was confronted by the evidence of Dr. Hanna that it was not he who collected the exhibits but rather P. Brotherton. His response was that P. Brotherton had taken her to the hospital the night before. However, Miss Fender's evidence is that she was not accompanied to the doctor by a police officer. Significantly there is no mention of that fact in his statement.

It is his evidence that another police officer accompanied them to the hospital, Rape Unit and the Forensic Laboratory. He admitted that it was not usual to be accompanied by another officer. Are the foregoing irregularities and discrepancies indications of something sinister?

It is Miss Fender's evidence that Sergeant Henry took her to the Government Laboratory at Hope Pastures where she gave another statement and left her underwear. That evidence of Miss Fender is quite curious and rings a sinister bell if it is the truth. Was the blue underwear taken by the doctor and handed to Sergeant Henry at the hospital by a sister or did Miss Fender leave her underwear at the Forensic Laboratory? It is Sergeant Henry's evidence that he was handed a blue panty by the sister. However, the doctor's report was that the swab and smears were placed into an envelope and picked up by P. Brotherton. The doctor's only mention of the blue underwear was that the seat was soaked with clear fluid. Would the doctor have neglected to state that the underwear was also sealed and picked up? What really is the truth in light of Miss Fender's evidence that she gave another statement and left her panty at the Forensic Laboratory?

Sergeant Henry, in Exhibit C which is entitled "Exhibits for Police Forensic Laboratory", informed the laboratory that Miss Fender was walking along the main road when she was

accosted by a man who dragged her into some bushes, near the roadside and sexually assaulted her. Her statement which informed him stated that she was on the verandah of a shop. Her assailant approached and removed her clothes. There was no statement by her that he pulled her anywhere, except that he forced her to lean over the rail of the verandah. The critical question is why did Sergeant Henry lie? The explanation he gave was that it could be an "overwrite." Is that an acceptable explanation or is it evidence that he knew that Miss Fender's claims were false and groundless and were merely supplementing her false claims? If it is evidence that he knew that she was not honest, his arrest of Williams would have been without reasonable and probable cause and his prosecution of him would have been malicious. I do not accept his explanation.

It is Mr. Williams' evidence that, upon hearing the allegations against him, his mother accompanied him to the Irish Town Police Station. He was advised that there was no complaint against him at that station. He was further advised that a report was made to the Gordon Town Police Station. Contact was made with the Gordon Town Police Station and he was informed by a female constable that Sergeant Henry requested that he remain at the Irish Town Police Station and await his arrival. Sergeant Henry and Miss Fender arrived some minutes after.

It is Mr. Williams' contention that the Irish Town Police Station is the station which serves his community. Sergeant Henry, however, contends that the Gordon Town Police Station is the subdivision headquarters for Irish Town and Mavis Bank Police Stations. Gordon Town Police Station supervises the stations within that area.

It is Sergeant Henry's evidence under cross-examination that the claimant was arrested and charged at the Gordon Town Police Station. However, when confronted by his statement, he agreed that he wrote in his statement that Mr. Williams was arrested and charged at the Irish Town Police Station and further stated that Mr. Williams was arrested and charged at the Irish Town Police Station. Upon being further cross-examined, he stated that he asked Mr. Williams

whether he raped Miss Fender at the Irish Town Police Station but he charged him at the Gordon Town Police Station. According to him, the sequence does not matter.

At the Preliminary Enquiry into the matter, it was his evidence that he pointed out the offence to Mr. Williams at the Irish Town Police Station and arrested and charged him at that station. He then escorted him to the Gordon Town Police Station and then to the Constant Spring Police Station.

Why did Sergeant Henry write in his statement and testify at the Preliminary Enquiry that he arrested and charged Mr. Williams at the Irish Town Police Station? Is there some merit in Mr. Williams' allegation that Irish Town is the proper station for the area? If Irish Town is indeed the proper station, can that be regarded as an irregularity from which something sinister can be inferred?

Can it be reasonably inferred from the procedural breaches and the discrepancies between the versions advanced by Miss Fender and by Sergeant Henry that he was actuated by some motive other than a desire to prosecute the person suspected to have raped and assaulted Miss Fender? Can the conclusion be drawn from the evidence that they were in a relationship? Is there evidence on a balance of probabilities that, at the time of the arrest, Sergeant Henry knew or must have, in all the circumstances, known that Miss Fender's claims of rape and assault were false and groundless? (Can such a relationship be inferred from Sergeant Henry's irregular handling of the matter?)

Mr. Williams' evidence is that Sergeant Henry and Miss Fender shared a relationship. Prior to his arrest, he saw them driving in Sergeant Henry's car on several occasions. However, under cross-examination he testified that the never saw Sergeant Henry's face before the date he was charged. Neither did he see Miss Fender and Sergeant Henry together outside the vehicle.

His ability to positively identify Sergeant Henry as the person he saw driving with her is therefore unreliable.

Mr. Earle submitted that, even if there is insufficient evidence to demonstrate an intimate relationship, there is a whole set of circumstances outside of that which demonstrates malice.

Let me now consider Miss Manley's submission that Sergeant Henry could not have acted maliciously because he was advised by the Director of Public Prosecution (DPP) or the Clerk of Court and the charges were confirmed by the DPP.

The head note of **Glinski v McIver** (1962) AC 726 at p 727 states the law on the matter:

> *"When a police officer preferring a charge has at every step acted on competent advice, and has put all the relevant facts known to him before his advisers, it would be hard to say that he acted without reasonable and probable cause."*

In that case, the police officer, before proffering the charges, submitted to his chief supervisor, a report and copies of all the statements of the witnesses and documents he obtained during his investigations, he also sought and received advice from a solicitor in the legal department of Scotland Yard.

In the instant case, Sergeant Henry charged Mr. Williams on the statement of Miss Fender. He later obtained the statements from her mother and Auldine Clarke which were materially discrepant with hers. There is no evidence that at any stage he solicited the advice of either the DPP or the Clerk of Court. Nor did he act on any advice of the DPP or the Clerk of Court. The evidence is that he handed the file over to the Clerk of Courts after he had charged Mr. Williams. It is true that the Clerk of Court, having perused the file could have decided not to pursue the charges. However, that does not exonerate him. It was Sergeant Henry's responsibility to investigate the matter. He was a police officer for twenty-six years who had investigated several rape cases. In **Glinski v McIver,** the police officer was not employed to

the fraud department for a long time before he arrested the appellant. It was noted by the court that he took statements from a number of witnesses who there was no reason to suppose were unreliable and his enquiries lasted from May until the middle of July. Evidence of lack of diligence is not *per se* evidence of malice. If, however, the claimant succeeds in showing affirmatively that he wilfully suppressed evidence, to wit: swab or DNA evidence, he would have succeeded in establishing malice.

