[2013] JMSC Civ 134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2007 HCV 04404

BETWEEN	**FRANKLYN WILSON**	**1ST CLAIMANT**
A N D	**MAULEAN WILSON**	**2ND CLAIMANT**
A N D	**COMMISSIONER OF POLICE**	**1ST DEFENDANT**
A N D	**DEVON GORDON**	**2ND DEFENDANT**
A N D	**THE ATTORNEY GENERAL OF JAMAICA**	**3RD DEFENDANT**

Mr. Ainsworth W. Campbell, of counsel, for the claimants.

Ms. Deidre M. Pinnock & Mr. I. St. Jude Alder, instructed by Director of State Proceedings, for the defendants.

Heard: March 20, 21, 22, 23, 2012 and September 27, 2013

CLAIM FOR DAMAGES FOR ALLEGED UNLAWFUL DETENTION OF PROPERTY (DETINUE) – PROOF OF MALICE – ELEMENTS OF TORT OF DETINUE – CONTRAST BETWEEN PARTICULARIZING CLAIM BASED ON VICARIOUS AS DISTINCT FROM PERSONAL LIABILITY – IMPORTANCE OF CAREFULLY PARTICULARIZING CLAIM AND DEFENCE RESPECTIVELY – RULE 8.9A AND 10.7 OF THE CIVIL PROCEDURE RULES (CPR) – EARNING OF INCOME BY ONE OF CLAIMANTS CONTRARY TO PERTINENT STATUTORY PROVISIONS – PUBLIC POLICY – MEASURE OF DAMAGES FOR DETINUE – BURDEN OF PROOF AS REGARDS MITIGATION OF DAMAGES

Anderson, K., J.

[1] By means of this claim, the claimants are seeking to obtain damages (monetary compensation), arising from what they allege, was the malicious and unlawful retention of a motor vehicle belonging to them and/or the wrongful withholding of that motor

vehicle from them and/or the negligent mislaying of the said vehicle, this being a motor vehicle licensed no. 4237 PPV and which was, at the material time, licensed to operate as and, being utilized by the claimants as a taxi (public passenger vehicle) and thereby transporting passengers, for hire/reward. It is further alleged by the claimants that such malicious and unlawful and/or negligent mislaying and /or malicious and unlawful retention of said vehicle occurred between the dates - January 16, 2002 and April 19, 2002.

[2] The claim is being made jointly by the claimants who were, at least up until the trial of this claim, husband and wife (and may very well, still be so). There is no dispute that between the dates – January 16 and April 19, 2002, the claimants were the registered owners of the said vehicle and were duly licensed to utilize the same for the purpose of conducting a taxi service. During that time period also, the 1st claimant was a special constable employed in that capacity, by the Government of Jamaica and was thus, then employed as a member of the government entity known as the Island Special Constabulary Force, which is in essence, a law enforcement agency in Jamaica, which functions as an auxiliary to the Jamaica Constabulary Force. As such, it has been confirmed by Jamaica's Court of Appeal, that a member of the Island Special Constabulary Force such as for instance, a special constable, is entitled to the same privileges and has the same rights, as also the same responsibilities, as a member of the Jamaica Constabulary Force. This court, in this judgment, describes the same as having been, 'confirmed' since Section 22(1) of the Constables (Special) Act, specifically states that a special constable shall have, exercise and enjoy all the powers, authorities, privileges and immunities and shall perform all the duties and have all the responsibilities of a constable of the Jamaica Constabulary Force constituted under the Constabulary Force Act. The Court of Appeal case referred to, is: **The Attorney General v D'Sent Nicholas and the Special Constabulary Force Association –** Supreme Court Civil Appeal No. 29/97**.**

[3] There will, in respect of this claim, when considered in the context of the aforementioned provision on of Section 22(1) of the Constables (Special) Act, have to be determined whether the first claimant's claim for loss of income, arising from that

which he has alleged, constitutes the unlawful detention of the vehicle which he jointly owned with his wife at the material time, can be properly maintained, such as to enable judgment in respect thereof, to be awarded in his favour. In that regard, there will be police guidelines for conduct which will have to be reviewed by this court and issues of public policy which will also have to be considered. All of these things will be addressed though, further on in this judgment.

[4] From early on in this judgment, this court must let it be known that the claim made against the first defendant arising from the alleged unlawful detention/retention of the claimants' motor vehicle during the relevant time period, must fail. This is so, as a matter of both law and fact. The claimants are not, either individually as collectively, contending that any specific action was taken by the first defendant, who is the Commissioner of Police, in relation to their vehicle, or that there was any inaction on the part of the Commissioner of Police, in relation to the relevant vehicle, which has given rise to this claim. To the contrary, the claimants are contending that such action and/or inaction was specifically carried out, or not carried out (as the case may be), by the second defendant, who was, at the material time, a special sergeant attached to the Island Special Constabulary Force. As a matter of law therefore, the second defendant was never, at the material time, either a servant or agent of the Commissioner of Police. Indeed, it has surprisingly, not at all been alleged by the claimants, for the purposes of this claim, that at the material time, the second defendant was then acting as the employee ('servant') or agent of anyone at all. How then, as a matter of law, can the Commissioner of Police be held liable for the actions and/or inactions of someone such as the second defendant, who was not, at the material time, a servant or agent of the Commissioner of Police? Both as a matter of law and of fact therefore, the claim against the first defendant must and does, fail.

[5] The claimants' claim has also been instituted against the Attorney General, who is the third defendant herein. It is alleged that the third defendant is sued pursuant to the provisions of the Crown Proceedings Act. As the Attorney General, the third defendant, is the proper legal representative of the Crown, for the purposes of this

claim. Section 13(2) of the Crown Proceedings Act, provides that – **'***Civil Proceedings against the Crown shall be instituted against the Attorney General.'*

[6] Accordingly, in this claim, the claimants have joined the Attorney General as a defendant, on the basis that they are seeking to obtain relief, through their claim, against the Crown. In order for the Crown to be liable in respect of the legal wrongs as allegedly committed in relation to them, as now form the substratum of this claim, this court has to further consider more carefully, the precise nature of the claim, as a matter of law and also, the relevant provisions of the Crown Proceedings Act, in relation to a claim such as this.

[7] This claim is based on the law of tort and in that regard, is a claim for damages for detinue (wrongful detention), arising from that which the claimants have alleged, was the unlawful detention/retention of their property, during the period – January 16, 2002 to April 19, 2002 and/or the 'negligent mislaying' of said properly, during that period of time. Just as detinue is a tort (wrong), so too is negligence. In either respect therefore, the claimants' claim against the Crown is based on the law of tort. As such, Section 3(1) and (3) of the Crown Proceedings Act are both applicable to this claim, insofar as the joining of the Crown as one of the defendants to this claim, is concerned.

