

IN THE HIGH COURT OF JUSTICE

OF

TRINIDAD AND TOBAGO

CV2011-02720

JAMAL SAMBURY

CLAIMANT

And

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

DEFENDANT

Before Master Patricia Sobion Awai

Appearances:

For the Claimant

Mr. Gerald Ramdeen

For the Defendant:-

Mr. Lee Merry

BACKGROUND

1. Jamal Sambury ("the Claimant") was a prisoner at the Golden Grove State Prison. On October 8, 2010 while at a holding cell at the Princes Town Magistrate's Court, he was assaulted by police officers.
2. In a Defence filed on December 1, 2011 and amended on January 5, 2012, the Attorney General ("the Defendant") admitted that the Claimant was assaulted and battered as a result of the actions of servants or agents of the State of Trinidad and Tobago. However the Defendant denied that the Claimant sustained all the injuries pleaded in the Statement of Case.
3. By consent, judgment on liability was entered against the Defendant with damages to be assessed by a Master.
4. When the Assessment of Damages came up for hearing before me, directions were given, inter alia, for the filing of witness statements. In compliance, the witness statement of the Claimant was filed on February 28, 2013 and the witness statements of Sean Salvary and Rafie Mohammed, both prison officers were filed on February 27, 2013 on behalf of the Defendant. The Defendant also filed a Hearsay Notice seeking to adduce into evidence five documents, including medical reports, without calling the makers of the documents.
5. Before the date fixed for the Assessment of Damages, the Defendant filed two Notices of Application raising preliminary issues. These notices were:

- (i) A notice filed on March 28, 2013 to strike out the statement of case (the first application);
 - (ii) A notice of evidential objections filed on April 19, 2013 and amended on July 25, 2013 to strike out the Claimant's witness statement filed on February 28, 2013 (the second application).
6. The first application was supported by the affidavit of Priscilla Rampersad filed on July 25, 2013 and the second application by the affidavit of Priscilla Rampersad filed on July 25, 2013.
7. The Claimant filed no affidavits in response.

THE DECISION

8. After considering the evidence and arguments, I was satisfied that substantial portions of the Claimant's witness statement had been lifted from other witness statements in an attempt to mislead the court as to the injuries the Claimant had sustained and the actual circumstances relating to his assault at the hands of police officers. Accordingly the conduct of the litigation by the Claimant was found to be dishonest and an abuse of the process of the Court.
9. In deciding whether the Statement of Case and/or the Claimant's witness statement should be struck out for abuse of process, I considered the nature of the abuse and whether the exercise of the discretion to strike out was

just and proportionate in the circumstances of the case. Weighing the factors in favour of and against striking out the Statement of Case and witness statement of the Claimant, I concluded that the balance was against striking out. The applications were accordingly dismissed.

10. However in light of the Claimant's conduct, it was appropriate to order the Claimant to pay the Defendant's costs of the applications. These costs were assessed in the sums of \$10,000.00 for the first application and \$5,000.00 for the second application.

GROUNDS FOR THE APPLICATIONS

11. The first application i.e. to strike out the Statement of Case, was made pursuant to Rules 26.1(1)(w) and 26.2(1)(b) of Civil Proceedings Rules 1998. Rule 26.1(1)(w) provides as follows:

The court may take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

Rule 26.2(1)(b) provides as follows:

The court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court.

I note that rule 26.2(1)(b) above is equivalent to Rule 3.4(2)(b) of the English Civil Procedure Rules and the

authorities on the application of Rule 3.4(2)(b) are therefore relevant to this jurisdiction. Rule 3.4(2)(b) of the Civil Procedure Rules reads as follows:

The court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

12. In summary, the grounds for alleging abuse of process in the first application were that (a) the Claimant had deliberately made a false claim by copying large segments from another witness statement thereby exaggerating the extent of his injuries in the statement of case, (b) the Claimant had attempted to adduce false evidence (c) the damages due to the Claimant would be relatively small and that the abuse was so serious that the Claimant had forfeited his right to have his claim determined, (d) to allow the case to continue would result in a waste of judicial time and resources, and (e) to deter fraudulent claims of this type from being made in the future.