Can Malice be Inferred from the Circumstances of this Case?

Assuming that the arrest of Mr. Williams was justified, is there evidence that in the course of the prosecution of Mr. Williams it became manifest that Miss Fender's evidence was untrustworthy and he continued nevertheless? Can it be concluded that he maliciously prosecuted Mr. Williams?

Further, can it be concluded that the defendant:

a. falsely and maliciously gave evidence that he investigated the accusation laid against the claimant when he did not;

b. deliberately and wrongfully withheld the fact that the claimant's underwear was taken for DNA testing or the result of the DNA test which should have been made available to him after November 5, 2003;

c. wrongfully withheld not only the fact that the claimant's underwear was taken for DNA testing but also the result of the DNA testing, the lack of which resulted in the conviction of the claimant;

d. was aware or should have become aware that Miss Fender's claims of rape and assault were concocted? Did he continue the prosecution of the claimant without regard to his responsibilities as the police officer knowing that Mr. Williams would be prosecuted? The claimant contends that Sergeant Henry was negligent in the conduct of his investigation, by failing, neglecting and/or refusing to collect the results of the DNA testing which were not provided to the DPP;

e. failed to perform his investigations to the standard required of an investigating officer;

f. failed to alert the DPP to the fact that DNA testing had been requested; and

g. failed to adequately investigate the complaint made by the first defendant.

Mr. Williams' evidence is that Miss Fender told him she would, "F...' him up," in Sergeant Henry's presence and hearing. I have already ruled that her statement was made in his presence. It is his evidence that he called Sergeant Henry's attention to the words she used but Sergeant Henry simply told him to go into the car. However, it is Mr. Williams' evidence that Sergeant Henry was not hostile towards him. Sergeant Henry, however, denies hearing such an utterance from Miss Fender. Can it reasonably be held on a balance of probabilities that his attention was called to the words but he ignored Mr. Williams? I accept Mr. Williams' evidence that he called his attention to the words uttered. I find also that Sergeant Henry ignored him. This by itself is not evidence of malice but rather of negligence.

Whether Sergeant Henry deliberately failed to disclose the fact that the claimant's underwear was taken for DNA testing and wilfully failed/neglected to collect the result

Submission by Miss Tasha Manley on behalf of Sergeant Henry re DNA

Miss Tasha Manley strenuously resists Mr. Earle's submission that Sergeant Henry concealed the DNA result. It is her submission that Sergeant Henry's involvement in the prosecution ended at the point where he handed the file to the DPP.

At that juncture, the conduct of the prosecution would be solely at the discretion of the DPP's office as prosecutions are carried on by the DPP. Therefore, liability for not producing the DNA evidence cannot, in the circumstances, rest with Sergeant Henry. In any event, neither

the Prosecutor nor Sergeant Henry knew of the existence of any DNA report. Further, she submits that, even if he knew of the existence of the DNA report, knowledge of that evidence could not negate the existence of reasonable or probable cause or render the prosecution groundless.

There were reasonable grounds on which Sergeant Henry based his beliefs: the report of Miss Fender, her positive identification of Mr. Williams, and the medical evidence. She submits also that the DNA results were inconclusive and therefore concealing them could not have aided any alleged motive which Sergeant Henry might have held as there is no guarantee that the verdict arrived at by the jury would have been different.

Sergeant Henry's Evidence re DNA

It is Sergeant Henry's evidence that he became aware of DNA evidence and analysis in or about 1995. He, however, was not aware that the laboratory automatically did a DNA test once there was a sufficient sample. It is his evidence that he would go to collect the forensic certificate but would not request DNA results. The laboratory would inform him if it was done. In fact, before the instant case, he had never done a case which involved DNA. He testified that upon collecting the forensic certificate he would not request DNA results. The personnel at the Forensic Laboratory would inform him if it was done. It is also his evidence that, although he knew DNA was in existence, it was the prerogative of the laboratory to state whether the semen on the exhibits matched. It was their responsibility to link the two. When pressed, he admitted that he could have made enquiries but did not. Under cross-examination, he stated that because of the knowledge he obtained from this case, he would now ensure that he obtains DNA results should he investigate a similar case.

Sergeant Henry testified that he was aware of DNA evidence and analysis since 1995. Why didn't he request such a test in light of his evidence under cross-examination that he had

acquainted himself with the usefulness of DNA for solving crimes and he was particularly aware that DNA analysis was useful in rape cases?

Having investigated several rape cases, Sergeant Henry should have requested such a test in a prudent approach to the pursuit of justice. It is, however, not very difficult to understand why he did not do so in light of the less than efficient manner in which he dealt with the matter.

He ought to have been aware that the swab was collected and yet he never ensured that he obtained the same. He failed to collect the forensic certificate and exhibits from the Forensic Laboratory before he testified at the Preliminary Enquiry and trial, even though they were available. The reasons advanced by him for not collecting the forensic certificates are spurious. His evidence under cross-examination is "I guess the time before I went they were not ready. I might have been given two weeks to return." He went to the laboratory the second to last week in December and two weeks "would have overlapped." He, however, stated that he had no response to the effect that the results would have been ready on the January 10, 2001. It is also his evidence that he returned to the laboratory but not to collect those exhibits. He, however, denies that he failed to collect the certificates because he did not want to see what was stated on the certificate.

The court, however, is of the view that on a balance of probabilities, the foregoing is not cogent enough evidence of malice. As already stated, the complainant's statement could have caused Sergeant Henry to form the honest belief that Miss Fender was raped and assaulted and that he was sure Mr. Williams was her assailant. There is no reliable evidence that Miss Fender and Sergeant Henry were involved in a relationship.

