

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: C.V. 2016-04255

Between

IAN HENRY

Claimant

And

W.P.C. CHARMYN BOVELL

(NO. 11661)

1st Defendant

And

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO

2nd Defendant

Before Her Honour Madame Justice Eleanor J. Donaldson-Honeywell

JUDGEMENT

Delivered on: April 27, 2018

Appearances:

For the Claimant: Mr. Chris D. Seelochan

For the Defendants: Ms. Trisha Ramlogan, Ms. Diane Katwaroo

A. Introduction

1. Two feuding neighbors found themselves together one afternoon eighteen years ago. They were at Affan's Bakery on Irving Street, San Fernando where they went to buy bread. There was a hostile interchange and fighting ensued. Ian Henry, the Claimant in this matter was one of the neighbors involved in the fight. He says it was his neighbor Veronica Hinds who attacked him and he merely pushed back to deflect her blows. However, his neighbor sustained injury. The Claimant was charged by the Second Defendant, WPC Charmyn Bovell, based on Ms. Hind's report. The charge was that he assaulted Mrs. Hinds occasioning actual bodily harm contrary to Section 30 of the Offences Against the Persons Act, Chap 11:08.

2. Mrs. Hinds, the Virtual Complainant, commenced her testimony in 2001. Thereafter the matter was postponed around 80 times for various reasons, including illness of Mrs. Hinds, applications for adjournment made by Defence Counsel and on some occasions the absence of WPC Bovell. Eventually, the Magistrate dismissed the matter on November 28, 2012 when it was confirmed that Mrs. Hinds was wheelchair bound. The Prosecutor could not proceed without the Virtual Complainant so the matter was dismissed for want of prosecution. Four years later on November 25, 2016, the Claimant commenced this Claim seeking damages for Malicious Prosecution.

B. Issues and Decision

3. The factors that must be established by the Claimant to prove Malicious Prosecution are well established in cases such as **Cecil Kennedy v the Attorney General CV No. 87 of 2004**. The first two hurdles the Claimant faces with regards to these factors are not in issue, namely that there has been a prosecution against him of a criminal charge and that the proceeding terminated in his favour.
4. The two remaining factors that must be determined in order to conclude that there is liability for Malicious Prosecution are
 - a. That there was an absence of reasonable and probable cause for the prosecution of the Claimant and
 - b. That the Defendant instituted or carried out the proceedings maliciously.
5. If it is found that there was reasonable and probable cause for the prosecution, then the issue as to whether malice was involved becomes irrelevant.
6. Accordingly, the issue I found most appropriate to be first considered was whether there was Reasonable and Probable cause including both the objective and subjective elements of reasonableness. Objective reasonableness may be found where there is evidence that a reasonable man assumed to know the law and, possessed of the information the officer had, would believe there was

proper basis for the prosecution. The subjective test is whether the officer herself actually believed that the Claimant should be charged for the offence.

7. If there is a finding that the Defendants are liable for Malicious Prosecution the final issue to be determined would be whether the Claimant suffered damage. However, for reasons more fully explained herein, I find that there was no fault in the policing work done by WPC Bovell. She had reasonable and probable cause to arrest the Claimant and her actions were neither motivated by malice nor carried out maliciously.
8. While there would appear to be no rational reason that could justify a period of some 14 years of Court attendances to which the Claimant was subjected, WPC Bovell did not cause the delays. She also soldiered on through the long tedious proceedings. She was more often than not present throughout the proceedings, culminating with her very cooperative and courteous participation in the instant civil proceedings.

C. **Pleadings**

9. The Claimant's pleaded case as to what transpired in the fight leading to his arrest is summarized by his Attorney as follows:

“On Thursday 19th October, 2000, at approximately 4:30 p.m., the Claimant's then four-year-old daughter and the Claimant entered

Affan's Bakery on Irving Street, San Fernando to purchase bread. On entering the bakery, the Claimant was making his way to the counter when he was verbally abused and threatened by Veronica Hinds. Ms. Hinds was a neighbour of the Claimant's. There were previous conflicts between Ms. Hinds and the Claimant which resulted in Ms. Hinds being aggrieved with the Claimant.

The Claimant did not want to get into yet another altercation with Ms. Hinds, so when she verbally abused him in full view of other customers at the bakery as well as workers at the bakery, the Claimant responded that he 'had no time for that' at which point the said Ms. Hinds physically attacked the Claimant by striking at him. The Claimant did not in any way attack Ms. Hinds but tried to deflect the blows as much as possible hoping that Ms. Hinds would just leave. Ms. Hinds also struck the Claimant's daughter during her attack. On seeing his daughter getting struck, the Claimant put forward his hand to deflect any further blows from Ms. Hinds' hand from striking his daughter. At no point was the Claimant aggressive to Ms. Hinds in any way.