13. The second application i.e. to strike out the witness statement, was made pursuant to rules 26.1(1)(w), 29.1 and 29.5 of Civil Proceedings Rules 1998. Rule 26.1(1)(w) was set out above. Rule 29.1 provides as follows:

The court may control the evidence by giving directions as to -

(a) the issues on which it requires evidence;

- (b) the nature of the evidence it requires; and
- (c) the way in which any matter is to be proved,

by giving appropriate directions at a case management conference or by other means.

Rule 29.5(d) provides as follows:

A witness statement must so far as reasonably practicable be in the intended witness's own words.

- 14. The sole ground of objection to the Claimant's witness statement was that it was not written in his own words but rather was a fraudulent misrepresentation intended to mislead the Court.
- 15. In relation to both applications, the first question for the court was whether the Claimant's witness statement was copied from another witness statement.

WHETHER WITNESS STATEMENT WAS COPIED

- 16. Specifically the question that arose was whether the similarities between the witness statement of the Claimant and that of Jamal Fortune in Jamal Fortune v AG CV 2009-3296 were so striking that the only reasonable conclusion was that one was copied from the other.
- 17. The affidavit of Priscilla Rampersad filed on March 28, 2013 set out both witness statements with identical parts

underlined. Set out below are the identically worded portions of the witness statements:

"I was experiencing severe pain in my right ear. It was ringing and I felt as if the room was spinning. I held one of my hands over it and tried to apply pressure to it in trying to make the pain go away but it didn't."

"The officers then began kicking me and stamping upon me as I lay on the ground."

"I was twisting and turning on the ground to try and brakes the lashes but every time I turned I was just exposing another part of my body to get licks and this is what exactly happened. Every blow I received seemed harder than the one before. This did not help as they continued beating me. I was being beaten as if I was an animal. I thought that the officers would not stop until I was dead. I remembering begging them to stop and telling them how my ear damage but that did not stop them."

"I felt a warm liquid in my hand and when I looked at it I realized that it was blood. This was the hand I was using to cover my eyes and then realized that it was my ear that was bleeding. When the officers saw this they stopped and left me on the ground for a little while."

"I could feel parts of my body swollen from the lashes I had received. My body was feeling hot from licks I received. I was feeling weak and my body was paining all over especially my ear...There was blood running down the side of my head and unto my clothes and the floor."

"When I was taken back to ... cell... I could not sleep for the whole night. My body was paining all over. I could not even lie down properly to try and rest because of the pain I was in at the time. The injury to my right ear I had received pained the most and I had a severe headache for the entire night. I could not hear in that ear. I began cry when I reflected on what happened to me earlier. I felt sad and frustrated at the same time. I thought that the hearing loss in my ear was just temporary and that when I go to the hospital they would treat me for it. I felt weak and at times I thought I was going to faint. My body was swollen all over and as I passed my hands over my body I would feel the swollen areas where I had been beaten. I had great difficulty moving my neck from side to side. I was getting a pulling feeling each time I moved my neck and this was very painful."

"Over the few days following the incident my entire body was blue black. I could not hear in my right ear. And I could see clearly the marks on my body from the

incident. I could not understand why the officers hit me on that day and why I had to be beaten because I did not do anything for the officers to have acted in the manner that they did."

"Since this incident I ... suffer sudden pains to my right ear... loss of hearing... fluid frequently runs from... when this happens... pain... ear. I also have sudden blackouts which I never had before this incident. Sometimes when I get these sudden pains to my head I would have to hold on to my head until the pain stops... The actions of these officers... made me lost hearing in my right ear... I did not do anything to deserve this and I have been dealt a great injustice on my part for absolutely no reason whatsoever."

18. Apart from the sheer volume of the material that is common to both witness statements, when one analyses it qualitatively, it was clear that this was not mere coincidence. There was a quite deliberate exercise of "cut and paste" undertaken to create the Claimant's witness statement from the earlier statement. To my mind, it was implausible that two persons could experience separate events involving different persons in such an identical manner. Moreover when one looked at the shared grammatical errors, phrasing and sequence of events, the similarities were so startling that the only reasonable conclusion was that the Claimant copied and presented as his own sizable portions of the witness statement of Jamal Fortune.