I cannot, however, accept the submission of Miss Manley that Sergeant Henry's involvement in the prosecution ended at the point where he handed the file to the DPP. Sergeant

Henry's role was to provide the laboratory with the exhibits and collect same. He was saddled with the responsibility of ensuring that the swab and smears were collected.

It is true that the DPP and indeed the Magistrate, whose Preliminary Enquiry it was, had a responsibility to ensure that the evidence was before the court. Sergeant Henry cannot be absolved of his responsibility, but that by itself is not evidence of malice.

Evidence of Sherone Brydson - Forensic Analyst

It is her evidence that the Forensic Laboratory has been carrying out routine testing on physical evidence that bears potential DNA material, since 1995. Some time in November 2000, Sergeant Henry submitted to the Forensic Laboratory vaginal smear, a panty and underpants.

Her examination revealed the presence of semen on the panties. An area was submitted for ABO - grouping, but the samples were insufficient. No blood was detected upon examining the underpants. Semen was present and was analyzed for ABO grouping. It was found that the semen belonged to a group 'A' individual. Two areas of the panty and underpants were sampled for the DNA analysis. The area analyzed on the panty produced a 'mixed profile' and the area analyzed on the underpants produced a 'pure profile'. A 'mixed profile' is indicative of the presence of more than one source of human DNA. A pure profile indicates DNA coming from one source. In order to determine whether the semen present on the underpants was of the same origin as that found in the mixture on the panty, a comparison of the genotype found in the corresponding markers (categories) on the profile was done. In the instant case, she compared the profile from the panty with the profile from the underpants. The profiles did not match so it was reasonable to infer that the semen on the panty was not from the same source as that present on the underpants. The results were inconclusive she said, because of the absence of a control sample, that is, swabs from the victim. For that reason, she could neither conclusively include Mr Williams nor rule him out. No control sample was submitted for Ms Fender. She could not

state definitively whether a specific request was made. It is her evidence that a control sample is important where there is a mixed profile obtained from DNA analysis. Only the control sample can assist in interpreting whether the victim's DNA was part of the mixture. As a result of the absence of the control sample (swab), the DNA report was retained pending the submission of the control sample.

On December 27, 2000, she prepared two certificates which outlined her findings regarding the samples she obtained. She is aware that Sergeant Henry collected the forensic certificates, underpants and panty on February 12, 2001, at a time when the DNA report was ready but was retained.

Assessment of Miss Brydson's Evidence

Miss Brydson's evidence before the Court of Appeal in the words of Forte P, was as follows:

> *"On examination she found as follows:*
>
> *1. there were semen stains on the crotch, back and outer aspect of the front of the blue panty;*
>
> *2. on the vaginal smear there were red blood cells, spermatozoa and many pus cells;*
>
> *3. on the multi-coloured print underpants there were semen stains on the front and inner aspect of the back.*
>
> *She submitted two samples of the semen stains from the panty, and two samples of the semen stains from the multi-coloured underpants taken from the appellant, to DNA analysis.*
>
> *There was a mixture of DNA material on both samples derived from the panty, but not so in respect of the underpants.*
>
> *She compared eight (8) markers on the DNA profile derived from the two samples taken from the panty with the DNA profile derived from the two samples taken from the underpants and concluded that the profiles were different and did not match."*

The analyst was to my mind, interested in whether the semen on the panty matched that on the underpants. To the Court of Appeal, her evidence was that the profiles were different and did not match. To this court, her evidence is that the results were inconclusive because of the absence of a control sample, that is, a swab from Miss Fender.

The issue is whether the semen on the panty matched that on the underpants. It was Dr. Hanna's evidence that the blue panty taken from Miss Fender was soaked with clear fluid. Miss Brydson found semen and spermatozoa on the said panty. There is no complaint by the analyst that the semen found either on the panty or the underpant was insufficient.

The absence of a swab taken from Miss Fender could not affect a conclusive finding of whether the semen found on the panty and the underpants matched.

The swab taken by Dr. Hanna would assist in determining whether Ms Fender was penetrated by the person whose sperm appeared on the underpants and would certainly be necessary where the smear is not helpful. It is Miss Brydson's evidence that, because of the absence of a control sample, that is, a swab from the victim, she was unable to conclude whether Miss Fender's DNA was part of the mixture. In light of the discrepancies surrounding the blue panty, the question arises as to whether the panty was indeed hers. However, the absence of the swab should not preclude a conclusive finding whether the sperm found on the underpants was the same as that found on the panty. In fact, to the Court of Appeal, she categorically stated not just that they were different, but that they never matched.

The vacillations of Miss Brydson as to her conclusion, that is, whether or not the sperm found on the panty and on the underpants was different are most unsettling.

Did Sergeant Henry Investigate the Matter?

It is the contention of the claimant that Sergeant Henry falsely and maliciously gave evidence that he investigated the accusation laid against the claimant.

Sergeant Henry's investigation of the matter might have left much to be desired. But has the complainant proven on a balance of probabilities that he did not investigate the matter? There are conflicts in the evidence as to whether he and another officer accompanied Miss Fender to the hospital. Either Sergeant Henry or Miss Fender must be lying; both cannot be speaking the truth. A reasonable question which arises is whether they are both not speaking the truth. If they are both not speaking the truth, is this evidence of concoction?

The fact that the medical report stated that he was not the officer who collected the smear and he insists that he was causes much concern. The fact also that the swab which was taken by the doctor cannot be accounted for has caused much disquiet. There are questions also about the blue panty, that is, whether he collected it and where it was handed over. The doctor stated that the swab and smears were handed to P. Brotherton. There is no mention that the panty was handed over. Miss Fender's testimony is that she left it at the Forensic Laboratory. The foregoing is cause for serious concern, but has Mr. Williams established malice?

I will forebear at this juncture to examine whether Sergeant Henry had reasonable or probable cause to prosecute Mr. Williams and turn instead to the issue of negligence, as malice can be inferred from all the circumstances of the case. Failure to conduct investigations at the standard required may amount to absence of reasonable or probable cause. Malice can be inferred from absence of reasonable or probable cause.

Negligence

Mr. Earle submits that the claimant has established the Tort of Negligence against the second defendant, that is, he asserts that Sergeant Henry owed Mr. Williams a duty of care. He

breached this duty and the breach of duty caused damage and loss to him. He submits that Sergeant Henry is charged with the statutory duty to investigate crimes. Mr. Williams, being the accused, fell within the neighbour principle.