Ms. Hinds then left the bakery and proceeded to her vehicle where she armed herself with a cutlass all the while hurling unfounded accusations at the Claimant. Upon leaving the bakery, the Claimant noticed Ms. Hinds waving the cutlass around and then getting into her vehicle and shouting to the Claimant, "You will pay!" The

Claimant immediately got into his vehicle and proceeded to his brother-in-law's house and thereafter drove to the San Fernando Police Station. The Claimant wife and other daughter were in his vehicle at all material time."

10. The Claimant pleads that when he arrived at the Station around 5.30pm Mrs. Hinds was already there making a report and she pointed him out as the person who assaulted her. There is a great deal of information pleaded by the Claimant as to how he was treated that evening at the station; with officers accusing him of being a woman beater after having ignored his requests to give his side of the story. He claims that eventually a P.C. Nanan told him they had investigated the matter and discovered that the Claimant was not the aggressor so he could go home and come back the next day.

11. He says he left around 7.00pm but later that night around 11.00pm W.P.C. Bovell and some other officers came to his home and arrested him. He claims WPC Bovell and the other officers didn't identify themselves and refused to listen when he tried to explain the incident. He was put in the backseat of a police car and claims that on the way to the station WPC Bovell said "Why you doh move, she own there, you only renting". He had to stay in a cell at the station and was not charged until the next morning before he was taken to Court.

12. The version of events pleaded by the Defendants does not in any way concede that WPC Bovell had any knowledge of the Claimant's visit to the Station at 5.00pm after the fight. Instead the Defendants' version of events, from which WPC Bovell would have derived the information to satisfy herself that the Claimant should be charged, starts with the visit of Mrs. Hinds to the Station at 8.00pm.
13. At that time it is pleaded that the Station Diary indicates that Mrs. Hinds made her report and proceeded to the San Fernando General Hospital. She was treated for a fractured nose. Her Medical Report and the Station Diary Extract, providing documentary evidence that would have been available to WPC Bovell, are attached to the Defendant's pleadings.
14. WPC Bovell's involvement in the matter commenced after these initial stages according to her pleadings. The pleaded account of her actions, as summarised by Counsel for the Defendant, is as follows:

"8. As the offence that the Claimant had committed was classified as a serious offence, Police Constable Nanan, Regimental number 14492 attached to the San Fernando Police Charge room proceeded with Veronica Hinds to the Criminal Investigations Department. There he met Woman Police Constable Charmyn Bovell Regimental Number 11661 attached to the Criminal Investigation Department San

Fernando Police Station. WPC Bovell was thereafter detailed to investigate a report, made by the said Veronica Hinds regarding a confrontation by the Claimant at Affan's Bakery in Irving Street, San Fernando, that the Claimant cuffed her in her face and she lost her balance and fell to the floor.

9. *In the presence of the victim Veronica Hinds, PC Nanan gave WPC Bovell a medical report from the San Fernando General Hospital in which WPC Bovell then placed markings CB #11661 and dated the said 19/10/2000 on the back of the medical report. Ms. Hinds' medical report revealed that she had a fractured nose. WPC Bovell observed that the victim had a bandage on her nose and was shown a pair of glasses by Ms. Hinds in which the lens were broken. WPC Bovell interviewed Veronica Hinds and took a written statement. A copy of the said statement is attached to the Defendant's Defence and marked "C".*

10. *WPC Bovell in company with PC Cameron, Regimental No. 11121, proceeded to Affan's Bakery on enquiries. There she met and spoke to several persons. Having received certain information and the medical report supporting Veronica Hinds' police report, WPC Bovell had reasonable and probable cause to arrest the Claimant.*

11. *WPC Bovell thereafter proceeded to Laurier Boulevard, Coconut Drive San Fernando where Veronica Hinds pointed out the Claimant's house. Upon her arrival WPC Bovell remained at the gate and called out to the Claimant. The Claimant's wife peered through the window and sometime after the Claimant came downstairs.*

12. *Ms. Hinds identified the Claimant. WPC Bovell thereafter identified herself by means of her Trinidad and Tobago police identification card. The Claimant was then cautioned for the offence of occasioning actual bodily harm and taken to the San Fernando Police Station.*