[8] To paraphrase the most pertinent aspects of Section 3(1) of said Act, the Crown is liable in tort, just as if it were a private person of full age and capacity, if said tort is committed by one of its servants or agents and in respect of any breach of duties attaching at common law to the ownership, occupation, possession or control of property. Section 3(1) of said Act though, it should be noted, also has as a proviso, that no proceedings shall be brought against the Crown, in respect of a tort committed by a Crown servant or agent, unless the said act or omission would have, apart from the provisions of the Crown Proceedings Act, given rise to a cause of action in tort against that servant or agent, or his estate.

[9] Section 3(1) of the Crown Proceedings Act makes it clear that if the second defendant, while functioning as Crown servant or agent, committed a tort in respect of

which he could have, either at common law, or by virtue of the provisions of any other statute than the Crown Proceedings Act, been personally held liable, then the Crown will, by extension, be vicariously liable for the commission of such tort. As such, if it is alleged, for the purpose of this claim, that the Crown's servant or agent, being the second defendant, committed a tortious act for which he could be personally held liable at common law, then the Crown can also be held vicariously liable arising from the commission of such tort.

[10] Section 3(3) of the Crown Proceedings Act also makes it clear that if functions and/or duties are conferred, or imposed upon an officer of the Crown as such, either by any common law rule or statute, and that officer commits a tort while performing or purporting to perform those functions, the liabilities of the Crown in respect of the tort, shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown. As such, vicarious liability arises for the Crown, in circumstances wherein, a duty has been imposed, or functions conferred, by either common law or statute and while performing those functions or that duty, a tort is committed by one of the Crown's servants or agents.

[11] This claim cannot succeed against the third defendant – as the Crown's representative herein. It cannot succeed because it has not at all been alleged by the claimants in respect of their claim, that at the material time, the second defendant was acting in the capacity of either a servant or agent of the Crown, or in exercise of his functions as a sergeant of the Island Special Constabulary Force. The 'Crown' does not exist as an individual under Jamaican law. Under Jamaican law, the Crown is represented by the Governor – General. Once an individual though, is functioning in Jamaica as a government employee and commits a tort as a servant or agent of the government, for which tort, such individual could have been personally held liable, then, in such circumstance, but only in such circumstance, the Crown can properly be held by a Jamaican court, as being vicariously liable, arising from the commission of that tort by the said government employee. If therefore, as is the situation as regards this claim, it has not been alleged that at the material time, the second defendant committed the alleged tort whilst functioning as a Crown servant or agent, this would therefore mean

that the Crown and by extension therefore, the Attorney General, being the third defendant herein, cannot properly be held liable.

[12] It is not open to this court to conclude as having been proven, an allegation which has not been made by a claimant, or claimants, regardless of how integral the making of such an allegation would have been towards facilitating proof of his/their claim. The law in that respect, has been very clearly set out in Rule 8.9A of the Civil Procedure Rules (CPR), which prescribes that – *'The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission*.' As such, since the claimants have made no allegation that at the material time, the second defendant was performing functions as a Crown servant or agent, in the capacity of a special constable, it is not at this time, properly permissible for this court to conclude that the second defendant was then performing his functions in that capacity. Such not having been alleged and therefore now being incapable of being proven, even by way of inference, the Crown cannot properly be held liable in respect of this claim. This court agrees with the defence counsel's closing submission in that particular respect.

[13] In the circumstances, there exists in this claim, only one defendant against whom this claim can, as presently framed, be pursued, and that is the second defendant. At the material time, he was functioning as a special sergeant attached to the Island Special Constabulary Force. At that time, he was attached to the Mandeville Police Station. On or about January 16, 2002, the claimants were then, through employees of theirs, operating the relevant motor vehicle as a taxi. It was the practice of the claimants' employees, to park that vehicle at the Mandeville bus park in the parish of Manchester, until departing to another location. Whilst the said vehicle was, on or about January 16, 2002, parked at that location while awaiting departure, the second defendant directed that the said vehicle be driven to the examination depot in Mandeville, for the purpose of being examined. The claimants' agent complied with that direction. Whilst there exists factual dispute as to what was the finding of the motor vehicle examiner when he initially examined the said vehicle and whether the said vehicle was re-examined and then, different findings made, what is not being disputed,

is that at some point in time, not long after the said vehicle was taken to the examination depot for the purpose of being examined, it was so examined, or re-examined (as the case may be) and defects were found as then existing to it. The defects then noticed by the examiner are disputed as to their precise nature, but the first claimant has himself accepted, while giving evidence to this court during cross-examination, that the defects which the examiner had certified as being required to be remedied, were cracked headlights and a cracked windscreen. Such damage had occurred to that vehicle, as a consequence of an accident in which it had been involved, prior to January 16, 2002. The second claimant confirmed, during her cross-examination evidence, that the said vehicle had been involved in an accident prior to January 16, 2002 and that she could recall that the said accident had caused that vehicle's headlights to be cracked. She did not, however, recall there having, as of January 16, 2002, existed any other damage to that vehicle. As already mentioned though, the first claimant confirmed that as at January 16, 2002, the said vehicle also had a cracked windscreen.

[14] Once said vehicle had been certified as being defective in certain respects, that vehicle's licence plates were then removed. It is alleged by the claimants that special sergeant Gordon had personally removed the licence plates from the vehicle, using a screwdriver and that he did so in the presence of Mr. Horace Harding (the vehicle driver) and Mr. Delroy Leachman (conductor). It is further alleged by the claimants that special sergeant Gordon also took the vehicle's key, from the person who was with the vehicle as the driver thereof (this being one of the claimants' employees/agents). It should be noted that the said vehicle is a Toyota Hiace minivan and that when it was operated, it had with it, a driver and a conductor. Mr. Delroy Leachman testified that he was the conductor with that vehicle on January 16, 2002. He gave evidence of the events which he had allegedly witnessed on said date, as regards the alleged 'seizure' of said vehicle by special sergeant Gordon. The only other witnesses to the most pertinent events concerning the interaction between special sergeant Gordon and the driver and conductor of that vehicle and with the vehicle itself, on January 16, 2002, who testified, were special sergeant Gordon himself and special sergeant Ervin Barrett. Special sergeant Gordon disputes the allegation that he never removed the vehicle's

licence plates from the vehicle. According to his evidence, it was the vehicle examiner who initially directed that the vehicle's licence plates be removed from the vehicle, following on which, he then further directed the vehicle driver – Mr. Horace Harding, to remove the said licence plates, whereupon he (Mr. Harding) removed the same and handed them over to special sergeant Gordon, who thereafter, retained the same in a locked drawer at the Mandeville park's police post.