Sergeant Henry was under a duty to take reasonable care in his investigations to avoid acts or omissions which he could reasonably foresee would be likely to cause injury to Miss Fender. Mr. Earle submits that the acts complained of are acts which are attributable to the officer and not a third party. That factor distinguishes the instant case from **Hill v Chief Constable of West Yorkshire**, (1988) 2 All ER 238 **Beverly Palmer v Tees Health Authority et al** 1999 Lloyd's Report MED 351 at 356**, Osman and another v Ferguson and another** [1993] 4 ALL ER 344 and **Ancell and another v McDermott and another** [1993] 4 All ER 355. The test, he argues, is satisfied as the officer was not dealing with a class of persons but with one individual. He relies on the case of **Hague v Deputy Governor of Parkhurst Prison, Weldon v Home Office** [1991] 3 All ER 733. He relies also on Lord Wright's statement at p 27 of **Lochgelly Iron & Coal Company Limited v M'mullan** [1934] AC 1.

The absence of vaginal swabs affected the forensic results. He submits that it was reasonably foreseeable that failure to properly investigate and collect the DNA samples would have an adverse impact on the claimant. Mr. Williams was committed to stand trial because of the absence of the medical and forensic certificates which were available.

Mr. Earle also submitted that Sergeant Henry ought not to be believed when he testified that he was present at the hospital and collected the samples. He submits that that evidence is a recent fabrication and made as an attempt to salvage the unreasonable, malicious and negligent manner in which the investigation was conducted and to explain the break in the chain of custody. It is his submission that Sergeant Henry failed to meet the standard of a reasonable

police officer as he failed to try to ascertain all the facts. Consequently, the court should find that he:

1. Failed to perform his investigations to the standard required of an investigating officer.
2. Failed to enquire into Mr. Williams' whereabouts on the night in question.
3. Failed to obtain a search warrant to determine whether Mr. Williams owned the clothes which the attacker wore.
4. Failed to obtain/retrieve the results of the DNA testing.
5. Failed to obtain vaginal swabs to facilitate the taking of blood samples.
6. Failed to adequately investigate the complaint made by the first defendant.

He submits that Sergeant Henry's negligent conduct of his investigations resulted in the claimant losing two years, nine months and twenty-three days of his liberty for which he should be compensated.

Submission on behalf of Miss Fender by Miss Akiliah Anderson

Miss Akilah Anderson submits that no claim in negligence arises against Miss Fender because there is no general or statutory duty between Miss Fender and Mr. Williams which could have been breached in the circumstances. She adopts the submission made on behalf of Sergeant Henry regarding negligence.

Submission on behalf of Sergeant Henry and the Attorney General

It is Miss Manley's submission that the claim of negligence against the second defendant is misconceived and unsubstantiated. She submits that there is no general or statutory duty of care in negligence whether notional or factual in relation to the initiation or conduct of criminal prosecution. She submits further that from a public policy perspective no such duty ought to be imposed in this case.

She relies on the statement made by Lord Browne-Wilkinson in **Barrett v Enfield London BC** [1993] 3 WLR 79 at p 85:

> *"In English Law, the decision as to whether it is fair, just and reasonable to impose a liability in negligence on a particular class of would-be defendants depends on weighing in the balance the total detriment to the public interest in all cases from holding such class in negligence as against the total loss to all would-be plaintiffs if they are not to have a cause of action in respect of the loss if they have individually suffered... The decision does not depend on weighing the balance between the extent of the damage to the plaintiff and the damage to the public in each particular case."*

She relies also on **Ancell v McDermott** [1993] 4 ALL ER 355 where she submits, the point was illustrated. It is her submission, that if a duty of care were to be imposed upon a police officer in the initiation and prosecution of a criminal charge, the constabulary force would be constantly enmeshed in an avalanche of interlocutory civil proceedings and civil trials. The consequences for the criminal justice system would be unsatisfactory.

Further, she submits that the implications which the imposition of such a duty would have on the efficient running of the police force would be far-reaching. She commends the caution of the court in **Palmer v Tees Health Authority** [1999] Lloyd's Report MED 351 at 356. She submits that not every act of carelessness or negligence is actionable under the Tort of Negligence. She places reliance on the statement of Lord Wright in **Lochgelly Iron & Coal Co Ltd v McMullen** [1934] AC 25:

> *"In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing."*

She submits that Mr. Williams has failed to establish the particulars outlined. He provided no evidence that Sergeant Henry knew the results of the test. It is her submission that the Court of Appeal supported the fact that no one knew of the result. The evidence is that he

did not request the DNA test. The attempts of Mr. Williams to show that he could have requested it would be incredible. Mr. Williams has failed, she submits, to establish negligence.

Can a Claim for Negligence against Sergeant Henry be sustained?

Was Sergeant Henry negligent? Did he investigate the matter to the standard required?

Findings in Law

At common law, police officers owe no general duty of care to suspects. (See **Calveley & Others v Chief Constable of Merseyside Police** [1985] AC 1228, **Elgusoulidaf v. The Commissioner of Police** [1995] QB 335, **Brooks v The Commissioner of Police for the Metropolis and Others** [2005] UKHL 24 and **Bryan James Thacker v Crown Prosecution Service** [1997] EWCA Civ 3000 (December 16, 1997).

The question as to whether a claim for negligence against Detective Sergeant Henry is sustainable is answered by Section 33 of the Constabulary Force Act.

Section 33 of the Constabulary Force Act requires that malice or absence of reasonable and probable cause be expressly alleged in every action against a constable for acts done by him in the execution of his office. That requirement precludes a claim of negligence *per se* being brought against a constable.

If Sergeant Henry's conduct of the matter was grossly negligent, that fact, if proven affirmatively by Mr Williams, might be indicative of malice or absence of reasonable or probable cause. That fact alone, however, is not sufficient to establish malice. I must in the words of Hawkins J in **Hicks v Faulkner**, "Draw it from all the circumstances of the case."

The pertinent question is whether he investigated the matter to the standard required.