13. *In the presence of the Claimant, Ms. Hinds said "Officer this is the Ian Henry I told you about who cuffed me in my face at Affan Bakery." WPC Bovell asked the Claimant if he heard what the victim had said and cautioned him. The Claimant replied "Yes, she attacked me and ah palm she in she face twice." WPC Bovell cautioned Mr. Henry for the offence of occasioning actual bodily harm and informed him that he would be taken to the station. WPC Bovell informed Mr. Henry of his legal rights and privileges.*

14. *At the station, the Claimant was informed of his rights and privileges, charged, fingerprinted, photographed and served a copy of the Notice to Prisoner for assault occasioning actual bodily harm."*
15. The Claimant pleads that there was no reasonable cause for his arrest. With regard to the required element of malice, the Claimant's Statement of Case includes particulars geared to supporting the contention that there was no possibility of a successful prosecution of the Claimant and so the prosecution must have been actuated for a reason other than to bring the perpetrator of a crime to justice. Hence the prosecution, according to the Claimant, was malicious.
16. Additionally, he pleads that WPC Bovell failed to conduct a proper investigation. In particular he says he was not interviewed before being charged and she failed to take into account that earlier police investigations revealed he was not the aggressor. Finally, he alleged that the words he says WPC Bovell said to him in the Police Vehicle showed that she was biased against him.
17. The Defendants counter by pleading particulars of reasonable and probable cause to arrest the Claimant based on WPC Bovell having conducted proper investigations and interviews. Based on the information she gathered and

having physical sight of Mrs. Hinds as well as her medical report she arrested and charged the Claimant without malice or ill-will.

D. Evidence

Factors taken into account in analyzing the evidence

18. The parties give two divergent accounts as to the conduct of WPC Bovell's investigations into the incident at Affan's Bakery. Neither side called an additional witness. In coming to my conclusion that the Defendants' account is more probable I weighed my impression of the contending versions against the factors highlighted in **Horace Reid v Dowling Charles and Percival Bain PC Appeal No. 36 of 1897** as follows:

a. Contemporaneous documents – I considered the documents disclosed by both sides. Those attached to WPC Bovell's witness statement included four contemporaneous documents dated the night/morning of her investigation into the incident. Firstly, the Medical Report for Mrs. Hinds. It confirmed that she sustained fractured nasal bones, abrasion to the jaw and soft tissue injury to her forehead.

Secondly, there was a Station Diary Extract which recorded that only Mrs. Hinds came to the Station to make a report that evening. She said she was cuffed several times in the face by the Claimant. The Diary further records that later on at 12:20am the Claimant was brought into

the Station by WPC Bovell and other officers, having been pointed out at his home by Mrs. Hinds. The Diary sets out the utterance WPC Bovell said the Claimant made in response "Yes, she attacked me and ah palm she in the face twice."

Finally, there are two accounts of the investigations on the night of the incident, one is a Statement taken by WPC Bovell from Mrs. Hinds and the other is WPC Bovell's own Report.

The only documents the Claimant seeks to rely on to prove his version of the incident and his impression of WPC Bovell's investigations are the notes of evidence and proceedings from the Magistrates' Court. The said documents were of no relevance to the role of WPC Bovell. They did serve to lend some credibility to parts of the Claimant's pleaded case about what happened before WPC Bovell became involved in the investigation that night. However, the nexus of that time period to the issues to be determined herein has not been established by any proof that WPC Bovell had knowledge of same.

- b. The pleaded case - In addition to assessing the weight of supporting documentary evidence I assessed the extent to which, when cross-examined, the witnesses contradicted pleaded facts and/or gave incredibly embellished versions of certain facts. This influenced my

determination as to which witness was more credible. I also took into consideration whether certain aspects of the pleadings were not supported by any evidence, whether by way of witness statements or oral testimony.

- c. The inherent improbability of the rival contentions – Of particular relevance in my assessment as to which witness I could believe overall was the improbable nature of some of the evidence given.

Analysis of the Evidence

19. An important aspect of the Claimant's pleaded case was that the Officers with whom he first interacted at the Station were accusing him of being a woman beater but later told him he could leave because he was not the aggressor. Accordingly, based on this information the Claimant contends that WPC Bovell would have had no basis for charging him. However, the Claimant presented no evidence as to WPC Bovell having knowledge of those events. He brought no proof at all that they happened other than his own oral testimony.
20. WPC Bovell's evidence was that she knew nothing of such occurrences. She was asked under cross-examination whether Officer Nanan, the original officer, never mentioned that the Claimant came to the Station before. WPC Bovell confirmed that Officer Nanan never did tell her that. She said she was surprised to be hearing that the Claimant went to the Station before she met

him at his house. Her position was supported by the fact that there was no mention of same in the contemporaneous Station Diary.