[15] There is no dispute that the actual vehicle itself was never in fact taken away from the possession of the claimants at any time. It is also not in dispute that the vehicle's licence plates were seized and retained by the second defendant, albeit that the precise circumstances leading up to same are greatly disputed. For the purposes of resolving this claim though, this court need make no findings of fact in that regard and as such, declines to make any such factual findings. Undoubtedly, once the claimants' vehicle no longer had its licence plates on it, it no longer could lawfully have been utilized to carry out its intended purpose, this being, to transport passengers to various and sundry locations, for a reward or fee. That situation is not therefore, one in which the relevant vehicle has been physically taken into the custody of a law enforcement authority and therefore, has been 'seized' by that authority. The effect of the removal and/or detention of that vehicle's licence plates by a law enforcement authority though, is, insofar as this court is concerned, just the same as if the said vehicle had in fact, physically been 'seized.' Indeed therefore, the legal principles applicable thereto, insofar as the law of detinue is concerned, will be precisely the same as if the said vehicle had physically been seized.

[16] What then, of the vehicle's key? Was that ever seized by special sergeant Gordon? Interestingly enough, the second defendant provided no evidence-in-chief to this court, either by means of that which he duly certified as being true, in his witness statement, or oral evidence in amplification thereof, specifically denying that he had seized and/or detained the relevant vehicle key. No such denial of that specific allegation, was ever forthcoming from special sergeant Ervin Barrett, during his examination-in-chief evidence, either. While being cross-examined, neither of those two witnesses for the defence, one of whom is the second defendant, was asked any

question about such alleged seizure of the vehicle key by the second defendant. It is understandable that no question about same, was put to either of the defence witnesses during cross-examination evidence as respectively, given by them. This is understandable, since, during their evidence-in-chief, neither of those witnesses had at all sought to dispute the claimants' allegation as to the seizure of the vehicle key by the second defendant, this even though, at the very least, the second defendant would have been able to do so, during his examination-in-chief evidence, if he and his counsel had wished to do so.

[17] What is the legal effect of the failure of the defendants to dispute this particular allegation by means of evidence from the witness stand? Does this mean that this court is obliged to accept the evidence which was provided to this court by the vehicle's conductor, Mr. Delroy Leachman, as to the said vehicle key having been seized by the second defendant? This court does not hold the view that it is required to accept evidence as given by any witness, even on an important factual issue, simply because such evidence is uncontradicted by any opposing party, this even in circumstances where such contradiction could reasonably have been expected by the court, to have been forthcoming. In this regard, see the decision of the Privy Council as rendered in the Jamaican case of – **Industrial Chemical Company (Jamaica) Ltd. v Ellis** – [1982] 35 W.I.R. 303.

[18] This court does not accept the evidence which has been given to it by the claimants' vehicle's conductor – Mr. Delroy Leachman, that the said vehicle key was ever seized or taken away from the vehicle's driver (the claimants' employee), by the second defendant. If that were so, why then, has there been no evidence whatsoever, provided to this court on the claimants' behalf, as regards said vehicle key having, at any time after it was allegedly seized by the second defendant, been returned to either or both of the claimants? There exists in evidence, a document on which there is, on the rear thereof, the note – 'Received my plates on April 28, 2002.' Below that note, according to the first claimant's testimony at trial, is his signature. There exists fervent dispute between the parties, as regards when the said licence plates were handed over to the first claimant, after the relevant vehicle defects which had been earlier certified by

a motor vehicle examiner, had been rectified. If though, such formality was entered into, as regards the return of the vehicle's licence plates to the first claimant, would not the same, also have been done with respect to the return to that claimant, of the vehicle's key, if in fact that key had ever been seized? If such was ever done, or the said key was ever returned to either of the claimants by anyone, this court was not provided with evidence of either such. This court is, in the circumstances, of the view, on the issue of fact as to whether the said vehicle key was ever seized by the second defendant, that such did not in fact occur. This court therefore disbelieves the claimants' witness – Mr. Leachman, on that specific issue of fact.

[19] This does not though, in and of itself, mean that the claimants' claim cannot be successful in any respect. As aforementioned, the detention of the vehicle's licence plates would have, in and of itself, prevented the claimants from using that vehicle for any purpose at all, as it is unlawful to drive a vehicle on Jamaica's road, without its licence plates being duly affixed to the front and rear thereof. Of course too, those licence plates must have, clearly designated on them, the licence plates number which is recorded on the vehicle's certificate of registration.

[20] The claimants have alleged, as an alternative aspect of their claim, that their vehicle's licence plates, being their property, was negligently mislaid. This specific alternative allegation, which is derived from the claimants' claim form is, it seems from that which has been more specifically particularized in the claimants' particulars of claim, not an allegation which is being seriously pursued by the claimants. This court so concludes because the alleged negligent mislaying of said licence plates is not in any way, shape or form, an allegation which has been even as much as repeated, much less particularized, in the claimants' particulars of claim. The negligence alleged, if indeed that was an allegation being seriously pursued by the claimants, ought to have been carefully and as fulsomely as possible, particularized. In the present claim, such has not been done. Legal practitioners must carefully note that claimants, who fail to properly particularize their claims, may inevitably be denied any redress at trial. If such happens, due to a failure to properly particularize same, as is required by Rule 8.9A of the CPR, which has been quoted above, then those claimants and/or their attorneys,

will only have themselves to blame for their misfortune (if even it can then properly be so described), in failing to obtain redress. The days of trial by ambush, are long over and indeed, it is meet and just that this should be so. In the circumstances, this court will give no further consideration to the alleged negligent mislaying aspect of the claimants' claim, in respect of which no particulars were provided to the defendants and also, no proof thereof, was even as much as attempted to be provided.

[21] The claimants' claim is, as aforementioned, founded on the tort of detinue, arising from that which, as was alleged, was the unlawful seizure of the claimants' vehicle, that vehicle's licence plates and that vehicle's keys, by the second defendant. The undoubted detention of the claimants' vehicle's licence plates by the second defendant, is a live issue which may properly form the basis for the tort of detinue and thus, for the claimants' claim, as against the second defendant, personally. This does not mean though, that this claim has been properly proven to the requisite standard, that being, on a balance of probabilities.