Lord Atkins in **Herniman v Smith** [1938] AC 305 at p 319 said:

> *"It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to*

> *ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution."*

Viscount Simmonds in **Glinski v McIver** [1962] AC 726 at p said:

> *"Upon this matter it is not possible to generalise, but I would accept as a guiding principle what Lord Atkins said in Herniman v Smith, that it is the duty of a prosecutor to find out not whether there is a possible defence but whether there is a reasonable and probable cause for prosecution."*

Hawkins J in **Hicks v Faulkner** (1881) ALL ER 187 at p192 opined:

> *"The distinction between facts necessary to establish actual guilt and those required to establish a reasonable bona fide belief in the guilt should never be lost sight of in considering a case such as I am now discussing."*

At the time he arrested Mr. Williams, Sergeant Henry had only Miss Fender's statement. It is Sergeant Henry's statement that he never thought he needed to be cautious about acting on the statement of Miss Fender without corroboration because her assailant was known to her. Also, he never thought it important to take her to the scene because she knew who her assailant was. According to him, it was not his duty to decide whether Mr. Williams committed the offence. His duty was to investigate whether "something happened."

Was he justified in concluding that it was a case of recognition and so abandoned caution? In Miss Fender's statement to the police she stated, "I was on the verandah of the shop when Fredricks approached us. He then started ... I said to him, "Yeow weh yuh a do dis for" and he said, "Mi nuh did tell yuh me ah goh rape yuh". Sergeant Henry could have concluded that it was a case of recognition. Miss Fender stated that he came up to her with a black object in his hand. She also stated in her statement, "...when Fredricks approached us." That conveys the impression that she saw him before he held her and not that he came behind her as she later testified. She gave a fairly detailed description of her assailant. Nevertheless, Mr. Williams

denied the accusation; in fact his defence was alibi. Sergeant Henry therefore had a duty to investigate the matter.

What happens in rape cases is usually within the exclusive knowledge of the victim. However, in the instant case, there was a veritable eyewitness in Auldine Clarke (Blacks). Sergeant Henry could have investigated the matter further by comparing her statement to his since there were conflicts between her statement and his. No attempt was made at the time to contact Blacks. It is Sergeant Henry's evidence that Blacks' statement was taken later because he had difficulty contacting him. However, there is no evidence that he even attempted to contact him before the arrest was made. He admitted that since Blacks assisted her to take up her clothes, that is, panty, shorts and tee shirt, he would have seen her naked and that fact he agreed would have been remarkable.

He should have at least interviewed "Gracie" to see whether Miss Fender was consistent in her allegations against Mr. Williams. Miss Fender in her statement asserted that she went to "Gracie" but he never sought to interview "Gracie." It is Sergeant Henry's evidence that it was not important. Under cross-examination, he did not recall who those persons were. He had to be presented with his statement. According to him, he went to the area and made enquiries. Persons knew something happened but what they knew amounted to hearsay and could not assist. He has no record of his visits to the area. He admitted that the proper procedure is to record such visits. The question is whether he did in fact visit the area.

Upon being pressed under further cross-examination, he recanted that position and told the court that if the situation replicated itself he would attempt to interview Gracie and her boyfriend.

He did not visit the *locus in quo* with Miss Fender. The following morning he visited the *locus in quo* without her. He observed a verandah, that is, an open area with a rail but he could

not say where Miss Fender stood that night. Nor could he say where the light was positioned. He agreed that lighting was important. He testified that it was not important to take her to the *locus in quo* because she knew her assailant. He later, under further cross-examination, resiled from that statement and testified that if the matter recurred he would visit the *locus* with Miss Fender.

The Forensic Certificates were ready since December 27, 2000, before he gave his evidence on January 3, 2001. However, they were not collected until February 12, 2001. He did not check to see if the certificates were ready. The excuses he offered for not returning were flimsy and indeed spurious. Indeed, he adopted a cavalier attitude to his duty in that regard.

Under cross-examination, he agreed that if the Forensic Laboratory had the vaginal swab, and a blood group other than 'A' was found on the underwear, it could exclude Mr. Williams. In fact, it is his evidence that he received no swab sample. He later testified that if he were to investigate a matter of this nature again he would ensure that he obtained the swabs if they were available.

He made no enquiry of the laboratory as to whether they were able to determine if the semen found on Mr. Williams' underpants was the same as that on Miss Fender's underwear. He agreed that it was important to link the two. He agreed he made no enquiries as to how they could be linked. He stated that that was the prerogative of the laboratory. He later resiled from that and stated that as investigator he would now make those enquiries in light of the presence of semen on the underwear which he now considers important. Also, if the report revealed semen on the underpants and panty and it could not be linked, he would now make enquiries as to how they could be linked. At the time of the arrest he did not have the medical report to substantiate her claim.

Miss Fender in her statement to the police stated that blood was taken from her. He made no enquiries as to her allegation of blood being taken from her and he made no effort to obtain the results.

On a balance of probabilities, it has not been proved that he knew the results were ready nor that he deliberately failed to collect the results or concealed the same. What has been proven is that he was grossly negligent in not making enquiries.

The accused denied the allegation but Sergeant Henry never asked him if there was anyone who could support his alibi. He later stated that he would now ask the accused whether he owned the clothes described by the complainant. Also, he later agreed that if the circumstances were replicated he would go to the accused's house, and he would interview his witness.

Sergeant Henry admitted that Mr. Williams denied Miss Fender's allegation more than once. Without hesitating, he arrested him and remanded him into custody. He failed to offer him a telephone call to an attorney.

Would the outcome have been different had he been more diligent and, if so, has his lack of diligence caused harm to Mr. Williams? Sergeant Henry's investigation of the matter was below what was expected of a police officer. However, it is important to consider the evidence in its totality as lack of diligence is not *per se* evidence of malice. The critical question is whether malice can be inferred from his lack of diligence and negligent handling of the matter. Can it be inferred that he knew or must have known that Miss Fender was putting forward false and groundless claims?

