IN THE SUPREME COURT OF JUDICATURE OF JAMACIA

IN CIVIL DIVISION

CLAIM NO. HCV 05443 OF 2005

BETWEEN	OPENIAH SHAW	CLAIMANT
AND	THE ATTORNEY GENERAL FOR JAMAICA	DEFENDANT

Mr. Charles Campbell instructed by Charles R. Campbell & Co. for the Claimant and Mr. Brian Moody instructed by the Director of State proceeding for the Defendant.

Heard Tuesday June 12 and Wednesday June 13, 2007; March 13, 2008.

CORAM: ANDERSON: J

In this action Ms. Openiah Shaw, (the "Claimant") an alleged businesswoman of a Denbigh address in Clarendon, claims damages for assault, battery or trespass to the person and false imprisonment against the Attorney General of Jamaica for the acts allegedly committed by certain un-named agents of the State, members of the Jamaica Constabulary Force. The Attorney General is sued by virtue of the Crown Proceedings Act.

To the Claimant, July 14, 2003, might have seemed to be proceeding along on unremarkable course. She left her home early the morning en route to the Norman Manley International Airport in Kingston. There, she was scheduled to board a flight for London, England sometime around 4-o-clock where, she alleges, she was to witness the joyous event of her son's marriage in London. How could she have known that she was about to live the age-old adage that "the best made plans of mice and men do sometimes go awry"? As fate would have it, at about 1:45 in the afternoon of that day, as she approached the Norman Manley International Airport security check point her luggage, the Claimant was stopped and questioned by a police officer, later identified as Detective Corporal Eunice Crooks, one of the witnesses for the Defendant in this case. According to her evidence, Miss Shaw was accosted by Corporal Crooks who asked her for her

travel documents and sought to secure answers to certain questions which were put to the Claimant.

After the initial questioning, she says that she was subjected to tests by police officers at the Norman Manley International Airport and that they accused her of having tested positive for cocaine contamination. It is agreed that the Claimant was subjected to a urine test and another test on an "Emit Machine". After the tests, the Claimant was taken by means of a police vehicle to the Kingston Public Hospital (KPH) where she was X-rayed. She says that after the first x-ray, (to which she admits she had consented), she was asked to wait. She says that thereafter, a second x-ray was done. It would appear that neither x-ray confirmed any positive sign of the presence of foreign bodies in the stomach of the Claimant. A decision was apparently then taken to keep the Claimant overnight at the KPH.

According to the evidence of Detective Corporal Crooks, a member of the Narcotics Division of the Jamaica Constabulary Force and who was at that time based at the Norman Manley Airport, the discussion with the Claimant led her to have certain "suspicions" about the Miss Shaw. She was accordingly taken to an area occupied by the Police Narcotics Division at the airport for "further processing". According to the evidence of the Defendant's witnesses, the Claimant gave a urine sample which tested positive for cocaine and these tests were carried out both on an Ion Scan machine and an Emit machine. The Defendant's witnesses allege that the results of these tests were shown to the Claimant and she was then held on suspicion that she had ingested pellets of cocaine which she had hoped to transport within her stomach to London on the flight on which she was due to leave.

The Claimant alleges, and this is not disputed by the evidence from the Defendant's witnesses, that she taken from the Norman Manley Airport in a police vehicle to the Kingston Public Hospital and that during the course of being transported, she was handcuffed to a male who himself seemed also to have aroused the suspicions of the Narcotics Police. Having arrived at the Kingston Public Hospital sometime around 7:00 p.m. in the evening, the Claimant was x-rayed to ascertain whether there was any

evidence of any foreign matter in her stomach. The Claimant alleges and I verily believe in light of the other evidence to which I shall refer later, that she was asked to await the doctor checking on the x-ray and that subsequently a second x-ray was done. The report of the doctor's findings in relation to this initial x-ray (although maybe they applied to both x-rays), is one of the documents in the agreed bundle of documents. This is the Report of Dr. O. Uche.

It is clear that there was no positive finding that the Claimant's stomach cavity contained any foreign substance. Notwithstanding that there was no positive confirmation of any foreign substance by virtue of the x-ray, the Claimant was kept at the KPH overnight. It is her evidence, and there is no evidence to the contrary, that she was given something to drink by a female police officer who was guarding her while she was in the hospital ward. She said that at the time she was given it, she was told that it was something "to calm her nerves". It turns out that she was administered a laxative as a result of which she had several bowel motions during the course of the night. It was also her evidence that she had about ten bowel motions during the course of the night and on each occasion, she was provided with a pail while the contents of her stool were carefully examined to ascertain whether she had passed out any drug pellets. It is also common ground that nothing was found as a consequence of her several motions. On the following day, the 15th July, she was again x-rayed during the course of the morning and again there does not appear to have been anything found. Subsequently she was taken from the Hospital by the Police to the Narcotics Division and thereafter, at about 3:00 on the 15th July, she was released and made her way back to Clarendon. She said that a member of the Police force gave her five hundred dollars ($500.00) to assist her in getting home. The Claimant said that she was not provided with any reasons or any explanation as to whether she would be provided with the means to travel on a subsequent flight. On the other hand, it was the evidence of Detective Corporal Crooks for the defense that she was told that she would be accommodated on the next available flight to London but that she had failed to turn up for the flight..