[22] In order for a claim for damages based on the tort of detinue to succeed, as clearly set out by Jamaica's Court of Appeal in the case – **George and Branday Ltd v. Lee** – [1964] 7 W.I.R. 275, it is necessary to prove the following elements -

i. That the claimant had, at the material time, an immediate right to possession of the allegedly unlawfully detained item(s); and

ii. That at the material time, the defendant was responsible for wrongfully detaining and therefore, being in possession of the item(s) which the claimant then had an immediate right to the possession of; and

iii. That the claimant made an unconditional demand for the return to him or her, of the item(s) wrongly so detained; and

iv. That such demand for the return of that/those item(s) was unconditional.

[23] **Regulation 179 of Jamaica's Road Traffic Regulations (1938),** is directly pertinent to this claim and is worthy of quotation herein, for the purpose of placing in a proper context, the alleged unlawful detention by the second defendant, of the claimants' vehicle's registration plates. That particular regulation, reads as follows:

> *'Any police constable in uniform or on showing his authority as a member of the police force of the Island or persons authorized by a road authority, having reason to believe that any motor vehicle or trailer is in a defective condition, may require the driver to take such vehicle or trailer to the nearest certifying officer of any traffic area authority who shall examine it as to its suitability or otherwise to be used on a road and what shall be done before it may so used. Should the certifying officer find out that the vehicle is defective he shall issue a certificate on the form 'E1' of the schedule and the police constable or authorized person shall remove and retain the registration plates and/or licence, and the person in charge of the vehicle shall be directed to take the vehicle to the nearest place where repairs can be effected and the registration plates and/or licence shall not be returned until a certifying officer certifies on the form 'E2' of the schedule, that the vehicle is no longer defective.'*

[24] Section 22 (1) of the Constables (Special) Act, is also directly pertinent to this claim. That section provides that:

> *'Every special constable enrolled under this Part shall while on duty in the capacity of a special constable have, exercise and enjoy all the powers, authorities, privileges and immunities and shall perform all the duties and have all the responsibilities of a constable of the Jamaica Constabulary Force constituted under the Constabulary Force Act...'*

From this section, it is very clear that, when considered along with Regulation 179 of the 1938 Road Traffic Regulations, a special constable or special sergeant of the Island Special Constabulary Force, would have lawful authority, if having reason to believe that a motor vehicle is in a defective condition, to then require that vehicle to then be taken to the vehicle examiner of the nearest traffic area authority. It that vehicle is certified as defective, then such special sergeant would be authorized to remove and retain that vehicle's registration/licence plates, there and then and not to return the same until the

appropriate traffic area authority's motor vehicle examiner, has certified that the said vehicle is not longer defective.

[25] In this court's view, the seizure and initial retention of the claimants' vehicle's licence plates as was done by the second defendant in the circumstances both as testified to by him and also , by special sergeant Ervin Barrett and also, even if only to the extent as therewith not disputed by the claimants, was lawfully done. Said seizure and retention, according to the evidence as provided to this court by respective persons at trial, occurred on January 16, 2002. The claimants are alleging that the relevant wrongly retention/detention of their vehicle's licence plates occurred beginning as of January 16, 2002 and ending as of ninety (90) days thereafter, or, more particularly, on April 15, 2002. The specific date of April 19, 2002, has been alleged by the claimants in their claim form, which was certified by them, as believed, in terms of the facts set out therein, to be true. Equally too, the claimants certified that they believed to be true, the facts stated in their claim form, particulars of claim and statement of special damages (which was attached as a separate document, to the claimants' particulars of claim). In the claimants' particulars of claim, no specifics other than to the extent as alleged in the statement of special damages, were provided as to the date when the said licence plates were returned to the claimants. In that regard, it was therein alleged that said licence plates were returned to the claimants after ninety (90) days had elapsed, commencing as of January 16, 2002. This would therefore mean that by their particulars of claim, the claimants have alleged that the said licence plates were returned to the claimants by April 16, 2002. The questions must be asked at this juncture – why did the claimants not claim damages for the 93 day period during which , as they had initially alleged, by means of their claim form, the said licence plates were unlawfully detained/retained? Is it that there exists uncertainty in the claimants' minds, as to when the said licence plates were in fact returned to them? Is it that what they alleged in their claim form and particulars of claim respectively, as to the date when the said licence plates were returned to them, is in each of those court documents, known to them as being untrue? This court will answer each of these questions, further on this judgment.

[26] The defendants have averred in their defence, at paragraph 9 thereof, that the actions of special sergeant Barrett (who incidentally was at the material time ranked as a special constable), and of the certified motor vehicle examiner, were done pursuant to Section 13 (2) (d) of the Transport Authority Act and Regulation 6 of the Transport Authority Regulations.

[27] Understandably, as part and parcel of their written closing submissions, however, the defendants resiled from their initial reliance on the aforesaid Section and Regulation, of the Transport Authority Act and Regulations, respectively. They undoubtedly did so, because that Section and Regulation relate to a situation in which a traffic authority inspector (this as distinct from a member of either the Island Special Constabulary Force or the Jamaica Constabulary Force), has reasonable cause to believe that a public passenger motor vehicle is defective. In place thereof, the defendants instead, now place reliance on Section 22 (1) of the Constables (Special) Act, considered along with Regulation 179 of Jamaica's Road Traffic Regulations (1938) and rightly so. The question arises though, can the defendants or either defendant, place reliance on a legal averment which is not set out in their particulars of claim? The answer is 'Yes'. This is so because, Rule 10.7 of the CPR, precludes reliance on any allegation or factual argument which could have been set out in the defence, but was not set out there, unless the court gives permission. The averment as set out in paragraph 9 of the defendants' defence, is not an averment of fact, but rather, is one of law. The same need not have been set out in the defendants' defence at all. It need not have been there set out, as it is an averment of law, as distinct from an allegation or factual argument. Accordingly, even though paragraph 9 of the defendants' defence, contains within it an averment of law which is entirely inappropriate for and inapplicable to the claim at hand and in place thereof, the defendants are now relying on a legal averment which has not at all been made in their defence, nonetheless, they are entitled to rely on the same. As will be recognized further on in this judgment though, there is a separate instance in which, on a critical issue of fact, the defendants' defence is defective, bearing in mind the evidence which was led at trial in respect of the said factual issue, just as was applied by this court, with respect to the claimants' seemingly

defective claim, insofar as the failure by them to have specifically alleged in their particulars of claim, that at the material time, the second defendant was functioning as a Crown servant or agent, is concerned. (See paragraphs 11 and 12 of this judgment, in that specific respect).