Having arrested Mr. Williams on the statement of Miss Fender, he later obtained a statement from her mother which provided support for Miss Fender that she was in a distressed condition and complained of pain to her face and body. However, these statements conflicted as

to whether her assailant came from behind her or whether he approached them. That conflict should have put him on alert that Miss Fender's claims ought to have been investigated. Auldine Clarke's statement supported her statement that he approached them. It was his statement that her assailant ran over to where they were sitting not that he stealthily came from behind her as she later testified. His statement supported her claim that she was with him that night; that a man came up to them; that Miss Fender spoke to the man and that he saw her crying. However, his statement was also discrepant from hers as to whether he voluntarily moved or whether he was threatened by her assailant; also, whether he took up stones and their assailant ran. Her statement that he took up her clothes and asked her if she wanted to go to the police station was not supported by him nor did his statement support her claim that the assailant returned to the square and stoned them. The discrepancies in the statements should have caused Sergeant Henry to investigate the matter further. Negligence *per se* cannot amount to malice. However, malice might be inferred from gross negligence. I have found that Miss Fender used the words attributed to her by Mr. Williams in the presence and hearing of Sergeant Henry and he failed to take them into consideration. That is also evidence of gross negligence. However, that itself falls short of malice.

Can the inference be drawn from the fact that Sergeant Henry had knowledge that Miss Fender's claim was not genuine? Can the evidence as a whole satisfy the required standard that Sergeant Henry maliciously prosecuted Mr. Williams? Is there evidence of malice? I find that Mr. Williams has not succeeded, on a balance of probabilities, in proving that Sergeant Henry knew that her claim was false and groundless.

Was there absence of reasonable and probable cause for the prosecution (by Sergeant Henry)?

Lord Denning in **Glinski v McIver** [1962] AC 726 at p 762 said:

"But these cases must be carefully watched so as to see that there is really some evidence from his conduct that he knew it was a groundless charge."

Would a prudent and cautious man in Sergeant Henry's position be led to the conclusion that Mr. Williams was probably guilty of the crimes imputed to him by Miss Fender? Was there any evidence that he knew that the claim was groundless?

The fact that a Magistrate committed Mr. Williams and he was convicted at his trial is evidence of reasonable and probable cause. However, if Sergeant Henry knew that Miss Fender's claims were false, although her evidence was accepted by the Resident Magistrate and a jury, that fact would negate reasonable and probable cause; an honest belief is an important requirement of reasonable and probable cause (see **Willis v Voisin** (1963) 6 WLR 50).

Is there evidence to support Mr. Williams' contention that he instituted and continued the proceedings against him without an honest belief that Miss Fender's claims were trustworthy?

Sergeant Henry arrested Mr. Williams on the statement of Miss Fender. His testimony is that Miss Fender attended the station hopping, complaining of feeling dizzy and with an abrasion to her cheek. He also obtained a statement in which she identified Mr. Williams. If he did not know her before, he could have honestly believed that her claim was genuine. At that point, he would have exercised his discretion to arrest in good faith.

Was there Evidence to Justify the Continuation of the Prosecution against Mr. Williams

If Sergeant Henry, after initiating the prosecution, discovered through investigations the facts which should have caused him to distrust Miss Fender's claim, he would have continued the prosecution without reasonable and probable cause.

He later obtained a statement from her mother (Mrs. Sybil Fender) which provided support for Miss Fender that she was in a distressed condition and complained of pain to her face and body. However, her mother's statement conflicted with hers in that her mother stated that

she informed her that Mr. Williams came behind her; held her from behind and overpowered her. Miss Fender's statement to the police was that she saw him come up to her and she further stated that he 'approached them.' That conflict in the statements ought to have put him on alert that Miss Fender's claims might have been untrustworthy and required further investigation.

The statement of Brett, MR in **Abrath v North Eastern Railway Company** [1883] 11 QBD 440 at p 50 is useful and states:

> *"Therefore, it becomes a necessary part of the question whether there was an absence of reasonable cause, to determine whether reasonable care was taken by the defendants to inform themselves of the true state of the facts. The question, whether reasonable care has or has not been taken by a prosecutor to inform himself of the real state of the case, is not merely a piece of evidence to prove some fact, but it is a question which is itself to be decided by evidence, and upon which evidence to prove and disprove it may be given. It is a necessary part of the question whether there was reasonable and probable cause, because if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable and probable cause."*

Sergeant Henry also obtained a statement from Mr. Auldine Clarke in which he supported her claim that:

a) she was with him that night and a man came up to them;

b) Miss Fender spoke to the man; and

c) he saw her crying.

His statement was, however, discrepant with hers on a number of issues. He stated that it was of his volition that he moved and not that he was threatened by her assailant. His statement was at variance with her assertion that he took up stones and her assailant ran. His statement also made no mention of the fact that he took up her clothes and asked her if she wanted to go to the police station. Nor did his statement support her that Mr. Williams returned to the square and

stoned them. In light of Lord Atkins' definition of reasonable and probable cause, would an ordinary prudent and cautious police officer, in light of the conflicting accounts in the statements, be 'fully convicted' that he was probably guilty without investigating the matter further?

Were there reasonable grounds which would cause the ordinary prudent and cautious police officer, given the circumstances outlined, to be fully convicted that Mr. Williams was probably guilty of raping and assaulting Miss Fender?

Would the ordinary prudent and cautious policeman be alerted that her claim might have been untrustworthy? A rejection of Miss Fender's statement without more investigation would amount to the usurpation of the court's function. However, in light of the conflicts in the statements and Mr. Williams' alibi defence (which must be disproved by the prosecution), an ordinary prudent and cautious police officer would have conducted further investigations into the matter.

The ordinary prudent and cautious police officer would have sought to contact "Gracie" in an effort to determine whether her story was consistent; since "Gracie" would have been the first person to whom she reported the matter (Blacks having stated that he was trying to find out from her what happened but to no avail).

The ordinary prudent and cautious police officer before arriving at a conclusion that Mr. Williams was probably guilty would have collected the forensic certificates. He would have ascertained the results of the forensic tests. If the results were inconclusive because of the absence of the swab, he would have made the necessary enquiries and sought to obtain the 'missing swab' which would have been independent evidence and which should have been available (the doctor having taken the swab from Miss Fender). The swab could have assisted him in arriving at the conclusion in the circumstances.

Sergeant Henry knew of the existence of DNA tests since 1995, some four (4) years prior to the incident. He also admitted that he was aware of the usefulness of DNA analysis in solving rape cases. In light of the conflicts in the statements, the ordinary prudent and cautious police officer would not conclude that Mr. Williams was probably guilty of the offence in the absence of the DNA results.