The Claimant in her evidence, states that from the time when she was held by the Police at the Norman Manley Internal Airport, during her overnight stay at the KPH and until she was taken to the Police Narcotics Division on Spanish Town Road on the 15th, she was not provided with anything to eat or drink. In fact the only thing she ingested was the laxative which was given to her. She also gave evidence that she had not "agreed" to drink the laxative but rather, as indicated above, that she was tricked by the police officer who guarded her as she was handcuffed to the bed in the KPH where she had been admitted. She said that based upon what she had been told by the police officer, she had taken the laxative. The effect of the laxative and the frequent bowel movements has given rise to other complaints which are detailed in two medical reports, that of Dr. Charles Robertson and Consultant Psychiatrist, Dr. Aggrey Irons to which I will refer later. The Claimant alleges that the acts about which she complains were committed by the servants or agents of the Crown who were acting in the execution of their duties and that the actions were either malicious or were done without reasonable or probable cause.

It is of course, trite law that it is necessary for a Claimant against a police constable, to establish that the actions of the constable were done "maliciously or without reasonable or probably cause" in order to succeed as set out in the relevant provision in Section 33 of the Jamaica Constabulary Force Act. That section is set out hereunder:

> 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 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.

According to the medical reports which were received from Dr. Charles Robertson and Dr. Aggrey Irons, the Claimant suffered various consequences of her stay in the hospital including;

(a) Hypermotility of the bowels

(b) Pain and tenderness to the bowels

(c) Pain and bruising of the wrists

(d) Vivid flashbacks and nightmares

(e) Phobic avoidance behaviour concerning her genitalia and complications regarding sexual desires

(f) Frequent bouts of recurrent anxiety

(g) Recurrent systems of depression

(h) Severe Post Traumatic Stress Disorder.

The Claimant further stated that because of the behaviour of the police in handcuffing her and taking her to the car at the Norman Manley Airport having her handcuffed to the bed at the Kingston Public Hospital, she suffered humiliation, embarrassment, injury, loss and damage and she will in fact require future medical care. The Claimant also claims aggravated damages as well as exemplary damages against the purported tortfeasors in relation to this incident. Part of the Claimant's complaint was that during the time of her confinement, she was also denied any opportunity to make contact with her relatives in Jamaica to advise them of the events which had taken place and therefore she was cut of from communication with anyone for over twenty-four hours during which time there was concern for her whereabouts.

Evidence for the Defendant was given by Detective Corporal Eunice Crooks and Corporal Paul Smith. Detective Corporal Crooks in her evidence indicated that on the 14th July 2003, she accosted the Claimant while the Claimant was on her way to the security check point. She said she stopped her, introduced herself to her as a narcotics police officer and requested a check of her documents and had a brief interview with her. As a result the interview she became suspicious that the Claimant may have swallowed drug pellets. There is no indication from the witness statement of this witness as to what in the interview led her to suspect that the Claimant had swallowed drugs. She does, however, say that she told the Claimant of her suspicions and further told her that she would like to do a test on her. She said that the Claimant agreed. The Claimant however, denied any such agreement. In any event, the Claimant was taken to the Narcotics office where she was tested by means of a urine test on an ion scan machine for cocaine contamination. According to Detective Corporal Crooks, the result showed evidence of recent cocaine contamination and she says that this was shown to the Claimant. She also said that in addition, she tested the Claimant on an "Emit machine" and again, she said

the test came up positive. As a result of these tests she said she indicated to the Claimant that she would have to go to the KPH where she would be further examined. According to Detective Corporal Crooks: "I further explained to her the procedure when she reached the hospital, that she may or may not consent to do the x-ray and explained that if she had the drugs inside of her stomach, she would be admitted to the said hospital until she expelled the last one and if she doesn't have them, I will get her back on the next available flight at no cost to her."

Detective Corporal Crooks admits that she did go to the hospital with the Claimant and that, as far as she is able to say, the claimant was x-rayed. By her own testimony, the need to be x-rayed was the one process that she had advised the Claimant that she would have to undergo. Moreover, according to that evidence, she had indicated that the Claimant could have withheld her consent to being x-rayed. Secondly, it was her written statement that an x-ray was done on the Claimant but according to her, "this was inconclusive and as a result admitted overnight for observation." The issue of what was meant by the use of the word "inconclusive" in the witness statement, a term which was also repeated by the other witness for the defence, Corporal Paul Smith, took up a fair amount of time. However, it seems clear to me that on the basis of what had been told to the Claimant, unless there was some evidence as a result of the x-rays, there would have been no basis on which to have held her further. There is no evidence that the Claimant was told that if the x-rays were "inconclusive" then she would be subject to further tests including laxatisation. There was not a scintilla of evidence that she had been advised of this possibility and of her being kept overnight at the KPH. Further, it is not at all clear on the evidence led before me, how a doctor could have made the decision to admit an individual without either the individual having consented or the police having insisted that she had to remain under their control. It is clear that the Claimant did not so consent. It must therefore be a reasonable inference that the police officers who took the Claimant to the hospital did instruct the hospital staff to keep the Claimant there. It is also instructive, and this is not denied, that the Claimant was under guard by a female police officer during the night which she sent at the hospital.

