

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

CAUSE NO. 125 OF 2013

BETWEEN: POLICE CONSTABLE CARDIFF ROBINSON
Plaintiff

AND CHIEF INSPECTOR FRANK OWEN
First Defendant

**AND THE COMMISSIONER OF POLICE (C/O THE ATTORNEY
GENERAL OF THE CAYMAN ISLANDS)**
Second Defendant

Appearances: Mr. Dennis Brady of Brady for the Plaintiff
Ms. Dawn Lewis and Ms. Marilyn Brandt Crown Counsel for
the Defendants

Before: Hon. Justice Richard Williams

Heard: 10-12 August 2016, 23 January 2018 and 29 January 2020

**Date for additional
Submissions: 11 February 2020**

**Draft Judgment
Circulated: 18 February 2020**

Date of Judgment: 21 February 2020



HEADNOTE

Action in tort assault

JUDGMENT

Introduction

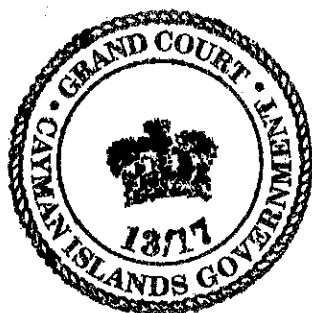
1. These proceedings commenced by a Writ of Summons and Statement of Claim filed over six years ago on 10 April 2016. Police Constable Cardiff Robinson, the

Plaintiff, (“P”) seeks damages in tort for two alleged assaults committed by Chief Inspector Frank Owen, the First Defendant (“D1”).

2. P and D1 are employed as Police Officers in the Royal Cayman Islands Police Service (“RCIPS”). The Commissioner of Police, Second Defendant (“D2”), is appointed by the Governor. D1 is appointed by D2 pursuant to s.6(1) and s.8(2)(b) of the Police Law (2010 Revision)¹. Section 6(1) provides that:

“6(1) The Commissioner shall have the command, superintendence and direction of the Service and may –

- (a) subject to section 8, make such appointments and promotions in respect of police officers as he may see fit;*
(b) make standing orders for the general government of police officers in relation to their enlistment, discharge, training, arms, clothing, equipment and other appointments, and particular services as well as their distribution and inspection, and such other orders as he may deem expedient for preventing neglect and for promoting efficiency and discipline; and
(c) make such rules of practice and procedure for the efficient operation of this Law as he may see fit.”



Section 8(2)(b) of the Law, provides that police officers² are:

“...appointed by the Commissioner to hold office at his pleasure and be disciplined, discharged, retired early or otherwise dealt with subject to such other terms and conditions as are provided by this Law, the regulations and standing orders.”³

¹ This was the Law in force governing the RCIPS when these proceedings were commenced.

² Except for the Deputy Commissioner and the Assistant Commissioner.

³ Both of these sections were not referred to by P during the hearing or in submissions, his Statement of claim simply stating at paragraph 58 that D1 was an *“an employee (sic.) of the second Defendant”*.

3. P and D1 have a relationship with D2 which is analogous to that of employer and employee even though there was no contract between them. Lord Griffiths stated in *Frost v Chief Constable of Yorkshire Police*⁴ that:



"An employee (I will for present purposes include in this category a "quasi-employee") such as a police officer who, although he holds an office and is not therefore strictly an employee, is owed the same duty by his "employer" - here the Chief Constable of South Yorkshire Police."

4. At paragraph 25 of his rather rambling Statement of Claim, P appears, although not properly pleaded, to be making a claim for damages as he was *"victimized and or harassed."* As rightly highlighted by Crown Counsel Lewis in her Written Closing Submissions, there is no common law tort of harassment or of victimisation in the Cayman Islands. In England and Wales the tort of harassment is a statutory tort pursuant to the Protection from Harassment Act 1997. There is no similar statutory provision in the Cayman Islands. Accordingly, any claim for *"damages for loss or injury"* for harassment or victimisation fails.
5. The tort of negligence against D2 based on harassment or victimisation by D1, with D2 being in breach of his duty because he failed to protect P against any such treatment or in relation an assault, appears to be raised almost as an afterthought in P's Closing Submissions. However, unlike the claim made in

⁴ [1999] 2 A.C. 455b at 481B.