Sergeant Henry arrived at the conclusion that Mr. Williams was probably guilty, having conducted investigations which were below the standard of those of the ordinary prudent and cautious police officer. He, therefore, was not in a position, because of his failure to conduct further investigations in the face of conflicting statements, to have been; 'fully convicted' that Mr. Williams was probably guilty of the crimes which were imputed to him by Miss Fender.

It is true that the Clerk of Court and the Resident Magistrate were also obliged to ensure that the proper evidence was placed before the court. However, as aforesaid, Sergeant Henry was responsible for conducting the investigations and collecting and presenting the evidence to the Clerk of Court.

In the circumstances, I find that Sergeant Henry's continuation of the prosecution was without probable and reasonable cause. I, therefore, find also that Mr. Williams was subjected to the legal process without reasonable and probable cause.

False Imprisonment

The authors of **Winfield & Jolowicz, Tort**, 16th edition (2002) p 81 define false imprisonment as:

> *"The infliction of bodily restraint which is not expressly or impliedly, authorized by law."*

The authors of **Halsbury's Laws of England**, 4th edition volume 45 para 1325 offer the following explanation:

> *"The gist of the action of false imprisonment is the mere imprisonment. The plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a prima facie case if he proves that he was imprisoned by the defendant."*

The burden of proof now shifts to Sergeant Henry.

Hawkins J in **Hicks v Faulkner** [1881-5] All ER 187 at p 190 states:

> *"...there being this recognised distinction between the two actions, that in false imprisonment the onus lies upon the defendant to plead and prove affirmatively the existence of reasonable cause as his justification; whereas in an action for malicious prosecution the plaintiff must allege and prove affirmatively its non-existence."*

There is no evidence that Sergeant Henry knew that Miss Fender concocted her claim. She attended the station in a distressed condition. She gave a statement in which she stated she knew her assailant. Given the nature of the allegation, the facts about which would have been within her knowledge, that would have provided the basis for reasonable and probable cause, that is, Mr. Williams was probably responsible for the acts she complained of.

The Question of Damages

Walker L J in the case of **Manley v Commissioner of Police for the Metropolis** [2006] EWCA Civ 879 cited with approval Roch LJ's statement on compensation for malicious prosecution:

> *"Compensation for malicious prosecution has three aspects. First, there is the damage to a person's reputation. The extent of that damage will depend upon the claimant's actual reputation and upon the gravity of the offence for which he has been maliciously prosecuted. The second aspect is the damage suffered by being put in danger of losing one's liberty or of losing property. Compensation is recoverable in respect of the risk of conviction. McGregor on Damages 16th Edition paragraph 1862 considers that an award under this head is basically for injury to feelings, unless there has been a conviction followed by imprisonment. The*

third aspect is pecuniary loss caused by the cost of defending the charge."

The case of **Thompson v The Commissioner of Police of the Metropolis [1997] 2 All ER 762** provides guidance as to appropriate awards in cases of malicious prosecution. At p 775 Lord Woolf MR stated:

> *"In the case of malicious prosecution the figure should start at £2,000.00 and for prosecution continuing for as long as two years, the case being taken to the Crown Court, an award of about £10,000 could be appropriate. If a malicious prosecution results in a conviction which is only set aside on an appeal this will justify a larger award to reflect the longer period during which the claimant has been in peril and has been caused distress.*

At p 774 he expressed the following view:

> *"But that sum should be on a reducing scale so as to keep the damages proportionate with those payable in personal injury cases and because the claimant is entitled to a higher rate of compensation for the initial shock of being arrested."*

The statement was made in reference to cases of wrongful arrest and imprisonment but I am of the view that it was intended to be applicable to cases of malicious prosecution.

Mr. Williams' antecedent was presented at his criminal trial by Detective Corporal Brimroy Garwood. His investigations revealed that Mr. Williams had no previous convictions and that soon after leaving school he became an apprentice at Scorpio Motor, Hagley Park Road. He later became a labourer on a construction site and was so employed at the time of his arrest.

Mr. David Rookwood, a private contractor, testified that Mr. Williams had worked with him for approximately five (5) years. He found him to be cheerful, helpful, reliable, and honest. In his absence, Mr. Williams acted as his supervisor. It was his evidence that he would re-employ Mr. Williams at the end of his conviction.

Mr. Andrew Walden, a factory manager also testified at the criminal trial on his behalf. He testified that Mr. Williams was his neighbour and he worked at various jobs. It is his evidence that Mr. Williams had asked him for a job and he would employ him when he had a vacancy. It was also his evidence that Mr. Williams was a fine young man who would not harm anyone. He was quiet and always looked for an opportunity to work. He was much admired by the young people in the community because he was helpful to his mother and siblings. Miss Lisa Gordon, a teacher in the community supported Messrs Walden and Rookwood that he was a young man of fine character. The foregoing evidence contradicts Miss Fender's evidence that he was an idler.

The Court of Appeal decision of **Inasu Everald Ellis v The Attorney General and Ransford Fraser** Civil Appeal No. 37/ 01 heard on December 20, 2004 is helpful in determining an award which should adequately compensate Mr. Williams.

Mr. Inasu Ellis was arrested on March 1, 1991 and was taken into custody at the Port Antonio Police Station where he was detained and interrogated for seven (7) hours. He was charged with several offences against the Larceny Act and released on bail. His arrest was broadcast on radio. Consequently, he was interdicted from his job and faced disciplinary proceedings.

On October 4, 1995, the charges against him were dismissed. Mr. Ellis instituted proceedings against the defendants and claimed damages for malicious prosecution *inter alia.* An award of $150,000.00 was made for malicious prosecution and $300,000.00 for aggravated damages.

On appeal, the court took into account the following: he was a Justice of the Peace; he performed the duties of a Lay Magistrate; he was a member of the Chamber of Commerce and was a well respected and popular member of his community. Prior to the incident, he was

gregarious, friendly, and cheerful and he entertained lavishly. After the incident his demeanour, emotional and mental status changed greatly.

The psychologist testified that he lost his self esteem and suffered from psychoneuroses. She was of the view that he had been psychologically destroyed. He suffered indignity, humiliation and embarrassment because he was charged. His reputation was injured irreparably.

The Court of Appeal increased the award for malicious prosecution and aggravated damages to $2.1 million. That figure at today's value converts to $3,496,254.01.