19. It was significant that the Claimant offered no explanation for the obvious copying and use of another person's witness statement. In the absence of any explanation, I concluded that the copying was done deliberately in an effort to mislead the court and obtain a larger award than that to which the Claimant was entitled.

THE MEDICAL REPORTS

20. At paragraph 9 of the Statement of Case, the Claimant stated that he would be relying on the medical records that were in the possession of the Defendant.

21. The following medical reports were set out in the Defendant's hearsay notice filed on Feb 27, 2013:

Medical report of Dr Patrick Knight dated October 11, 2010

The Claimant was seen at Accident and Emergency Department of the Port of Spain General Hospital on October 11. He was found to be suffering from loss of hearing to right ear, with signs of a ruptured tympanic membrane, swelling of right knee and left elbow joint.

Medical report of Dr Patrick Knight dated June 3, 2011

The Claimant presented at A&E with a 3 day history of loss of hearing in the right ear. He recalled being

beaten about the body with a baton and suffered soft tissue injury to the right knee and elbow. He said he was also slapped on the ear and as a result lost his hearing on the right side.

On examination, he had loss of hearing in the right ear. Otoscopy revealed a normal left ear canal and eardrum but his right eardrum was ruptured with blood and wax present in the canal.

He was diagnosed with a ruptured eardrum, referred to ENT outpatient clinic for follow up. He was advised against eardrops. A prescription was given for Augmentin 625po bd and Motrin 800mg po. bd. He was told that he should return if he has any new recurring or worsening symptoms or attend the nearest health facility.

Medical report of Dr Tilluckdharry dated June 20, 2012

On May 16, 2012 (approximately one year nine months after the incident), the Claimant was seen at ENT Department of the Port of Spain General Hospital. He complained of occasional lancinating pain in the right ear with hearing loss and injury in right ear on and off. ENT examination was normal. Hearing test performed at DRETCHI on 31.05.2012 revealed normal hearing in both ears.

The Claimant's history of allegedly being beaten could have resulted in temporary perforation of the tympanic membrane (ear drum) which would normally heal in two (2) weeks post trauma without medication.

It is also clear from his recent examination and hearing test that the Claimant has normal ear (outer, middle and inner ear) functions with no complication to his allegedly being beaten to the right ear.

The Claimant has perfect ear functions.

22. From the above medical reports, the Claimant's injury following the beating consisted of loss of hearing to right ear, a ruptured tympanic membrane, swelling of right knee and swelling of the left elbow joint. With respect to the ear injury, the Claimant suffered temporary loss of hearing in right ear after the assault. Such an injury would normally heal in two weeks. When seen and examined one year and nine months after the beating, all tests showed normal hearing and the Claimant was described as having perfect ear functions.
23. In the Statement of Case, many of the injuries listed in the particulars of injuries were not supported by the medical evidence. Examples of injuries not mentioned in the medical reports included broken and fractured ribs, bruises and welt marks all over the body, tender swelling to the head, face and chest and extensive scars over his body.
24. Similarly in his witness statement dated February 25, 2013, the Claimant referred to fractured ribs and bruises and swelling about the body as a result of the beating. In contradiction to the medical report dated June 20, 2012, the Claimant stated that since the accident he occasionally suffered pains to his right ear and sometimes experienced a

loss of hearing in that ear and fluid frequently ran from it causing him pain. The report of June 20, 2012 stated that the Claimant had perfect ear functions.

25. Accordingly I rejected the submission of the Claimant's attorney that the medical evidence substantially supported all of the injuries alleged in the claim and witness statement to have been sustained. The inconsistency between the medical evidence and the Claimant's alleged injuries reinforced my finding that the Claimant copied portions of his witness statement and exaggerated his claim to get a larger award.

STRIKING OUT CLAIM

26. In his oral submissions, attorney for the Defendant asked that the claim be struck out for the following reasons:

- (a) Deterring persons from making false claims or dishonestly exaggerating the extent of their injuries
- (b) Saving the time and expense of a trial on quantum
- (c) Preserving the court's resources and saving costs by striking out at the earliest opportunity
- (d) The court's inability to assess damages fairly in the circumstances of the case
- (e) Proportionality in the face of a massive attempt to deceive the court and the small award to which the claimant may be entitled.