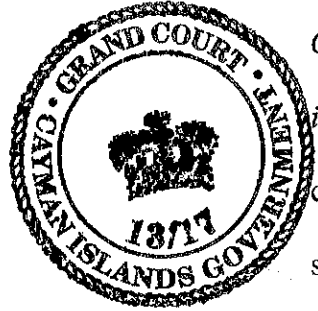
*Clark v Chief Constable of Essex*⁵, this is not a case in which P has actually pleaded the primary liability in negligence which may arise from the personal non-delegable duty of an employer to take reasonable care for the safety of his employee. There is no mention of there being a claim for damages for negligence in P's Statement of Claim and therefore such an action is not before this Court and does not need to be met by D2. Although P has failed to clearly plead the relationship between D2 and P in the Statement of Claim, it appears from that poorly drafted pleading that the only pleaded claim for loss or damages made against D2 is that he, as an employer, is vicariously liable to P for the "assault" allegedly inflicted by D1 on P in the course of his employment.

6. Having regard to the content of paragraphs 8 and 9 of P's Closing Written Submissions, P is now only arguing that D2 is vicariously liable for D1's alleged assault upon him on 15 February 2012.

7. In the Statement of Claim P sought a declaration that the internal investigation procedure used by the Police Standards Unit ("PSU") "*produces a real danger of bias and thus is likely to breach its duty to act fairly without bias whether the bias be imputed or apparent*".⁶

⁵ 2006 WL 2667594 (2006).

⁶ Paragraph (c) in the prayer of the Statement of Claim.

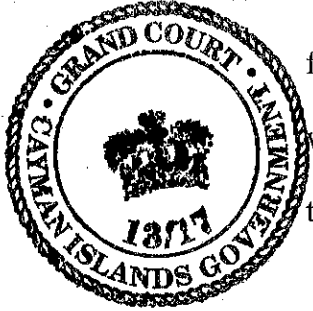


A further declaration was sought, apparently that his rights under s.7(1) of the Cayman Islands Constitution Order 2009 (“BOR”) have been breached by the D2 on the basis that he has “*abdicated his duty under sections 19 and 24 of the Constitution in not properly investigating the Plaintiff’s complaints, and by not implementing a fair and independent internal investigation procedure*”. It was confirmed, to his credit, by Mr. Brady that these declarations are no longer being sought. That said, I may well comment herein concerning the apparent lack of an appropriate internal investigation into P’s complaints.

8. Regrettably a great part of P’s oral and documentary evidence and P’s Written Submissions are directed to events and potential actions that are not pleaded. In reality, the only properly pleaded tortious claims are two allegations of assault, the first being on 1 June 2011 and the second being on 15 February 2012. This was accepted by Mr. Brady, who was not the attorney who drafted the Statement of Claim, in his closing oral submissions.

Procedural Background

9. After service of the Writ and Statement of Claim, the Defendants promptly filed and served their Acknowledgement of Service. From that time, unfortunately, this matter has had an extremely laboured history leading up to the close of evidence and even thereafter. It is therefore necessary to set out the procedural history in more detail than would ordinarily be required.



10. On 13 June 2013 the Defendants filed a Summons seeking an extension of time to file their Defence. On 26 July 2013, by consent, leave was given by Quin J to withdraw that Summons on the basis that the Defendants were permitted to file their Defence. The Defence was then filed on 9 August 2013.

11. Agreed directions about the exchange and inspection of documents and the exchange of Witness Statements were approved administratively by Quin J on 27 December 2013. The Court also directed that the trial be set down on a date as soon as possible after 30 April 2014, with a three-day time estimate. Thereafter, the Defendants' List of Documents was filed on 12 February 2014 and P's List was filed on 26 February 2014. The Defendants' Amended List of Documents was filed on 14 April 2014 and P's Amended List of Documents was filed on 2 June 2014.