[28] The defendants' only two witnesses, namely, the second defendant – who retired as a special inspector of the Island Special Constabulary Force and special sergeant Ervin Barrett, both relevant motor vehicle licence plates were returned to the claimants on January 19, 2002, this following on the first claimant having shown to the second defendant, in the latter part of the afternoon of January 18, 2002, that he had, by then, received from a motor vehicle examiner a Certificate of Defects Remedied – this being the requisite condition precedent, as prescribed by regulation 179 of the Motor vehicle and Road Traffic Regulations (1938), for the return to the claimants, of the licence plates for their vehicle. As earlier stated, this is directly contrary to the first claimant's evidence, that he did not receive the same back from the second defendant, until April 28, 2002. Interestingly enough, the first claimant produced, during the course of his evidence at trial, documentary proof in support of same, in that, on the rear of the Certificate of Defects Remedied document, there has been recorded the words – 'received my plates on April 28, 2002' and immediately below that wording is a signature which was identified by the first claimant, as being his.

[29] When that evidence on the factual issue as to exactly when it was that the relevant licence plates were duly returned to the claimants, is considered in the context of what constitutes the tort of detinue, as laid down very clearly by Jamaica's Court of Appeal, in the case – **George and Branday Ltd v Lee** (op.cit.), it is clear that the relevant factual issue to be decided on by this court, is when the said licence plates were returned to the claimants and thereafter, the legal issue to be determined, is whether or not the return of the same at that time, was done, 'within a reasonable time'.

[30] At paragraph 15 of the defendants' defence, the following is stated:

> *'Further, the defendants state that on or about January 17, 2002, the first claimant produced a certificate to the said*

> *Sergeant Gordon indicating that the defects (as stated in paragraph 6 herein) have been remedied. Consequently, the licence plates for the said motor vehicle were returned to the first claimant.'*

From this paragraph of the defendants' defence, which is not at all in opposition to any allegation of fact in that specific respect, as set out by the claimants in their particulars of claim, it is clear to this court, that there exists, for the purposes of this court at this stage of these proceedings, no actual dispute of fact which can properly be considered by this court.

[31] This is so because, as part and parcel of any defendant's duty to set out his case, not only can the defendant not rely on any allegation or factual argument which is not set out in his defence, but which could have been set out there, unless the court gives permission (Rule 10.7 of the CPR), but in addition, Rule 10.5 (5) of the CPR, requires that:

> *'Where in relation to any allegation in the claim form or particulars of claim, the defendant does not –*
>
> *a) admit it or*
>
> *b) deny it and put forward a different version of events, the defendant must state the reason for resisting the allegation.'*

[32] The effectual essence of this, is that, in respect of the claim at hand, the defendants, although not having expressly denied the claimants' allegation as set out in their claim form (that the licence plates were returned on April 19, 2002) and in their particulars of claim (that the licence plates were returned ninety (90) days post – January 16, 2002), have not, as they ought to have, expressly refuted the claimants' allegation in that specific respect. Surely, if anyone would have known when the said licence plates were returned to the first claimant, it would have been the second defendant – since he was the one who returned the same. If therefore, the defendants intended to resist the allegation in that respect, it was incumbent on them to have set

out in their defence, exactly when it is that they allege, that the said licence plates were duly returned. This however, the defendants have not done and thus, to give evidence at trial concerning same, cannot avail either defendant in that respect. Just as should have been for the defendants, the claimants were entitled to have known the case that they would have had to have met at trial. The claimants were entitled to have fully known of such, long prior to the actual commencement of trial and indeed, were entitled to have known of same, even prior to filing by the defendants, of the witness statements upon which they then intended to rely. They should have, at least, been enabled to have known of same, once the defendants' defence was served upon them. Alas, such was not the case here. This court must be even-handed and apply the pertinent rules of law without fear or favour. In other words, as the saying is – '*What goes for the goose, must go for the gander*.' In the circumstances, this court will take no cognizance whatsoever, of the evidence led on the defendants' behalf, that the said licence plates were returned to the first claimant, on January 19, 2002. In any event though, on that particular issue of fact, this court prefers the evidence as given by the first claimant as being truthful and would therefore, in any event, have rejected the evidence of the defence witnesses on that particular factual issue. For reasons already provided though, this court need say and will say, no more on that particular issue of fact.

[33] There clearly does exist same degree of uncertainty, even on the claimants' statement of case, as comprised of their claim form and particulars of claim, as regards when their vehicle's licence plates were in fact returned to them. The extent of uncertainty in that respect, which was specifically highlighted earlier on in this judgment, was heightened by evidence as provided to the court by the first claimant, from the witness stand. This court is prepared nonetheless, to accept that which has been set out in the claimants' particulars of claim, as regards the period of retention of the said licence plates by then special sergeant Gordon – the second defendant. This court accepts the same, firstly, because it has not been specifically refuted by any of the defendants and secondly, because the claimants are bound to rely on what has been set out in their particulars of claim in that respect, since no permission was ever sought and thus, was ever obtained from the court, to rely on any other allegation in that

respect, than what is currently set out in the particulars of claim. Rule 8.9A of the CPR, requires that this court take this approach.

[34] There is no doubt in this court's mind that once an unconditional demand was made by the claimants, to the person then in possession of same, that being the second defendant, for the return to them, of the said licence plates, then, if the second defendant thereafter failed to return the same within a reasonable time, the tort of detinue, as regards those licence plates, would thereby have been committed. A period of three months less two days (thus counting from August 18, 2002) after the claimants had duly remedied the certified defects and presented the said Certificate of Defects Remedied to the second defendant, is far from being a reasonable time. In other words, it is this court's view that once the Certificate of Defects Remedied had been duly presented to the second defendant and there did not then exist any new defects, the second defendant ought to have returned the claimant's vehicle's licence plates to the claimants, within 24 hours (1 day) thereof. This court is prepared to and does draw the inference, from the evidence presented to it at trial by the claimants, that after the defects to the vehicle had been duly remedied and duly certified as having been so remedied, an unconditional demand was then made by the first claimants, for the return to them of the then retained/detained licence plates for that vehicle. There having been thereafter, a failure to return the said licence plates within a reasonable time, those licence plates were, after that reasonable period of time had elapsed, then being unlawfully detained/retained. It follows from this, that the claimants have proven the tort of detinue, in respect of those licence plates.

[35] That is not, however, all that is required to be proven, in order for the claimants to succeed as to liability and in addition, there is the issue as to whether the first claimant should be able to receive, through this court, an award of damages to any extent whatsoever, this even if this court were to determine that the claim made by him against the defendants is proven in all respects, as to liability.

[36] Having proven that the tort of detinue was committed by the second defendant while acting solely in his personal capacity, as distinct from, as a servant or agent of the

Crown, or in the course of his functions as a special sergeant (as neither such was ever alleged by the claimants) another legal issue to be now determined by this court, is whether or not the requirements of Section 33 of the Constabulary Force Act, will, in the particular circumstances of this particular claim and carefully considering the manner in which this claim has been particularized, be applicable hereto.