According to Detective Corporal Crooks, on Claimant's release on the 15th, she was taken to Narcotics Headquarters on Spanish Town Road, where "we apologized to her and handed her travel documents back". She also said that arrangements were made for the Claimant to travel on the 16th of July but she did not take up this officer. When one looks at the medical reports, however, one has to wonder whether the offer was purely academic as it does not appear that the Claimant would have been in any condition to travel on the 16th or any day soon thereafter. Detective Corporal Crooks also denies the Claimant's allegations that she was the subject of taunting and ridicule by members of the public and persons in the hospital during the time she was in police custody and while she was chained to the bed. Moreover, Detective Corporal Crooks states in her witness statement: "No one on the team had treated Openiah in any way for her to feel the way she has stated." However, this is a conclusion which could only be based upon her observation *up the time that she left the hospital after the Claimant's being admitted to hospital*. There is no evidence that she saw the Claimant at any time before her arrival at the Narcotics Headquarters on the following day. I therefore find that the evidence of the Claimant in this regard is un-contradicted and I accept it in preference to that of Detective Crooks.

The other witness for the defence was Corporal Paul Smith. I find his witness statement interesting and I set out in some detail a section from it. "At about 3:30 p.m. on that same day, I was inside narcotics office when I saw Detective Woman Corporal E. Crooks escorting a female suspect to the office. The suspect appeared to be nervous. I asked her for a name and address and she identified herself as Openiah Shaw of 15 Terlight Street, Western Park, Clarendon. The process was explained to her and she was tested for cocaine use on the ion scan machine which resulted in a positive reading by showing a bight red on the screen. The results were shown to her and Detective Woman Corporal E. Crooks requested a sample of her urine from her and she asked why. It was further explained to her that because of the sensitivity of the ion scan machine, we would want to do another test on the emit machine by testing a sample of her urine. She was further told that if this emit reading resulted in a negative one, then she would be free to leave and board her flight. However, if the reading was positive, then she will be taken to the

Kingston Public Hospital for an x-ray examination to be done. If the x-ray examination reading *shows evidence of foreign packages inside her stomach*, she will be admitted to the ward for observation and treatment for the expelling of any such foreign packages from her stomach and she consented. A sealed plastic jar was given to her. Detective Woman Corporal Crooks escorted her to the female rest room which is just across from the office police post".

I find a number of the averments in the witness statement to be interesting. Firstly, he immediately describes the Claimant as "a suspect" because, it seems, she was in the company of Detective Woman Corporal Crooks. Having asked her for a name and address, the Claimant having responded, he then said the process was explained to her and she was tested for cocaine use on the ion scan machine. It also clear that Corporal Paul Smith told Claimant that, "if the x-ray examination result reading proved negative, she would be booked on the next available fight to London, England at no extra cost to her but if positive, she would be admitted to the ward for observation and treatment if necessary". It seems therefore that the alternatives which were put before the Claimant were based on the x-ray examination and that unless it were positive, there would have been no basis on which to hold her overnight for further observation. It is quite clear from Dr. Uche's testimony that there was no positive reading. In fact he describes the x-ray as being "unremarkable and showed evidence of no foreign packages". The question which arises and the issue for determination as submitted by counsel for the defence is as follows: the Claimant having alleged the assault, false imprisonment, and battery or trespass to the person against servants of the Crown, has she proven on a balance of probabilities any of these torts, and could she show as well, either that there had been an absence of reasonable and probable cause or that there was malice on the part of the defendants.

Counsel cited a number of authorities and he referred in particular to Section 33 of the Constabulary Force Act which is set out above as well as Section 13 of the same Act. Section 13 is in the following terms:

> The duties of the police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company.

In his closing address Mr. Moody for the Attorney General submitted that the evidence of the defendant's witnesses should be accepted in preference to that of the Claimant. For example, he submitted:-

a) The Claimant's consent had been lawfully obtained in relation to the alleged imprisonment and so it could not amount to alse imprisonment";
b) That the treatment which she received at the hospital was ordinary and normal treatment under the circumstances, and there was therefore no "assault";
c) That the Claimant gave her informed consent to this treatment
d) That the police officers were motivated by a desire to prove their suspicions which had been aroused at the airport and not by malice, a necessary ingredient of the tort of false imprisonment.

It was submitted that the issues that the court had to determine are as follows:-

i) Was there reasonable and probable cause to detain the Claimant?
ii) Was the treatment at the Kingston Public Hospital an assault for which the Defendant was liable?
iii) If the defendant is found liable what would be the measure of damages?