27. Attorney for the Claimant in his oral submissions argued in opposition as follows:

- (a) There was a consent order relating to liability which negated the fabrication of a claim
- (b) Medical reports emanating from the State made reference to the Claimant's injuries to the knee, elbow and ear
- (c) There were an increasing number of cases of alleged brutality by servants or agents of the State for which the State had to pay out millions of dollars in damages to litigants.
- (d) People who were beaten in a similar way might sustain similar injuries.
- (e) A consent order was based on instructions and could only be interfered with in very limited circumstances
- (f) There was no objective evidence of fraud.

28. Both parties relied on Summers v Fairclough Homes Ltd [2112] UKSC 26.. In that case, the claimant was injured in an accident at work and he commenced proceedings alleging breach of duty and negligence. After a trial, the judge gave judgment for the claimant on liability with damages to be assessed. Shortly thereafter, the defendant obtained video evidence of the claimant which showed that the claimant had exaggerated the effects of the injury. The claimant did not dispute the video evidence. The Defendant

asked for claim to be struck out in its entirety. The judge found that the claimant had suffered serious injuries but that he had made fraudulent exaggerations and had lied to medical experts. However, the application to strike out the claim was refused.

29. Summers established clearly that the court had power to strike out the claim at any stage in the proceedings under its inherent jurisdiction and under CPR 3.4(2) for abuse of process. Even where it had already determined that the claimant was in principle entitled to damages in an ascertained sum, the power to strike out could be used. At paragraph 45, the court held as follows:

[45] It was submitted that an ascertained claim for damages could only be removed by Parliament and not by the courts. We are unable to accept that submission. It is for the court, not for Parliament, to protect the court's process. The power to strike out is not a power to punish but to protect the court's process.

30. At the end of the day, the test applied by the Court in Summers was what was just and proportionate. The Court reasoned as follows:

[61] The test in every case must be what is just and proportionate. It seems to us that it will only be in the very exceptional case that it will be just and proportionate for the court to strike out an action after a trial. Judgment will be given on the claim if the claimant's case is established on the facts.

All proper inferences can be drawn against the claimant. The claimant may be held entitled to some costs but is likely to face a substantial order for indemnity costs in respect of time wasted by his fraudulent claims. The defendant may well be able to protect itself against costs by making a Calderbank offer. Moreover, it is open to the defendant (or its insurer) to seek to bring contempt proceedings against the claimant, which are likely to result in the imprisonment of the claimant if they are successful. It seems to us that the combination of these consequences is like to be a very effective deterrent to claimants bringing dishonest or fraudulent claims, especially if (as should of course happen in appropriate cases) the risks are explained by the claimant's solicitor. It further seems to us that it is in principle more appropriate to penalize such a claimant as a contemnor than to relieve the defendant of what the court has held to be a substantive liability.

[63] If the approach set out above is applied to the facts of this case, we conclude that this is not an appropriate case in which to strike the action out instead of giving judgment for the claimant. It would not be proportionate or just to do so. It would be wrong in principle to do so. We accept the submission that this is a serious case of abuse of process. The claimant persistently maintained his claim on a basis or bases which he knew to be false, both before he was found out and thereafter at the trial. Nevertheless, as a matter of substantive law, he suffered

significant injury as a result of the defendant's breach of duty and, on those findings of fact, subject to deductions referred to below was entitled to damages amounting to £88,716.76.....

[65] Although we have accepted the defendant's submission that the court has power under the CPR and under its inherent jurisdiction to strike out a statement of case at any stage in the proceedings, even when it has already determined that the claimant is in principle entitled to damages in an ascertained sum, we have concluded that that power should in principle only be exercised where it is just and proportionate to do so, which is likely to be only in very exceptional circumstances. We have further concluded that this is not such a case.