[37] At the onset of the claimants' pursuit of this claim, it is clear that they then believed that they needed to both allege and therefore, prove malice. This court so concludes, because, malice was alleged in the claimants' claim form, as regards the then alleged unlawful retention of the claimants' property. Somewhat surprisingly to this court though, nowhere in the claimants' particular of claim, is there to be found any allegation of malice, or lack of reasonable or probable cause, being made as against any of the defendants. If as a matter of law, Section 33 of the Constabulary Force Act is applicable to the present claim in the manner in which it has otherwise been particularized then, in such circumstance, the failure to have alleged same, in both the claimants' claim form and particulars of claim, would in and of itself, be fatal to the claimants' claim. This is because, as can be clearly understood from the precise wording of the said Section 33, which is quoted in the next paragraph of this judgment, that section requires that 'in the declaration,' it be *'...expressly alleged that such act was done either maliciously or without reasonable or probable cause...'* To this court's mind therefore, such express allegation of either malice or absence of reasonable or probable cause, as underlying the tortious cause of action, must be made not only in any claimant's claim form, but also, in that claimant's particulars of claim, whenever the cause of action is founded on tort and the person who allegedly committed such tort in relation to the claimant, was allegedly, at the material time, either a police constable or a special constable, acting in the execution of his office. It is all the more important for such allegation to be made in such a claimant's particulars of claim, since as may be recalled, the failure to allege such in one's particulars of claim, would, by virtue of Rule 8.9A of the CPR, unless the court gives permission, for such an unparticularized allegation to be relied upon, precludes the claimant from relying on same. If such an allegation is not both made in a claimant's particulars of claim and properly

particularized and therefore, and as a consequence, cannot properly be relied upon, then such allegation clearly cannot be proven and in such circumstance, the trial court would be obliged to enter a verdict/judgment in favour of the defendant. In respect of the present claim therefore, if as a matter of law, the existence of malice, or the absence of reasonable or probable cause, was required to be alleged and proven, by the claimants, in order for their claim against the second defendant to succeed, then clearly, the failure of the claimants to have alleged same in their particulars of claim, renders such particulars defective in that important respect and thus, even though malice has been alleged by the claimants in their claim form, this would not be adequate to meet the important requirements of Section 33 of the Constabulary Force Act, read along with Rule 8.9A of the CPR.

[38] What then, is the precise wording of Section 33 of the Constabulary Force Act? That section reads 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.'*

What can readily be recognized from the particular wording of this particular statutory provision, apart from that which has already been addressed in the immediately preceding paragraph of this judgment, is that Section 33 of the Constabulary Force Act will only be applicable in circumstances wherein a tortious act is being alleged against a member of either the police or special constabulary and further, wherein it is alleged that the said tortious act was done by such member in the execution of his office, or in order words, in exercise of his functions as either a member of the police constabulary or special constabulary.

[39] It is to be noted and is accepted by this court, that Section 33 of the Constabulary Force Act, must be read and considered along with the provisions of Section 22 (1) of

the Constables (Special) Act (earlier quoted) and in so doing, it is abundantly clear that Section 33 applies not only to members of the police constabulary force, but also to members of the special constabulary force.

[40] This court has earlier concluded in these reasons for judgment, that the claimants never particularized in their particulars of claim and indeed, never so much as hinted at in their claim form, that at the material time, the second defendant seized and withheld/retained/detained the claimants' licence plates in exercise or purported exercise of his functions as a servant or agent of the Crown, or in other words, as a special sergeant attached to the Island Special Constabulary Force (as he then was). In the circumstances, this court has, from early on, considered this claim as being, in relation to the second defendant, brought against him, not in his capacity as a Crown servant or agent, but rather, solely in his personal capacity. As such this court earlier concluded that the Crown, through the Attorney-General, can under no circumstances as obtain in respect of this claim, be held liable. Equally too, if this applies with respect to the Crown, because the claimants did not allege in their particulars of claim that at the material time, the second defendant was exercising, or purporting to exercise the functions of his office, then, Section 33 could not and would not, have any applicability whatsoever, to the only defendant against whom this claim can properly subsist, this being, the second defendant. There is just one final point to be addressed on the matter of Section 33 of the Constabulary Force Act. It is that the mere allegation that at the material time, the second defendant was a member of the Island Special Constabulary Force, is not to be equated with an allegation that at the material time, that defendant acted, insofar as the commission of the relevant tort in relation to the claimants, is concerned, in exercise or purported exercise of the functions of his office as a special sergeant of the Island Special Constabulary Force. It is the latter of these allegations which is of the utmost importance, if the Crown is to be held vicariously liable for the tortious actions of either a police or special constable. Furthermore though, it is only if such an allegation has been duly particularized in a claimant's particulars of claim, that Section 33 of the Constabulary Force Act would, as is said, 'come into play.'

[41] This court thus concludes that the second defendant is personally liable to one or the other, or perhaps both of the claimants, for damages for detinue. In that regard, this court does not accept the closing submission which has been made in writing by the claimants' counsel, to the effect that the first claimant, who was employed as a special constable at the material time, was not then precluded by any law or police code of conduct which the law requires him to abide by, from investing in and/or operating a bus for material gain. It is though, the claimants' contention that the operating of said bus by the claimants through their servants or agents, does not constitute 'outside employment,' since, the claimant was not 'employed' in any respect other than as a special constable, at the material time. The claimants', lead counsel has suggested, in his closing submissions, that to suggest that the first claimant could not have, while employed as a special constable, lawfully engaged in outside income earning opportunities, such as for instance, as he was doing at the material time, by being part-owner and operator of a public passenger motor bus which transported passengers for hire/reward and which was duly licensed to so do, is tantamount to contending that the first claimant could not have, while employed as a special constable, owned a farm and earned income therefrom.

[42] The defendants have, to the contrary, contended that such operation of a bus carrying passengers for hire, whether singularly or jointly by the first claimant, is unlawful and thus, the first claimant should not, in any event be permitted by this court, to recover damages arising from any alleged loss of income as a consequence of the alleged and now determined by this court, to have been proven, unlawful detention of the claimants' property – their vehicle's licence plates.