He submitted that pursuant to Section 33 of the Jamaica Constabulary Force Act the Claimant must not only allege and prove on a balance of probabilities that the acts complained of were tortious, but also that they were done either maliciously or without reasonable or probable cause. In this regard he cited the case of **Flemming v Detective**

Corporal Myers and the Attorney General ***[1989] 26 JLR page 525*** a decision of the Jamaican Court of Appeal. There the court held that false imprisonment arises where a person is detained:-

a) against his will; and

b) without legal justification.

However, as was pointed out by the learned President Carey (Ag), as he then was, an action for false imprisonment may also lie where a person is held in custody for an unreasonable period after arrest and without either being taken before a Justice of the Peace or a Resident Magistrate. The court was also reminded that the onus of proving the absence of legal justification would be on the person alleging that she had been falsely imprisoned but once she showed that the period of detention was unduly lengthy an evidential burden was cast on or shifted to the Defendant to show that the period was reasonable. Counsel also cited Section 13 of the Constabulary Force Act which, as indicated above, give to the police the right to "Apprehend or summon before a justice, persons found committing any offence or whom they may reasonable suspect of having committed any offence". It was his further submission that in the present case the circumstances justified the police acting under Section 13 because they provided reasonable and probable cause for the course of their conduct. Further, he cited the case of **Glinski v McIver 1962 1 AER 696.** In particular he referenced the judgment of the learned law lord, Lord Denning who said: (at page 7 to 9)

> "My lords in **Hicks v Faulkner 1881 8QBD 167 at page 171** Hawkins J. put forward a definition of reasonable and probable cause which later received the approval of this house. He defined it as "an honest belief in the guilt of the accused" and proceeded to detail its constituent elements. The definition was appropriate and fair. It was I suspected tailor made to fit the measurements of that exceptional case. It may fit other outside measurements too, but experience has shown that it does not fit the ordinary round of cases. It is a mistake to treat it as a touchstone it cannot serve as a substitute for the rule of law which says that in order to succeed in an action for Malicious Prosecution the Plaintiff must prove to the satisfaction of the Judge that at the time when the charge was made there was an absence of reasonable and probable cause for the prosecution. Let me give some of the reasons which show how careful the judge must be before he puts

> to the jury the question, "Did the Defendant honestly believe that the accused was guilty?"

Indeed in answering his own question Lord Denning pointed out that in such circumstances: (although he was dealing here with Malicious Prosecution) "A police officer is only concerned to see that there is a case proper to be laid before the court". It was the submission from Defendant's Counsel that the same principles applicable to malicious prosecution as shown by the Glinski case are equally applicable to the issues to be determined in considering the question of False Imprisonment.

Mr. Moodie thereafter referred to the English case **Dallison v Caffery 1962 2 All E Rep. page 610**, a decision of the English Court of Appeal. There the headnote states:

> "When a Constable has taken into custody a person reasonably suspected of a felony, the constable may without becoming liable for false imprisonment, do what is reasonable to investigate the matter, (for example, he may take a suspect to his house to see whether any of the stolen property is there) and is not bound to take the suspect immediately and directly to the police station or the magistrate. But the constable will not be protected from liability if the measures that he takes are not reasonable".

In that case, it was held that the question whether the constable acted reasonably is a question for the judge and not for the jury. He therefore submitted that the conduct of the police in taking the Claimant to the Kingston Public Hospital where she was admitted and kept overnight was reasonable in the circumstances.

By way of comparison and contrast Mr. Moodie cited the case **Sharon Greenwood Henry v The Attorney General**. The case was cited, he said, to distinguish the facts from those in the present case. In the former case the court found that the police were untruthful and they had stripped and searched the Claimant in that case in a manner which was most invasive of her privacy. There was, as a result, evidence of malice. He then asked the question whether the treatment given to the Claimant in this case at the Kingston Public Hospital was sufficient to render what in his view was initially a proper detention, a case of false imprisonment. He submitted that based upon the evidence

which was before the court there is nothing to indicate that Dr. Uche, the Doctor who admitted the Claimant to the hospital had been influenced by the police in the detention of the Claimant. It should be pointed out at this point that Dr. Uche's report dated October 21, 2004, described the Claimant as one had been "brought into our care by the police for presumed body packing. It must also be quite clear that it was not the Claimant who had requested that she be admitted to hospital.

Couunsel referred extensively to the witness statement of a Dr. McCartney. However, Dr. McCartney was not one of the doctors treating the claimant. Much of the evidence which he suggest refers to "standard practice" can only be considered to be hearsay and it is difficult to see what value can be placed upon it since we do not know whether the procedures outlined in Dr. McCartney's written statement were in fact followed. There is no evidence that it was indeed so followed. For example Dr. McCartney talks about the Claimant having consented to treatment but the court can place absolutely no reliance on this statement as Dr. McCartney certainly could only have heard this by hearsay. Finally therefore, Counsel for the defendant submitted that the Claimant had failed to establish that there had been unlawful detention or that the police had acted in detaining her, without reasonable and probable cause or as a result of malice.