An award for aggravated damages was made because it was found that the conduct of the arresting officer towards Mr. Ellis was disdainful, grossly insulting and offensive. He was left standing for 5½ hours. He was denied the right to communicate with his attorney. He was not given an opportunity to obtain food or drink, nor was he offered any.

The trial was highly publicized and the proceedings lasted for five years. The behaviour of the officer and the failure of the prosecution to dispose of the matter within a reasonable time were factors which contributed to the aggravation of the damages. The sum awarded by the trial judge for aggravated damages was significantly higher than the award for malicious prosecution. The Court of Appeal, however, awarded a global figure which included an award for aggravated damages. Mr. Ellis was unable to continue sexual relations with his wife, his health was destroyed, and his reputation was injured irreparably.

There is no evidence that Mr. Williams was shunned by his friends or that his social life was destroyed. No evidence was adduced that Mr. Williams has suffered any permanent physical injury. Unlike Mr. Ellis, there is no evidence that Mr. Williams is psychologically destroyed. In fact there is no evidence that he was psychologically affected. In the instant case, an apology to Mr. Williams was made on national television by Miss Paula Llewellyn, Deputy Director of Public Prosecutions (as she then was).

Mr. Williams was a man of 'wholly good character,' but he was from humble circumstances while Mr. Ellis was an esteemed and respected member of his community. However, the offence of rape is a most serious offence of violence. The heinous nature of the offence placed Mr. Williams in a humiliating position from the time he was prosecuted. Mr. Williams had to endure the prosecution process while he was remanded in custody for four (4) months in horrifying circumstances. He not only faced the risk of imprisonment but was in fact convicted and sentenced to seven (7) years imprisonment for the offence of rape and three (3) years for assault. He was incarcerated for three (3) years and suffered the anguish of contemplating serving the entire seven (7) years. It is his evidence that he looked with despair at serving seven (7) years in the dreadful penitentiary.

His existence behind bars was miserable, horrific and torturous. Not only was he deprived of his liberty but he was stabbed just above his navel and bitten by an inmate. The stab wound was sutured and the area still bears the scar. He worried about contracting HIV as a result of being bitten which was a real fear because of the high incidence of the disease among the prisoners. He was tormented by the fact that he was innocent and imprisoned. Mr. Ellis was only detained for seven (7) hours although the charges were pending against him for five (5) years

Mr. Williams refused to eat the food provided by the prison authorities and only ate when his family visited and brought him food. Thoughts of being reunited with his 'little family' were his 'salvation.' He was robbed of that hope as his girlfriend became stressed and depressed as a result of his incarceration and stopped visiting him. Consequently, he lost contact with his daughter who was one (1) year old. He was only able to locate her some eight months plus after. He became angry and resentful of his situation.

The Court of Appeal case of **Air Jamaica v Collman**, SCCA 45/2006 although not a malicious prosecution case, provides guidance. The claimant in that case was employed to Air Jamaica as an air craft technician. Air Jamaica caused him to travel to the USA to work on their aircraft without providing him with the correct visa. As a result, he was detained for eighteen (18) hours by the US immigration officers and returned home. He was manacled and shackled at his waist. He was placed into a cell with criminals and suffered the indignity, inconvenience and humiliation of being a prisoner. The Court considered the injury to the claimant's liberty and expressed the view that it should not be treated lightly. The Court also considered the disgrace, humiliation and resultant depression he suffered. The sum of $2,500,000.00 was considered to be adequate compensation.

Whether Damages should be Aggravated

The case of **Thompson v Commissioner of Police of the Metropolis** [1997] 2 All ER 762 dealt with the proper approach to aggravated damages:

> "It is when the jury have to consider whether there should be an *award of aggravated damages as additional compensation, that the award in this class of case is more analogous to that in defamation proceedings. As the Law Commission points out in their admirable consultative paper, Aggravated, Exemplary and Restitutionary Damages (Consultation Paper No. 132 (1993) para 2.17 ff, there can be a penal element in the award of aggravated damages. However, they are primarily to be awarded to compensate the claimant for injury to his proper pride and dignity and the consequences of his being humiliated. This injury is made worse for the claimant because it is more difficult to excuse when the malicious motives, spite or arrogance are on the part of the police. (see Rooks v Bernard [1964] 1 All ER 367 at 407 ff, [1964] AC1129 at 1221ff per Lord Devlin)"*
>
> The court continued
>
> *"If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would*

result in the claimant not receiving sufficient compensation for the injury suffered, if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high-handed, insulting, malicious or oppressive manner, either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating feature can also include the way the litigation and trial are conducted."

Mr. Williams having attended the Irish Town Police Station voluntarily was instructed to remain and await the arrival of Sergeant Henry. Upon Sergeant Henry's arrival he was ordered into the jeep and transported to the Gordon Town Police Station. It was Mr. Williams' evidence that Sergeant Henry's treatment of him was not hostile. However, he suffered the indignity of being shackled to a chair at the station for about half an hour and was ordered to hand over his underpants. The shackling of Mr. Williams and the handing over of his undergarment can be considered part of the normal procedure of dealing with persons suspected of committing an offence of the gravity with which he was charged. It was nevertheless humiliating particularly to a person who ought not to have been accused. However the evidence is bereft of any allegation of the type of behaviour by Sergeant Henry which could be considered as high-handed, unnecessarily humiliating, insulting, oppressive or malicious.

In determining an appropriate award for the malicious prosecution of Mr. Williams, I have considered all the circumstances including the indignity he suffered at being shackled and having to hand over his underwear, and the fact that he was bitten and stabbed while incarcerated for nearly three years and lost contact with his girlfriend and child. Those unfortunate incidents were as a result of the malicious prosecution, and so would not be factors which would allow for an award of aggravated damages.

In the circumstances, there shall be judgment for the claimant against the defendants.

The sum of $6,000,000.00 is awarded for malicious prosecution with interest at the rate of 6% per annum from January 14, 2005 to June 21, 2006 and thereafter at 3% per annum to July 1, 2009. The sum of $77,184.00 is awarded for special damages with interest at 6% per annum from November 5, 2000 to June 21, 2006 and thereafter at 3% per annum to July 1, 2009. The claimant shall have costs to be taxed if not agreed.