[43] The defendants have, in that regard, in their written closing submissions, expressly placed reliance, in support of their contention on this particular issue, on rule 3.6 of the Books of Rules for the guidance and general direction of the Jamaica Constabulary Force. This court accepts that such rules, which were promulgated pursuant to the provisions of Section 26 of the Constabulary Force Act, by the then Minister of National Security – Honourable Errol Anderson, on September 7, 1998, have

continued in full force and effect since that date and also, by virtue of the provisions of Section 22(1) of the Constabulary (Special) Act, must apply equally to members of the Island Special Constabulary Force, as they do, to members of the Jamaica Constabulary Force. Rule 3.6 states, as follows, in relation to 'members' – these no doubt being persons who are members of the island of Jamaica's Constabulary Forces, or in other words, to police constables and special constables alike -

> *'A member shall be required to disclose for the information of the Public Services Commission particulars of any investment on (sic) shareholding which he may possess in any company, occupation or undertaking, or any other direct or indirect interest in such organization. If the member's private office is brought into conflict with his duties or in any way influences him in the discharge of his duties, he shall to such extent as may be directed, divest himself of such investment or interest or arrange to have the investment places in trust.'*

[44] If the law were to be interpreted otherwise, it would make a mockery of the provisions of section 22(1) of the Constables (Special) Act. This court thus considers that the said rules would have undoubtedly been applicable to the first claimant, in relation to the exercise by him of what was undoubtedly an investment in the undertaking of transporting passengers for hire/reward, via motor bus. There exists no evidence to suggest that the first claimant ever sought permission from anyone, much less disclosed to the Public Services Commission, that he had invested in any such undertaking while functioning as a member of the Island Special Constabulary Force. The first claimant's failure to do the latter, particularly in circumstances where it is clear to this court, that at the material time, he was carrying out his activities as a traffic duty officer attached to the Mandeville Police Station, makes it all the more apparent to this court, that the failure to have so disclosed, of necessity, would render the first claimant's claim to recover damages arising from the investment by him in such undisclosed commercial undertaking, as the part owner thereof, an abuse of process. Accordingly, this court will award no damages to the claimant in respect of same, this even though this court has concluded that a tort was committed in relation to the relevant vehicle's licence plates, by the second defendant. The basis for the claim, in terms of liability has

been made out by both claimants, but the first claimant is not entitled to recover any damages whatsoever arising therefrom, since this court concludes that it would be an abuse of process if it were to make an award of same to the first claimant in the existing circumstances.

[45] As such, this court will now address its mind to the quantum of damages to be awarded to the second claimant. As should be recalled, the evidence is that she was, at the material time, a co-owner and operator of the relevant vehicle as a public passenger vehicle/bus, along with her husband, who is the first claimant. As such, this court must first determine what would have been the overall sum to have been awarded to the claimants, in respect of their claim as based on the tort of detinue and thereafter, reduce same by 50%, for the purpose of determining the damages award which will be made in favour of the second claimant.

[46] The measure of damages for detinue is, as has been stated by Harrison, J. (as he then was), in – **Savings and Loan Bank v Howard Wright**, **Anthony Magnus and Horace Shields** – SCCA 113/98 – Judgment delivered on December 20, 1999 -

> *'The measure of damages in detinue is the market value of the goods on their return and any normal loss through their detention that is, the market rate at which the goods could have been hired.'*

Applying said dicta to the present claim, it is firstly, clear, that the licence plates by themselves, would have been of little, if any value, to anyone. This is so because vehicle licence plates are only useful when properly affixed to the vehicle which they are registered to be affixed to. As such, the unlawful detention of said licence plates, deprived the claimants of the benefit of utilizing their Hiace van for the purpose of transporting passengers for hire/reward, during the period of time when the same were being unlawfully detained. The loss suffered by the claimants as a consequence of the unlawful detention/retention of their vehicle's licence plates, would therefore constitute the overall sum that would be awarded to the claimants. The second claimant would only be entitled to recover 50% of that overall sum. What then, was the extent of such loss? It will certainly not simply be the equivalent of loss of income in a particular

business venture, such as the claimants had, at the material time, been engaging in, with the use of their motor vehicle. It will instead be the equivalent of the loss of any profits during the relevant period of time, by such business enterprise. This court also has borne in mind that in a civil trial, the burden of proof as regards any alleged failure to sufficiently or properly mitigate one's loss as a claimant, rests squarely, not on the claimants' shoulders, but rather, on the defendant's shoulders. See: **Geest Plc v Lansiquot** – [2002] 61 W.I.R. 212. Thus, despite the presently habitual use by attorneys of the phrase – 'The claimant had/has a duty to mitigate his loss,' this is, and this court states this, with all due respect to such attorneys, not the law. In the **Geest** case (*op. cit*), the Privy Council did not abide by the ratio *decidendi* (reason for decision) as expressed in its earlier judgment which arose from another jurisdiction. That earlier judgment of the Privy Council, was rendered in the case: **Ponnampalam Selvanayagam v University of the West Indies** – [1983] 34 W.I.R. 267. See **McGregor on Damages** (16th ed.) [1997], at paragraph 299 (page 190) and **Sotiros Shipping Inc. v Sameiet Solholt**, **The Solholt** – [1983] 1 Lloyd's Rep. 605, esp. at p. 608, whereat, Ld. Donaldson, M.R., stated:

> *'A plaintiff is under no duty to mitigate his loss, despite the habitual use by lawyers of the phrase duty to mitigate'*. He is completely free to act as he judges in his best interests. On the other hand, a defendant is not liable for all loss suffered by the plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff's loss as is properly to be regarded as caused by the defendant's breach of duty.'

What this court gleams from the last – quoted extract which is from the **Solholt** case, is that there is no burden on the claimant to mitigate damages in a personal injuries case and instead, the burden of proof as regards mitigation of damages, rests with the defendant. There is though, a burden on the claimant to prove that the losses which he claims for, are losses which are attributable to the legally recognized wrong which was done to him, in the sense of having been caused by that wrong. In other words, causation is always to be proven by a claimant, whereas an alleged failure to sufficiently mitigate damages, is to be proven by a defendant. This court takes the view that in that respect, the same applies to the proof of commercial loss arising from the commission

of tort and mitigation of damages in such type of claim, as it does in respect of a personal injuries based claims for damages.

[47] The evidence-in-chief of the second claimant, as per her first witness statement which was filed on March 24, 2011 and her further witness statement, which was filed on June 6, 2011, was primarily directed to the issue of proof of loss arising from the inability of the claimants to operate their motor vehicle as a public passenger vehicle during the 90 day period as claimed for (in the claimants' particulars of claim). Before addressing in this judgment, more closely, the evidence given, not only by the second claimant, out also, particularly in that respect, by the vehicle's conductor at the material time, namely, Delroy Leachman, this court must state that the time period to be considered, in terms of the period for which losses to the second claimant will be, recoverable, will begin as of the date when the detention/retention of the relevant licence plates, became unlawful. That period will end as at April 16, 2002, as that would be, as stated earlier on in this judgment, the date on which the 90 day period claimed for, commencing as of January 16, 2002, would have ended.