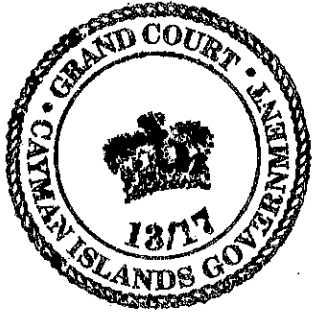
12. After seven months of inaction, on 6 January 2015, P's former attorney wrote to the Listing Officer seeking "news" of the trial date in the matter. On 13 January 2015 the Listing Officer wrote to both parties requesting details of their dates to avoid. P's Counsel replied saying that he was unavailable until the end of May 2015, but that any date after that would be appropriate. Due to his serious ill-health, P's former attorney was then unable to continue handling P's case. This unavoidably contributed to the delay.



13. On 10 November 2015 Mr. Brady filed his Notice of Appointment as Attorney for P dated 30 October 2015. Mr. Brady wrote to the Listing Officer on 21 November 2015 requesting that the matter be set down for hearing and he provided his dates to avoid in November and December 2015. On 23 November 2015 the Listing Officer asked the parties to provide their dates in a Listing Form and for them to furnish her with the details of the applications to be listed for hearing. On 4 December 2015 Mr. Brady provided her with the Listing Form containing his dates to avoid. On 14 December 2015 the Listing Officer emailed the Listing Form to Crown Counsel for her to complete and submit with her dates to avoid. On 30 December 2015 Crown Counsel replied to the Listing Officer indicating that she wished to discuss the matter with Mr. Brady before completing the listing form, as she did not agree with his *“description of the substance of the matter”*.

14. On 24 March 2016 Mr. Brady submitted an updated Listing Form *“to set down date for hearing”* with his dates to avoid up until August 2016. It appears that he was seeking a date for the hearing, with, as it turned out, an unrealistic one-day time estimate. He indicated that he sought an order in relation to *“the release of information in order to pursue a civil claim against Inspector Frank Brennan”*, presumably he meant Inspector Frank Owen. Mr. Brady stated in the Form that the legal issues to be argued at the hearing would be:

“(1) The unlawfulness of the assault upon PC Robinson by Insp. Frank Owens



- (2) *The decision to deem the release off the decision of the DPP not in the Public Interest*
- (3) *Alternatively the decision not to release the information concerned with the DPP's ruling that the allegation of Assault was made out, and this being essential to facilitate PC Robinson's claim; is arbitrary, unreasonable and in breach of natural justice;*
- (4) *That the foregoing decisions should be subject to Judicial Review and set aside*
- (5) *That indeed and on the contrary, a matter such as is being sought to be pursued by PC Robinson is in the Public Interest as it reflects the actions of a public servant vis a vis a fellow public servant; in a public place"*

The bulk of what were termed by Mr. Brady at that time as being "legal issues" to be argued were not consistent with the relief sought in the Statement of Claim or in other formal pleadings.

15. On 7 April 2016, the hearing was set down for a 10 August 2016 date, with a three day time estimate. The parties therefore had at least four months to ensure that the hearing was ready to proceed. On 4 August 2016 at 1.04PM the Listing Officer emailed Mr. Brady seeking urgent confirmation that the trial was going ahead. It appears that he gave a confirmation on the telephone to her, because at 1:23 p.m. the Listing Officer emailed my Personal Assistant stating that Mr. Brady said that the matter was proceeding and that he would have the bundles prepared by the following day. At 5:08 p.m., the Listing Officer was directed to

contact both parties to inform them that the Skeleton Arguments and the Bundle of Authorities had to be filed by noon on Monday, 8 August 2016.

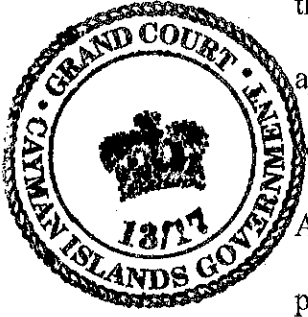


16. Despite his indication on 4 August 2016 that the matter was ready to proceed, Mr. Brady contacted the Listing Officer on Friday, 5 August 2016 saying that he was now applying for an adjournment. In an email sent to my Personal Assistant, after business hours at 6:24 p.m., Mr. Brady indicated that the adjournment was sought because P was not in receipt of certain documents requested through the Freedom of Information Manager believed to be in possession of the PSU. He also stated that P came into possession of a CD that had been given to his former attorney which contains numerous documents that counsel said he needed to peruse and take instructions on.