In the event however, the court was not with him on this submission, he suggested that the case of **Keith Nelson v Gayle and The Attorney General (Claim No: C.L. N – 120 of 1998)** (Unreported) a decision of my learned brother Brooks J. on April 20, 2007, was authority for the proposition that where the Claimant had been detained for only a day she should be entitled to special damages of not more that One Hundred Thousand Dollars $100,000.00 for the day for which she was detained. The Special Damages had been agreed between the parties so I do not need to rehearse those here for the time being. Finally, he submitted that based on the authorities there was no basis for awarding exemplary damages as the condition set out in **Rookes v Barnard** had not been fulfilled. Nor was there any evidence to support a claim for Aggravated Damages. The Claimant could not show and ought not to be believed when she said that she was subject to embarrassing and degrading treatment. He also submitted that the Claimant ought not to

be believed when she stated that she had been tricked into taking the laxative by the police who was guarding her, who told her that the liquid which she was about to take was merely a medication to settle her nerves.

I will now turn to the submissions made on behalf of the Claimant by her counsel before going into the Courts discussion of these issues.

Mr. Campbell for the Claimant reminded the court that the claim was for (1) assault and battery or trespass to the person, and (2) False Imprisonment. He agreed that with respect to the issue of False Imprisonment the Claimant had to show that the police had acted either without reasonable or probable cause, or with malice. However, as Lord Denning pointed out in **Glinski v McIver**, the absence of reasonable and probable cause may be, but is not necessarily determinative of, the existence of malice. It was his submission however, that "reasonable and probable cause" connotes a reasonable belief in the guilt of the accused. As Lord Denning also pointed out in **Glinski**, the use of the expression "belief in the guilt" is apt to be misleading as there is no requirement that the police must have a view that guilt beyond a reasonable doubt is the state of mind that he must have. Rather, as is cited above, there must be a belief that there is a sufficient matter that can be taken before a court/jury.

Counsel conceded that the police may detain on the basis of "reasonable suspicion" but argued that in such a case, the basis of that suspicion has to be disclosed to the court so it may determine whether the suspicion is "reasonable". This, he submitted, was critical in terms of the time of the original detention of the Claimant. It is common ground that the Claimant was stopped by the witness, Eunice Crooks, as she approached the security check point inside the airport, asked questions and requested to show her travel documents. It would appear that it was as a result of those questions that she was removed to the area occupied by the constabulary force's narcotics operations and I have formed the view that her detention commenced with her being taken from the position where she was going to the security check point. In counsel's view therefore, the question of reasonable or probable cause would have had to be determined as at the time of the

detention. He asks whether the court may find in such circumstances that the detention was arbitrary and whether this would be some evidence of malice. False imprisonment is, of course, a restraint upon a person's liberty of movement without legal justification or, as it is put in Clerk and Lindsell on Torts, 14th edition: "the complete deprivation of liberty for any time, however short, without lawful cause".

It is clear that the Claimant was not in control of where she went once she had been accosted by Detective Corporal Crooks or at any time subsequent thereto, and up to the time she was released at the Narcotics Division on the following afternoon. There was in my view imprisonment. The question which arises is whether pursuant to section 33 of the Constabulary Force Act as to reasonable or probable cause or malice, on the part of the agents of the state. In that regard, I adopt the reasoning of my learned brother Brooks J. in **Keith Nelson v Gayle and the A-G of Jamaica,** (cited above), concerning what is reasonable and probable cause. There the judge cited the following dictum from **Hicks v Faulkner (1878) 8 Q.B.D. 167**:

> "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. There must be: first, an honest belief of the accuser in the guilt of the accused; secondly, such belief must be based upon an honest conviction of the existence of the circumstances which led the accuser to that conclusion; thirdly, such secondly-mentioned belief must be based upon reasonable grounds; by this I mean such ground as would lead a reasonably cautious man in the defendant's situation so to believe; fourthly; the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused".

Mr. Campbell has submitted and I agree, that this court has not been provided with any explanation as to why Corporal Crooks decided to restrain the Claimant at the time she did. Neither Ms. Crooks nor Mr. Paul Smith sought to give any reason why the Claimant had been stopped and detained. There is nothing to indicate that there was any consideration of, let alone a "conviction founded on reasonable grounds," of the existence

of circumstances pointing to the guilt of the Claimant. The fact is that the imprisonment must be based upon "reasonable or probable cause". There is, regrettably, no evidence of such reasonable or probable cause. In this day of widespread international drug trafficking one must not denigrate or do anything to make more difficult the job of the security forces as they seek to combat the nefarious methods used in that trade, the proceeds of which threaten the very fabric of societies based on law and order. However, the liberty of the citizen is sacrosanct and ought not to be taken away except for reasons which can be justified fully within our laws. In other words, civil liberties ought not to be sacrificed on the altar of the war on drugs.