21. The Claimant tendered no contemporaneous document or witness to support that he had been to the Station before or more importantly that WPC Bovell should have known about his visit. His Attorney sought to prove that he had made the visit by cross-examining WPC Bovell about the evidence given by Mrs. Hinds at the Magistrates' Court a year after the incident. He pointed out that Mrs. Hinds admitted she saw the Claimant at the Police Station before she went to the hospital. However, WPC Bovell said she had not seen that part of the Court transcript.
22. In any event Mrs. Hinds' testimony after the fact in no way proved that WPC Bovell was also aware that the Claimant visited the Station. Accordingly, this aspect of the Claimant's case was not proven. All pleadings and evidence about his interaction with PC Nanan and other officers prior to WPC Bovell taking over the case proved to be irrelevant.
23. On the other hand, all aspects of the Defendant's pleaded case as to her reasonable and probable cause for arresting and prosecuting the Claimant were supported by the four contemporaneous documents mentioned above.

24. In assessing the witnesses, I took into consideration that both the Claimant and WPC Bovell would be affected by the passage of 18 years since the incident and arrest took place. The failure to recollect insignificant details and the occurrence of minor testimonial inconsistencies, with minimal bearing on whether there was cause for arrest and or malice, were not taken into account as discrediting the evidence given.
25. Heavy weather was made, for example, of the fact that under cross-examination WPC Bovell appeared to have been admitting that she didn't interview the Claimant because it was not necessary to do so. In her Witness Statement however, she attached her contemporaneous report made around the same time that the Claimant was charged. The Report exhibited as "CM4" states at the last page *"I asked the defendant¹ if he would like to give me a written statement and he said "No" .*
26. I did not find that WPC Bovell discredited herself by 18 years later saying she did not try to interview the Claimant, Ian Henry. What she made clear was that there was no need to do so because she had all the information required to charge him. The said information included his alleged utterance which she accepted as an admission that the Claimant had hit Mrs. Hinds. She saw no need to investigate whether he acted in self-defense. It is also my finding that the fact that WPC Bovell did not investigate whether the Claimant was

¹i.e. the Defendant to the criminal charge who is the Claimant herein, Mr. Ian Henry

defending himself is not a sound basis for contending that she had no reasonable and probable cause to arrest.

27. As underscored by counsel for the Defendants, there is no duty on the part of the officer to determine whether there is a defence to the charge but only to determine whether there is reasonable and probable cause for the prosecution.

Herniman v Smith (1938) 1 AC 305 Per Lord Atkin at p. 319:

"No doubt circumstances may exist in which it is right before charging a man with misconduct to ask him for an explanation. But certainly there can be no general rule laid down, and where a man is satisfied, or has apparently sufficient evidence, that in fact he has been cheated, there is no obligation to call on the cheat and ask for an explanation which may only have the effect of causing material evidence to disappear or be manufactured. It is not required of any prosecutor that he must have tested every possible relevant fact before he takes action. His duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution."

28. Accordingly, the slight inconsistency regarding whether or not the Claimant was given an opportunity to state his version of the fight to the Officer is irrelevant.

29. In a similar vein, the fact that WPC Bovell visited Affan's at night after the incident and did not record names of persons she spoke with is not indicative of a lack of reasonable and probable cause. At that time WPC Bovell's investigations were at a sufficiently advanced stage as she had all information required as to the alleged assault.

30. She sought to interview possible eye-witnesses and spoke with the owner of the Bakery but he was unable to confirm Mrs. Hinds report. No-one was able to assist WPC Bovell with any information. In any event, information gleaned could only have been relevant to determining whether the Claimant acted in self-defence since he is admitting to striking Mrs. Hinds. As aforementioned, an investigation into whether he was just deflecting her blows in self-defence was not required.

31. The Claimant's evidence as to certain circumstances peripheral to his version of the fight and to his visit to the Station thereafter is supported by the transcript of evidence of Mrs. Hinds given in 2001 at the Magistrates Court. There is confirmation there, for example, that the Claimant visited the station. As it relates to the Claimant's complaints about WPC Bovell and what he saw as her investigative failings, he relies only on his own testimony. I had to weigh that against WPC Bovell's version that was supported by contemporaneous documents.