17. At 10:51 a.m. on Monday, 8 August 2016 my Personal Assistant emailed Mr. Brady informing him that a formal application to adjourn would have to be made at the outset of the hearing as it was opposed. He was reminded that the bundles and Skeleton Arguments were due for filing and that time for filing would be extended to no later than 3:00 p.m. on 8 August 2016.

18. In his email in reply sent at 12:12 p.m., Mr. Brady confirmed that he would be making a formal application to adjourn and that the Defendants would not be prejudiced by an adjournment. Unfortunately he failed to comply with the

direction to file a Skeleton Argument for a hearing that was still scheduled to go ahead, justifying that course by his opinion that the submission of a Skeleton Argument would not do justice to P's ability to adequately prosecute his claim. At that time Mr. Brady apparently failed to recognise that, when considering an application for an adjournment, one of the factors the Court would consider is whether the documents sought would materially benefit the applying party's case. A Skeleton Argument was required, due to the poorly drafted Statement of Claim prepared by P's former attorney and the confusing nature of the legal issues for determination set out in the Listing Form submitted by Mr. Brady, to enable the Court to try to identify what P's claim actually was and upon what it was based.



19. An email was sent by my Personal Assistant to Mr. Brady noting the non-compliance with the Grand Court Rules, namely GCR Order 34. He was also informed that ordinarily one would expect an opposed application to break that fixture to be made a lot earlier and not so close to the trial. I was conscious that the Defendants had fully complied with their obligations and had filed their Skeleton Argument and Authorities. I was also aware of the fact that the matter had been fixed for hearing four months earlier, providing ample time for evidential issues to be resolved or a timely application of an adjournment to be made.

20. On 8 August 2016 P filed his Summons to adjourn the 10 August hearing. The Summons was supported by an affidavit sworn by Mr. Brady on 8 August 2018.

21. When the matter came before the Court on 10 August 2016, the hearing of P's Summons to adjourn was put off until 11 August 2016 with a direction that an affidavit should be obtained from P with elaboration on the content of Mr. Brady's Affidavit. P was directed to file his overdue Skeleton Argument by 8:30 a.m. on 11 August 2016. The parties were directed to provide a list of the witnesses who would be giving oral evidence by 2:00 p.m. on 10 August 2016.



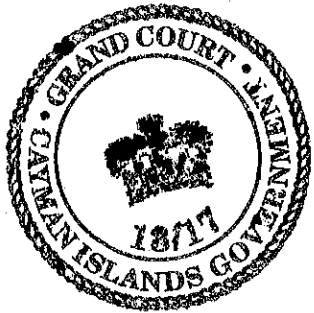
22. On 11 August 2016, P withdrew his application for an adjournment. At the outset of the hearing the parties agreed that, due to the late filing of the medical evidence, there should be a split hearing with liability being the issue for determination at this stage. Oral evidence was given by Mr. Donald McLaughlin, the P and D1 in chief. On 12 August 2016, the evidence of D1 was concluded and evidence was given by DCI Peter McLaughlin. The matter was then adjourned for a half-day hearing on a date to be fixed.

23. It appears from the file that little had been done by the parties to advance the matter between August 2016 and April 2017 when the parties provided the Listing Officer with their dates to avoid. On 5 June 2017 a Notice of Hearing for 8 September 2017 was provided to the parties. It appeared that the 8 September date

was not convenient to the Defendants' Counsel and the hearing was re-fixed for 10 October 2017. Regrettably that October date was during a period of my absence which the Listing Officer had been informed about since April 2017.