Mr. Campbell also relied upon the dictum of Carey P (Ag) in **Fleming v Myers and the Attorney General** cited above to the effect that a detention which had been lawful at its inception may become unlawful on account of the circumstances; for example, where there has been an unduly long period of detention before the claimant was taken before a judge or justice of the peace. He further cited **Herwin Fearon v The Attorney General C.L. F -046 of 1990** where, her ladyship Harris J., as she then was, opined that "even if the initial detention is justifiable, the period of detention ought not to be unduly long. If the detention is found to be longer than justified, then this could amount to unreasonable delay and consequently result in false imprisonment, as it would be demonstrative of absence of reasonable and probable cause". It was his submission that, in the instant case, even if the initial detention was lawful, once the x-ray had failed to positively confirm the suspicions of the police officers, they ought to have ended the detention.

Such a course of action would have been consistent with the evidence of Paul Smith who, on my findings, told the Claimant that if the x-ray was *positive*, she would be held overnight. Dr. Uche's report clearly indicated that the x-ray did not show the presence of any foreign bodies in the stomach of the Claimant. He submitted that this was a definitive finding, on the basis of which the police should have acted and ended the imprisonment, but did not. Yet, the defendant's agents persisted in detaining the Claimant, and having a guard watch over her overnight. It was the evidence of the police witnesses that the x-ray was "inconclusive". However, it was the witness, Crooks, who apparently used the term

"inconclusive" although, when pressed in cross examination, she sought to suggest that it was, in fact, Dr. Uche's characterization. This did not appear in his witness statement. This was one aspect of the case upon which counsel for the Claimant focused significant attention. He reminded the court that the word "inconclusive" was not Dr. Uche's characterization, but rather that of the witness, which she later tried to suggest was what Dr. Uche had said. Indeed, her own explanation of "inconclusive" was that "what we were looking for was not readily seen". I understand from counsel's line of submission in this regard that he was suggesting that the officer had, very early, made up her mind that there was something illegal to be found in the Claimant's body. In any event as counsel submitted, the Claimant had not been told that if the x-ray was "inconclusive" she would be further detained. She had been told, and this was clearly the evidence, that if the x-ray was positive, in those circumstances, she would be further detained.

Counsel also further submitted that the Claimant had been subjected to more than one x-ray when it was her evidence she had only consented to one. On the basis of this fact, counsel submitted that any detention after about 9:00 p.m., by which time the first x-ray had been done, must have been unlawful. Moreover, there had been no mention of approval sought for the Claimant to be administered a laxative. Indeed, as Dr. Uche's report states: "She was monitored, hydrated and *several doses of Mgs04 laxative administered".* I accept the Claimant's testimony that this had been done under the pretext that she was being given a sedative, something to "calm her nerves". In my view, it is also highly instructive that Uche's report is in the following terms.

> "Chest, cardiovascular, neurological and abdominal examination(s) were unremarkable. Abdominal x-ray findings as interpreted by me (were) unremarkable and showed evidence of no foreign packages".

The report then continued:

> "Patient was subsequently kept under observation for 24 hours over which she was monitored, hydrated and several doses of Mgs04 laxative administered.

It seems clear from the sequence of the factors set out above that by the time the decision was taken to keep her "for observation", there had already been a clear finding that there was nothing inside the Claimant's body.

A statement by Dr. Trevor McCartney, the Senior Medical Officer at the KPH (who was neither present at the hospital on the occasion of the Claimant's detention nor present to give evidence) was admitted by agreement. It spoke of the practice of the hospital upon admission of persons suspected of being drug mules. It is not at all clear to me that this statement can assist the court as there is no independent confirmation that these practices were followed in the instant case. Even assuming the statement correctly sets out the factual procedure, the court would still have to make a further evidentially unsustainable assumption that the processes were followed. Moreover, it is clear that some parts of the doctor's statement were hearsay, and accordingly, not in any event, admissible.

Finally, the Claimant's counsel submitted that the witnesses for the government should not be believed. In particular, Detective Woman Corporal Crooks' evidence should be rejected for she had not been forthcoming with the court, and in giving her evidence, she was not credible. He therefore submitted that the Claimant's case should succeed.

With respect to damages, he cited the case of **Sharon Greenwood Henry v The Attorney General of Jamaica, Claim No: C.L. G – 116 of 1999**. He submitted that the cases were factually similar. There, as here, the claimant had been taken from a queue at the same Norman Manley International Airport, taken to the KPH, was x-rayed and laxatised but no trace of any drugs were found on or in her. My learned brother, Sykes J. in his judgment in that case described, quite graphically, the seriously invasive searches of the claimant which showed the humiliating way the claimant was treated there. The damages awarded there, $1.1 million are now worth $1.86.

Counsel further submitted that the Claimant should be awarded aggravated damages for the disappointment of missing her son's wedding; the embarrassment occasioned by her detention and being handcuffed to a male who she did not know on her way to the KPH as well as being kept handcuffed to the hospital bed and under police guard during her imprisonment at the hospital. He also submitted that the Claimant should be awarded exemplary damages on the basis that the treatment she received at the hands of the agents

of the state in not allowing her anything to eat or drink while she was at the hospital, and indeed, until the following day after her detention was egregiously wrongful.