31. In Ul- Haq and others v Shah [2008] EWHC 1896 (QB), there was a car collision between a car driven by Mr. Ul-Haq and another driven by Mrs. Shah, who was found liable in negligence. Mr. Ul-Haq, his wife and their two children were in the vehicle at the time of the accident. However Mr. Ul-Haq's mother also claimed to have been in the car but at trial that claim was found to be fraudulent. The question arose as to whether the claims of Mr. Ul-Haq and his wife should have been struck out. The Court found that Mr. Ul-Haq and his wife had conspired to support a fraudulent claim. However the judge refused to exercise his discretion to strike out the claims pursuant to r.3.4(2) of the Civil Procedure Rules 1998. The Defendant appealed but the appeal was dismissed. The analysis of the Appellate Court set out below is instructive:

43. More generally, in my view the questions of law arising in a case of this kind under CPR3.4(2) in light of the decision in *Arrow Nominees* were accurately identified by HHJ Phillips in *Ghaffar*. The first question involved analyzing the extent to which a claimant had acted contrary to the overriding objective. The second question involved examining whether, in light of the court's conclusions on the first question, it would be right to exercise the discretion to strike out the claimant's statement of case.

49. ... In the present case, as the judge said, the wrongdoing was extremely serious. It was not, however, the worst of its kind. It did not, for example, involve the forgery of documents. Nor did it involve a determination to persevere with dishonesty even after being found out. Both these factors were present in *Arrow Nominees* and in my view were important factors in the decision to strike out the petition in that case.

50. Weighing all these factors, I consider that this is a case where the lies about Mrs. Khatoon had no substantial impact on the court's ability to resolve the case fairly. There was an impact on the individual claims of Mr. Ul-Haq and Mrs. Parveen in this sense: if they had not lied about Mrs. Khatoon their claims would have been settled without a trial. I do not accept that there is any reason to think that their lies about Mrs. Khatoon made it impossible for

the court to consider their claims fairly. Their lies were extremely serious. For the reasons I have given, however, they did not involve conduct falling squarely within a category which could be described as the worst kind. It is important that, outside the special class of insurance claims, other fraudulent claims are not routinely treated in the exceptional way which the common law recognizes is appropriate in the context of insurance. Exercise of the court's power to award indemnity costs against Mr. Ul-Haq and Mrs. Parveen in the manner adopted by the judge deprives them of any practical benefit from the bringing of proceedings, and thus effectively forfeits their genuine claims to damages. Moreover it exposes them to a significant net liability to pay costs. In my view this outcome justly reflects the seriousness of their breaches of the overriding objective, and there is no additional need to strike out their claims. The upshot is that I consider it right to make the order which was in fact made by the judge.

32. In this case, I adopted the court's approach in the Summers and Ul-Haq cases. The questions for the court therefore were as follows:

- (i) To what extent did the Claimant act contrary to the overriding objective and
- (ii) In light of (i) above, would it be right to exercise the discretion to strike out the Claimant's statement of case or alternatively what was just and proportionate?

33. Starting with the first question, namely, the nature of the Claimant's breach, copying large portions of a witness statement of another litigant was not only a breach of the rule 29.5(d) but also was an attempt to misrepresent facts and mislead the court. I noted that the Claimant had the opportunity, if he wished, to file an affidavit in response so as to provide an explanation. His failure to do so suggested there was no excuse. His conduct in making a dishonest claim was serious and it resulted in a waste of the Court's resources and time because the issue of quantum might well have been settled between the parties without the need for a trial had his claim been genuine.
34. As to the discretion to strike out the claim, the main point in favour of striking out was the serious nature of the breach involving dishonesty and exaggeration his claim to the detriment of others. Instead of helping the court to further the overriding objective, this Claimant sought to deceive the court.
35. Turning to the points against striking out, it was admitted in the defence that the Claimant was "assaulted and battered" by police officers and liability was conceded by the State by means of a consent order. It would be inappropriate, in my view, for a citizen who sustained injuries at the hands of police officers to obtain no redress for an acknowledged wrong. Such redress could be substantial depending not only on the nature of the injuries but also on the circumstances of the wrongdoing. Exemplary damages might be awarded in appropriate cases.