24. On 28 September 2017, my Personal Assistant proactively contacted the parties for clarification about the continuation of this matter. On 9 October 2017 a Notice of Hearing for 23 January 2018 was provided to the parties. On 23 January evidence was given by Mr. Michael Myles and PC Michael Peart. The parties wished to file Written Closing Submissions, and were directed to provide the same by 9 February 2018. D1's Written Closing Submissions were received on 8 February 2018. P's Written Closing Submissions were received on 9 February 2018. The matter was adjourned part heard for the Court to receive those submissions at a 90 minute hearing. That hearing was set for 9 February 2018, but was vacated as P was out of the jurisdiction.

25. On 23 May 2019, Mr. Brady wrote to the Listing Officer to try to list the matter. It is unclear from the file why nothing had happened to advance the matter since February 2018. On 28 June 2018, Ms. Lewis informed the Listing Officer that her position as Crown Counsel came to an end on that day and she suggested that the Judge simply review the Written Submission and then provide a reserved ruling. On 4 July 2018 Mr. Brady stated that he had instructions from P *"to the effect that*



he wishes to be present and in court, for submissions to be made on his behalf orally”.

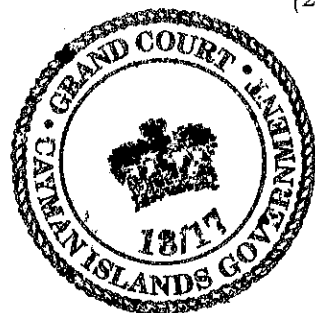
26. On 17 July 2019 Mr. Brady filed a Listing Form for “*the continuation/completion of hearing*”. In that form he stated that under the heading:

“Legal issues ALREADY argued:”

“(1) *The unlawfulness of the assault PC Robinson by Inspector Frank Owens.*

(2) *There is a claim for assault against Chief Inspector Frank Owens in respect of two alleged incidents. The first incident is alleged to have occurred on June 1 2011 when as alleged Chief Inspector Owen threw a log book at the Plaintiff. The second incident is alleged to have occurred on February 15, 2012 when as alleged Chief Inspector Owens spoke to the plaintiff aggressively and spittle from Chief Inspector Owen’s mouth caught the Plaintiff’s face.*

(3) *There is a claim for infringement of Section 7(1) of the Bill of Rights by the Commissioner of Police allegedly not properly investigating the disciplinary complaints against Chief Inspector Owens and by not implementing a fair and independent internal investigation procedure.”*



27. On or around 22 July 2019 the matter was fixed for hearing on 26 September 2019 having regard to P’s dates to avoid. Regrettably the matter could not proceed on that date due to lack of Court time due to an urgent Family Division matter being placed into my list for that day. The date of 7 October 2029 was offered to the parties. Unfortunately, that date was not convenient to both counsel. The

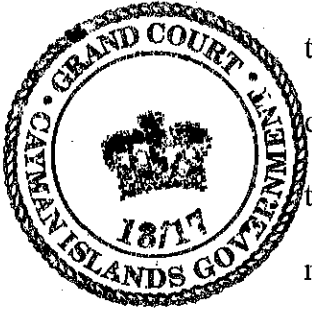
parties were then offered 22 November 2019 but, regrettably, the hearing had to be vacated, as Listing had been unaware that all of the Judges had to attend a judicial education course on that day.

28. On 12 November the parties were offered the date of 29 January 2020. Thankfully the hearing concluded on that date as scheduled. Mr. Brady made full oral Closing Submissions. Ms. Brandt, who had taken over conduct of the case on behalf of the Defendants, relied upon the Written Submissions drafted by preceding counsel, Ms. Lewis, and she provided brief oral replies to Mr. Brady's submissions and to questions from me.

29. Following the receipt of the parties' submissions at the hearing on 20 January 2020, I deemed it appropriate on 4 February 2020 to provide them with the transcript of two judgments⁷ which had been referred to in the extract in Clerk & Lindsell on Torts Twentieth Edition ("Clerk & Lindsell"), which I had read out to them during the hearing. The parties were given until 11 February 2020 to provide any comments upon those two cases if they wished to do so. At the time of writing post 11 February 2020, neither party has submitted any comments about the cases to the Court.



⁷ *Wilson v Pringle* [1986] EWCA Civ 6 and *Re F (Mental Patient: Sterilisation)* (1990) [2 AC 1].