As was said by Potter L. J. in **Larrier v Chief Constable of Merseyside Police 2004 EWCA 246:**

> "In a case of false imprisonment where detention is admitted, the burden is on the defendant to establish, on a balance of probabilities, that the detention was lawful. If no such lawful justification is established, the claimant is entitled to succeed".

I adopt the dictum of the learned Lord Justice. Based upon the evidence which I accept, the Claimant was imprisoned in that she was subjected to a total restraint upon her liberty. In the absence of any credible evidence providing a satisfactory explanation for the detention, I find that there was no reasonable and probable cause for her detention so as to bring the agents of the state within the protection of section 33 of the Constabulary Force Act. I accept that in this case, the absence of reasonable and probable cause is also evidence of malice. I accordingly find for the Claimant on her substantive claim for false imprisonment. With respect to the claim for damages for assault and trespass to the person, it is not clear to me on the evidence as found, that there was any conduct which put the Claimant in real apprehension that a battery would be committed upon her. However, in the circumstances of her unlawful detention, I would hold that administering to her a laxative on the pretext that it was something "to calm her nerves" does constitute a trespass to her person, and I so find.

I turn then to the issue of damages. The Claimant has produced medical reports which indicate that she suffered physical and emotional damage from her ordeal. The report of Dr. Aggrey Irons, well-known consultant psychiatrist, indicated that his examination revealed that the Claimant was suffering from severe Post Traumatic Stress Disorder as a consequence of her ordeal with the police. He also found that the Claimant was suffering from high anxiety and was increasingly agitated. She also displayed depressed mood "which has become worse over time" and "persistent Phobic Avoidance responses to health care professionals" and is "in urgent need of effective psychological treatment".

The Claimant was also examined by Dr. Charles Robertson, a general practitioner, who diagnosed her as suffering "hypermotility of the bowels with pain". He ascribed this to the purgative which the Claimant had received at the KPH, although, in fairness, it should be noted that there had been a "full recovery". Finally, I wish to refer again to the report of Dr. Trevor McCartney, Senior Medical Officer ("SMO") at KPH. I have already stated that since the SMO had not in fact been involved with the Claimant's hospitalization, his report of "facts" must of necessity have been hearsay. To the extent that the litigants have consented to its admission, the Court still has to consider what weight is to be given to it. In this regard, what I find most significant in that report is that the SMO in describing what "is standard therapy for patients suspected of having intra intestinal foreign materials" stated that:

> "A stat dose of 250 mg (of magnesium sulphate) was given followed by dosage 250 mg three times per day for one day".

It is clear that the several doses of magnesium sulphate that Dr. Uche said were administered to the Claimant, were all done during the period between her admission to the hospital, about 7:00 p.m. and late that same night, a matter of, not one day, but a few hours. In my judgment, I would hold that this provides compelling evidence of aggravating circumstances.

Notwithstanding the best efforts of Mr. Moody to distinguish the case and suggest that it does not assist the court, I accept that the case of **Sharon Greenwood-Henry** does provide some useful guidance in principle, on the issue of damages. There are, however, clearly distinguishing features as the totally egregious conduct and invasive personal investigations to which the claimant was subjected in that case, are not the same as in the instant case at Bar. Nevertheless, I am of the view that the Claimant has demonstrated on a balance of probabilities the existence of the necessary criteria to show an entitlement to aggravated damages. It has been said that these damages (aggravated damages) are part of the compensatory damages awarded a claimant for injury to his proper feelings of dignity and pride. According to Lord Devlin's authoritative analysis in **Rookes v Barnard [1964] AC 1129, 1223** aggravated damages are "damages awarded for a tort as compensation for the plaintiffs mental distress, where the manner in which the defendant

has committed the tort, or his motives in so doing, or his conduct subsequent to the tort, has upset or outraged the plaintiff. Such conduct or motive aggravates the injury done to the plaintiff, and therefore warrants a greater or additional compensatory sum"[1]. I have determined that the Claimant is entitled to aggravated damages.

What of the submission of counsel on exemplary damages? In **Rookes v Barnard**, (the case in which, for the first time, a critical analysis of the conceptual differences between aggravated and exemplary damages was carried out) Lord Devlin articulated the circumstances in which or the categories for which exemplary should and could be awarded. There, Lord Devlin, in a part of his speech adopted by the other members of the appellate committee, held that for the court to have a discretion to award exemplary damages in tort, either the facts of the case must fall within one or other of two broad factual categories, or the award of exemplary damages in the circumstances of the case must be expressly authorized by statute. The two factual categories are:

> 1. Oppressive, arbitrary or unconstitutional actions by servants of the Government; and
> 2. Conduct (by the defendant) calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff.