32. Additionally, I considered which witness seemed more truthful so as to determine whether certain things the Claimant said, such as the alleged words WPC Bovell told him in the Police car, actually took place. In that regard I found WPC Bovell to be a far more credible witness than the Claimant who was prone to embellishing his story. An example of the embellishment is highlighted by Counsel for the Defendant as follows:

“e) The Claimant when asked to demonstrate how he raised his hand to deflect the blows he responded “Raising my right hand in the numerous times she tried to hit my hand”. He further stated “I was defending myself, my daughter was to my side.” When asked “where did you raise your hand?” He responded “shoulder level”. The Claimant was asked “Your four year old daughter was hit? He responded, “Blows coming at shoulder level”. He was further asked “At 4 years old how tall?” and he responded, “About my chest”. When the Honourable Justice Honeywell enquired, “About 5 feet?” He responded, “Yes”. He was further asked “At four years old and chest level and deflecting blows she hit your daughter?” And he replied, “Yes”.

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27. *The Claimant stated that during the alleged physical attack by Veronica Hinds that his daughter had been struck in her face while she was attacking him. Under cross-examination he was asked, “How tall are you?” to which he replied “6feet 3inches”. Further he was asked “You said that your 4 year old daughter was hit, blows coming at shoulder level? At 4 years how tall?” to which he answered, “About*

my chest". When Justice Honeywell enquired, "About 5 feet?" he replied, "yes". He was further asked, "At 4 years old, and at chest level and deflecting blows and hit daughter?" to which he responded, "Yes". It is impossible that the Claimant's daughter at four years old would have been five feet tall. If this were true then this would be a rare phenomenon and one for world record books."

33. Counsel for the Claimant responded to this submission by asking the Court to take judicial notice of the fact that the Claimant was well in excess of 6 feet tall and as such implying that his daughter at 4 years old could have been five feet tall. This submission did not assist with rebuilding the credibility of the Claimant. I was left with the unlikely picture of the Claimant over 6 feet tall and his five foot tall four year old daughter being attacked by one woman, leaving the Claimant helpless to do anything but deflect blows in self-defense.
34. The improbability of the version of events being put forward by the Claimant further led me to the view that he was probably not truthful when he testified as to the actions and words of WPC Bovell on the night of his arrest.

E. Findings

35. It is my finding that WPC Bovell clearly had reasonable and probable cause to arrest and charge the Claimant. Objectively, this was so because, based on the law governing the offence of Assault Occasioning Actual Bodily Harm, the Defendant had all the facts required to make a decision to charge him. Counsel

for the Defendants submits that it was based on her investigative report that the final decision to charge the Claimant was to be that of the Director of Public Prosecutions. Counsel for the Claimant did not deny this.

36. Subjectively, all WPC Bovell's actions, including faithful attendance at the Magistrates' Court for many years and up to the time of her testimony in Court for this matter, supported that she strongly believed that the Claimant had assaulted Mrs. Hinds.
37. I therefore hold that the first of the two remaining elements of Malicious Prosecution i.e. lack of reasonable and probable cause has not been proven by the Claimant on a balance of probabilities.
38. It follows that there is no need to consider whether there was Malice as a motivating factor in the prosecution. I will however, as a matter of completeness, indicate that I have found no evidence of Malice on the part of WPC Bovell. This is so because it is my foremost finding that she did not utter the alleged words said to prove her bias.
39. The other aspect of WPC Bovell's actions based on which the Claimant alleges she was malicious is that he says she was negligent and reckless in the conduct of her investigation. He highlights her failure to interview potential eye-

witnesses during the day at Affan's and that he himself was not asked to give a statement despite having said he was attacked.

40. It will not be possible in this matter for me to find Malice on this account since I have held that the officer had reasonable and probable cause to arrest the Claimant. It follows that her investigations could not have been negligent. In any event, mere negligence in investigations will not be sufficient to prove Malice in a Malicious Prosecution case.

41. As underscored by Pemberton J, as she then was, in **CV 2012-02652 Simon Fleming v Attorney General** at para [50] citing Mendonca JA in **Alistaire Manzano v The AG Civ Appeal No 151 of 2011**

"...It may therefore be a question of degree whether malice should be inferred from the absence of reasonable and probable cause. If the prosecution was launched on 'obviously insufficient material' that to me suffices to support the inference of malice. Malice may also be inferred from the absence of honest belief in the merits of the case. Indeed this can provide strong evidence of malice..."

42. Counsel for the Claimant helpfully highlights the findings of Pemberton J in **Simon Fleming** as an example of a case where a prosecution was launched on obviously insufficient material and the Defendant was found liable for Malicious Prosecution. The circumstances of insufficient material to charge in that case were stark in that there was a firearm charge with no proof of a

firearm. The suggestion by the Claimant that WPC Bovell's prosecution was similarly ill-informed is without merit.

F. Disposition

43. The Claimant's case is dismissed with costs to be paid to the Defendants on the prescribed basis in the amount of \$14,000.00.

Delivered on the 27th day of April, 2018

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Eleanor Joye Donaldson-Honeywell

Judge