30. As a consequence of these drawn out proceedings, most regretfully P has had to wait too long for a conclusion to the liability part of his claim and, significantly, D1 has had these allegations ‘hanging over his head’ for six years. I find myself in the unenviable position of being expected to reach a decision based on extremely dated evidence, the bulk of which I heard over three years ago in August 2016 and the balance received over nineteen months ago in January 2018. Thankfully I made contemporaneous typed detailed notes of the oral evidence given during the hearing. Copies of the same were provided to the parties in January 2018 which, to a degree, may abate the difficulties caused by the delay.

The Law – Tort of Assault

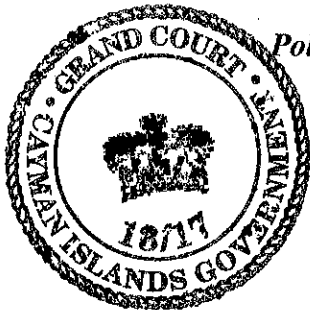
31. There is little or no case authority in the Cayman Islands to assist the Court with the approach to be taken in assault and battery civil claims. Therefore, I will review the law in greater details than one might ordinarily expect for such a matter.

32. In P’s Statement of Claim and Closing Written Submissions reference is made to P being “*criminally assaulted*” or that there has been a “*common assault*”. In the law of torts, the actual application of force to a person is not an assault but a battery. Strictly interpreted, if an object is thrown at somebody it may be an assault if the object is in the air but, if it hits him, it becomes a battery. Despite this distinction, courts have blurred the distinction and frequently describe

conduct as an assault when if strictly interpreted it amounts to a battery. In the matter before me, when asked by me during their Closing Submissions, neither party sought to take a point as to whether spittle landing in someone's face or a book hitting them in the head could and should only be the basis of a claim for the tort of battery and not assault. Although P's case could have been made clearer if battery had been pleaded, especially for the allegation of a book being thrown by D1 in anger and striking P, when asked, no submission was made that, in the circumstances of this case, those acts should only have been pleaded as battery and could not be considered as the action is brought as an assault. I am therefore content to proceed on the basis that I may treat P's alleged actions as being ones for assault if proved, although some of the case law in battery cases, especially in relation to intention, may be applicable. I note that in *Fagan v Metropolitan*

Police Commissioner [1968] 3 All ER 442 at 445 James J stated that:

"For practical purposes today, "assault" is generally synonymous with the term "battery" and is a term used to mean the actual intended use of unlawful force to another without his consent."



33. As stated by the authors in *Clerk & Lindsell* at 15-12, a passage which I read out to the parties during their Closing Written Submissions:

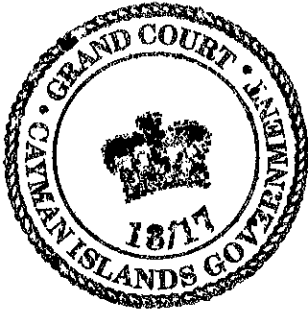
*"An assault is an act which causes another person to apprehend the infliction of immediate, unlawful, force on his person."*⁸ *The Defendant's*

⁸ *Collins v Wilcock* [1984] 1 W.L.R. 172.

act must also be coupled with the capacity of carrying the intention to commit a battery into effect.⁹”

34. An actionable assault requires proof that:

- (i) the defendant intends that the claimant apprehends the application of unlawful force;
- (ii) the Plaintiff reasonably apprehends the immediate and direct application of unlawful force; and
- (iii) for which the defendant has no lawful justification or excuse.



The burden of proof in relation to establishing the tort of assault lies with the Plaintiff who must establish, on the balance of probabilities’, the interference with his person by D1.