In **Thompson v Commissioner of Police of the Metropolis [1997] 3 WLR 403** the UK Court of Appeal clearly accepted that (i) aggravated damages are compensatory; (ii) that an award of compensatory damages (which includes aggravated damages) will, incidentally, have some adverse (or punitive) effect on the defendant who must pay the award; and (iii) that this incidental adverse (or punitive) effect should be taken into account when deciding whether exemplary damages should be awarded (the if but only if test). Hence juries should be told that:

> ... if [they] are awarding aggravated damages those damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendants point of view.

[1] AGGRAVATED, EXEMPLARY AND RESTITUTIONARY DAMAGES [1997] EWLC 247(2) (16 December 1997)

> ... exemplary damages should be awarded if, *but only if*, they consider that the compensation awarded by way of basic or aggravated damages is in the circumstances an inadequate punishment for the defendants.[2]

Lord Nicholls of Birkenhead said in **Kuddus (AP) v Chief Constable of Leicestershire Constabulary [2001] UKHL 29**:

> Exemplary damages or punitive damages, the terms are synonymous, stand apart from awards of compensatory damages. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary. They are intended to punish and deter.

The question that has to be determined here are what damages should be awarded to this claimant? In **Sharon Greenwood-Henry**, Sykes J, in the particularly egregious circumstances of that case, awarded $100,000 for false imprisonment, $1.1 million for assault and battery, and $700,000 each for aggravated damages and exemplary damages. Brooks J, in **Nelson v The Attorney General of Jamaica C, L. N. 120 of 1998**, canvassed a number of cases cited to him involving awards in false imprisonment. These included **Keith Bent and Others v The Attorney General (unreported) C.L.1998 B - 330** where the court awarded a labourer $60,000.00 for four hours incarceration; **Inasu Ellis v The Attorney General**, where the Court of Appeal awarded a claimant, a Justice of the Peace, $100,000.00 for seven hours detention; **Currie v The Attorney General C.L. C – 315 of 1989** where Rattray J. (in 2004) awarded a sum of $500,000.00 for twenty-nine days imprisonment. Brooks J. concluded that the awards for shorter periods of incarceration appeared relatively higher than for longer periods. In the **Nelson** case, his Lordship, in April 2007, awarded the Claimant the sum of $200,000.00 for false imprisonment which lasted for two (2) days. I am of the view that this Claimant ought to be awarded $80,000.00 for her unlawful imprisonment for just under twenty four (24) hours. I also believe that she is entitled to an award for trespass to her person or battery for the unauthorized administering of several doses of the laxative, magnesium sulphate during the night of her incarceration. She has demonstrated by the evidence of her doctors, and I find as fact, that there was, in fact, pain and suffering and she has

[2] Ibid

continued to suffer the effects of the traumatic event. In my judgment, a sum of $1,000,000 would be appropriate for this tort.

In **Thompson v Commissioner of Police of the Metropolis1997 3 WLR 403** (referred to elsewhere herein) the view was expressed that :"Aggravated damages are awardable where there are aggravating features about the case which would result in the plaintiff *not receiving sufficient compensation* for the injury suffered if the award were restricted to a basic award"[3].

As I have indicated above, I also hold on the facts as found by me that the Claimant is entitled to aggravated damages to compensate for hurt feelings and injury to her dignity. In that regard, I accept the Claimant was also subject to taunts when she was being taken from the Norman Manley International Airport to the hospital and that she was handcuffed to a male whom she did not know. I have formed the view that she should be awarded a sum of $600,000.00 for aggravated damages.

In so far as a claim for exemplary damages is concerned, I accept the position articulated by the English House of Lords in **Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29** (delivered June 7, 2001), where Lord Slynne of Hadley had this to say about exemplary damages:

> It is equally accepted by the parties that exemplary damages are not precluded by the fact that aggravated damages may be awarded though it is clear that before the decision of the House in ***Rookes v Barnard*** **[1964] AC 1129** the distinction between the two was not fully appreciated. In that case Lord Devlin, at p 1228, drew attention to the difference of purpose of compensatory damages and punitive or exemplary damages:
>
> > "In a case in which exemplary damages are appropriate, a jury should be directed that *if, but only if,* the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum." (my emphasis)

[3] Page 417 of the judgment

I am of the view that in considering the particular circumstances of this case, there ought not to be an award for exemplary damages. In my judgment, while the conduct of the agents of the state was unfortunate, I believe that this claimant may be adequately compensated by an award of basic and general damages, and I so hold.

Special damages were agreed between the parties at $13,524.00 and that sum is awarded as special damages with interest at 6% from July 14, 2003 to 22/6/06 and thereafter at 3% to the date of this judgment.

I also award general damages as follows:

False Imprisonment, $80,000.00; Battery/Trespass to the Person, $1,000,000.00 and aggravated damages, $600,000.00, all sums to bear interest at 6% from the date of service of the claim form to 22/6/06 and 3% thereafter to the date of this judgment.

I also award costs to the Claimant, to be taxed, if not agreed.

ROY K. ANDERSON
PUISNE JUDGE