36. Further, I considered that a fair trial was still possible given the existence of the medical evidence which was accepted by both parties. The medical evidence indicated that the Claimant sustained a temporary loss of hearing and injuries to his elbow and knee. With respect to the circumstances of the assault, adverse inferences could be drawn if necessary from the Claimant's conduct of the litigation.
37. I noted that there were other ways of penalizing wrongdoers and deterring false claims apart from striking out. In Summers, the court at paragraph 51 outlined some measures including "ensuring that dishonesty does not increase the award of damages, making order for costs, reducing interest, proceedings for contempt and criminal proceedings."
38. I concluded that in the present case the Claimant's breach was serious. However it was not the worst of its kind. For instance, it did not involve forgery of documents. I also found that the Claimant sustained some injuries in the assault for which he should be compensated and that a fair trial was still possible. I found that it was not proportionate and just to strike out and the application was therefore dismissed.

STRIKING OUT THE WITNESS STATEMENT

39. The second application that the entire witness statement of the Claimant be struck out was based on the fact that the witness statement was not in the Claimant's own words and

the contents amounted to a fraudulent misrepresentation intended to mislead the Court.

40. Attorney for the Defendant submitted that a comparison between the Claimant's witness statement and those of Jamal Fortune and Rodney Samaroo showed clearly that certain portions had been copied by the Claimant. This was not coincidental. He submitted that the Claimant was motivated to obtain an award similar to that of Jamal Fortune and he had opportunity in that they were both incarcerated at the Golden Grove State Prison. He also argued that the medical reports and other contemporaneous documents contradicted the "copied" portions of the Claimant's witness statement.
41. Attorney for the Claimant relied on the submissions made in the first application. He also submitted on the basis of Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm) [2009] UKHL 39 that for the purposes of a striking out application, the pleaded facts in the statement of case must be assumed to be true.
42. On the last point, I agree with the Defendant's submission in reply that the rule was not of general application. The case cited was not helpful in relation to the facts of this case.
43. The application to strike out the witness statement was in my opinion not materially different from the application to strike out the case in the circumstances of this case since the Claimant's witness statement was the only evidence that he put before the court and he would be hard-pressed to

proceed with the claim if the only witness statement were struck out.

44. For the reasons given in relation to the first application, the second application was dismissed

COSTS

45. After ruling on the applications, I invited the parties to make submissions on costs. After hearing those submissions, I ruled that the costs of both applications were assessed against the Claimant in the sum of \$10,000 for first application and \$5,000 for second application.

46. In so ruling, I took into account the general rule that the successful party gets costs. However there are exceptions to that rule as stated in rules 66.6(4) and (5) which read as follows:

"4) In deciding who should be liable to pay costs the court must have regard to all the circumstances.

(5) In particular it must have regard to -

- (a) the conduct of the parties;
- (b) whether a party has succeeded on particular issues, even if he has not been successful in the whole of the proceedings;
- (c) whether it was reasonable for a party
 - (i) to pursue a particular allegation;
 - and/or
 - (ii) to raise a particular issue;
- (d) the manner in which a party has pursued
 - (i) his case; or

- (ii) a particular allegation; or
- (iii) a particular issue;
- (e) whether a claimant who has won his claimed caused the proceedings to be defended by claiming an unreasonable sum; and
- (f) whether the claimant gave reasonable notice of his intention to issue a claim.

53. In this case I found that the Claimant was guilty of abuse of the process of the court insofar as he had copied extensively from the witness statement of another litigant. The Defendant was therefore successful in relation to the principal issue before the court but the relief which was sought was not granted on the ground that it was not proportional and just. As noted above, other sanctions might apply.

55. On the other hand, the Claimant's conduct of the litigation has been dishonest and calculated to mislead the court to award increased damages.

56. In all the circumstances, it was appropriate to award costs against the Claimant and in favour of the Defendant.

CONCLUSION

58. The extent to which the practice of copying the witness statements of successful litigants exists in this jurisdiction, particularly among the prison population is uncertain. However it is clear that it did occur in this

case. This is a matter for concern. What occurred in this case calls for an investigation of some sort to determine where responsibility lies and what action can be taken to prevent future abuses of this type. Attorneys must caution their clients about misrepresenting facts in their witness statements and about presenting fraudulent claims. Litigants must be made aware that contempt proceedings may be pursued with imprisonment as a probable outcome.

Dated this 5th day of **February**, 2014

P. Sobion Awai
Master