[48] This court holds the view that the reasonable period of time after the unconditional demand was made by the first claimant, for the return to the claimants for their motor vehicle's licence plates, which would have been the latest date by which the said licence plates ought to have been returned to them, was: January 20, 2002 – this being the second day after the requisite certificate of Defects Remedied was shown to the second defendant. As such, this court will assess the claimants' losses for the period of January 20, 2002 to April 16, 2002 and for reasons earlier given, award only to the second claimant, damages, to the extent of 50% thereof.

[49] The claimants' bus was licensed to operate in the collection and transport of passengers between the locations of Mandeville, Manchester and Spanish Town, St. Catherine, on Mondays to Saturdays, each week, commencing from as of 5:30 a.m. and ending at 9:00 p.m. According to Maulean Wilson's evidence-in-chief, the driver of their bus was paid $1,200.00 per day (thus $7,200.00 per week), while the conductor was paid $3,000.00 per week ($500.00 per day). Gas and oil cost $3,500.00 per day

($21,000.00 per week). In addition, the driver and conductor were given $800.00 each day, for food, this therefore amounting to $4,800.00 per week. Under questioning from the court, the first claimant testified that the sum of $800.00 which was paid daily to the conductor and the driver for lunch, was paid to those two persons, in addition to their wages and these sums were paid out of $14,000.00 per day which the bus allegedly earned for the claimants. He also then testified that the claimants' bus could seat 15 passengers. The evidence of Mr. Delroy Leachman – the claimants' vehicle's conductor at the material time, as given during cross-examination, was that he collected money from the vehicle's passengers and the vehicle would generally make 3 trips a day, even on Saturdays, although, on some Saturdays, the vehicle would make 3 ½ trips a day. He further testified that, each day, he would hand over $17,300.00 to the claimants. In testifying in answer to questions which were posed to him by the court, he further testified that he would take the money, 'out of the money he work' and buy gas and 'all that I would put in would be the gas'. The owner was responsible for servicing the vehicle in oil and things like that'. That evidence as provided to the court by Mr. Leachman, as to how and/or by what means, the servicing of the relevant vehicle in terms of payment for such needed things, as oil, was done, was in complete contradiction to the evidence which had earlier been provided to the court by the first claimant, as to same. The first claimant testified in answer to two questions which were, one immediately after the other, posed to him by the court – '*Out of the $14,000.00 that I would earn as income from the bus, I would use some of that money to pay the conductor and the driver. The maintenance would be separate from the $14,000.00. The employees would pay for the oil the gas and other items needed for maintenance, from out of monies earned by the bus in addition to the $14,000.00 per day.'*

[50] This court rejects the first claimant's evidence that the oil was paid for, out of an additional sum, over and above the $14,000.00 each day which was, at the end of each day, handed over to the claimants by Mr. Leachman. Instead, this court concludes that the payment for the vehicle's needed oil supplies, would have been paid by the claimants out of the sum otherwise earned as income on each day that the claimants' bus operated. This is exactly what was done, in respect of the wages paid to that

vehicle's driver and conductor, respectively. In addition, the second claimant testified as part of her examination-in-chief evidence, as per her first witness statement, that the said vehicle's tyres were changed about every ten (10) weeks and each set at that time costs $8,800.00. This court understood by this evidence, that 'a set' consists of two tyres and that during every three (3) month period of time, $17,600.00 would have been paid to change the vehicle's four (4) tyres. This court does accept the first claimant's evidence that the sum of $14,000.00 was paid over to the claimants by the then bus conductor – Mr. Leachman on each of the six (6) working days for the bus. This would therefore mean that apart from additional monies earned and which were used to pay for gas, the gross income would have been $84,000.00 per week ($14,000.00 x 6 days). The money for gas was earned in addition to the said $14,000.00. Thus $336,000.00 would have been earned per month (equivalent of $11,200.00 per day) separate and apart from an additional sum which was earned and used to pay for gas for the vehicle. This is not, however, net income. From the sum of $963,200.00 ($11,200.00 per day x 86 days) there must be deducted, the wages paid, for the vehicle's conductor and driver respectively. Additionally, there must be deducted, the cost of providing lunch to the vehicle's driver and conductor, respectively. Also, there will have to be deducted, the cost of providing two new sets of tyres, as would have had to have been done within the 86 day period during which the claimants' vehicle's licence plates were unlawfully detained/retained by the second defendant and finally, there would have to be deducted, the cost of oil for the relevant vehicle, during the relevant period of time.

[51] The claimants would, as shown above, when earning $336,000.00 per month, have been earning on average, $11,200.00 per day, as gross income. From that gross income, $800 per day, for the cost of two lunches, would have to be deducted. In addition, the wages paid to the driver and conductor, would have to be deducted. That aggregate daily wages sum was $1,700.00. As such, deducting from the gross daily income, the requisite sum for lunch and wages, leaves the sum of $8,700.00 per day. For a total of 86 days therefore, the claimants would have earned from the bus, prior to there being any deduction taken as payment for new tyres in replacement, as well as for the cost of the relevant vehicle's oil supply, the sum of $748,200.00. From the sum of

$748,200.00, there must be deducted the sum of $17,600.00 for change of the vehicle's tyres, which this court holds the view, would have had to have been done at sometime during that 86 day period. In addition, this court deducts the modest sum of $8,000.00 as the cost of oil supply for the relevant vehicle, over the 86 day period. This would therefore result in the claimants having earned a net income of $722,600.00, if they had been able to have used their bus during that 86 day period. The second defendant's unlawful action in having unlawful detained said bus for that period of time, even though not having been lawfully entitled to have done so, entitles, for reasons already provided, the second claimant only, to recover as damages, 50% of $722,600.00.

[52] The first claimant's claim against each and all defendants, fails in its entirety. The second claimant's claim against the first and third defendants fails in its entirety, as against those defendants. Thus, judgment is awarded in favour of all defendants in respect of the first claimant's claim and is awarded in favour of the first and third defendants, in respect of the second claimant's claim. Judgment in favour of the second claimant, is awarded against the second defendant, in the sum of $361,300.00 with interest at the rate of 6% with effect from the date on which the second defendant's commission of the tort of detinue in relation to the claimants' vehicle's licence plates, commenced, this being January 20, 2002 until the date of this judgment. This court orders also, that each party shall bear their own costs, as regards this claim. The defence counsel shall file and serve the judgment orders made.

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Hon. Kirk Anderson, J.