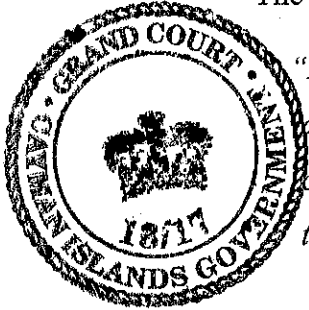
35. This means that the tort of assault is a tort of intention. Submissions were received on this point, particularly on behalf of the Defendants. As pointed out by the authors of Clerk & Lindsell:

“In this context the term “intention” has a very particular meaning. Although there is a generalised principle of liability for careless conduct (in the form of the tort of negligence) English Law has not developed a general principle of liability for the intentional infliction of harm; rather a

⁹ *R v Chief Constable of Devon v Cornwall Ex P. CEGB* [1982] Q.B. 458 at 471.

claimant must demonstrate that his case falls within the specific requirements of a particular tort.”¹⁰

The authors added at paragraph 15-04 that:



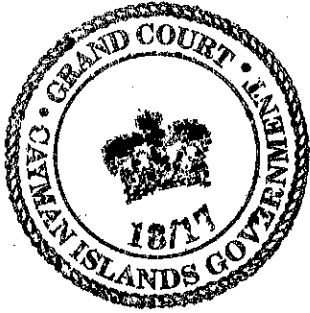
“An act does not constitute trespass to the person unless it is done deliberately or negligently... The defendant’s intention relates to the act constituting trespass; there is no requirement that the defendant intended to harm the claimant.”¹¹

36. Ms. Brandt placed great weight on the written closing submissions prepared by Ms. Lewis concerning Lord Denning MR’s attempt to confine trespass to the persons to intentional acts and to bar any action for negligent trespass when he stated in *Letang v Cooper* [1965] 1 QB 232:

“The truth is that the distinction between trespass and case is obsolete. We have a different sub-division altogether. Instead of dividing actions for personal injuries into trespass (direct damage) or case (consequential damage), we divide the causes of action now according as the defendant did the injury intentionally or unintentionally. If one man intentionally applies force directly to another, the plaintiff has a cause of action in assault and battery, or, if you so please to describe it, in trespass to the person. “The least touching of another in anger is a battery”. If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action to-day in trespass. His only cause of action is in negligence, and then only on proof of want of reasonable care. If the

¹⁰ Para 15-02 - a section which was read out to the parties during the closing submissions at the hearing.

¹¹ *“It is the act and not the injury which must be intentional. An intention to injure is not essential to an action for trespass to the person. It is mere trespass by itself which is the offence”*: *Wilson v Pringle* [1987] Q.B. 237 at 248.

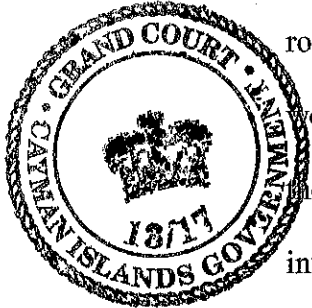


plaintiff cannot prove want of reasonable care, he may have no cause of action at all. Thus, it is not enough nowadays for the plaintiff to plead that "the defendant shot the plaintiff". He must also allege that he did it intentionally or negligently. If intentional, it is the tort of assault and battery. If negligent and causing damage, it is the tort of negligence.

The modern law on this subject was well expounded by my brother Diplock in *Fowler v. Lanning*, in 1959 1 Queen's Bench, with which I fully agree. But I would go this one step further: When the injury is not inflicted intentionally, but negligently, I would say that the only cause of action is negligence and not trespass. If it were trespass, it would be actionable without proof of damage; and that is not the law to-day. [My emphasis]

In my judgment, therefore, the only cause of action in the present case (where the injury was unintentional) is negligence and is barred by reason of the express provision of the statute."

37. In *Letang* a woman suffered personal injury whilst sitting out sunbathing at a hotel on a piece of grass where cars parked. The woman brought an action for negligence and trespass of the person. However, she could not pursue the action in negligence as it was time barred which did not arise in relation to the trespass claim. Lord Denning was concerned about a situation where a plaintiff could avoid the limitations imposed by the law by suing in trespass instead of in negligence which he felt would "produce the most absurd anomalies". As a consequence he decided that the court needed to assess whether this could be brought in trespass and had to consider the difference between the two. Lord Denning decided according to whether a defendant did the injury intentionally or unintentionally. If a defendant does not inflict it intentionally, but negligently, he



felt that the only cause of action is negligence and not trespass. He gave the example of a man carelessly throwing a piece of wood from a house into a roadway which hits a plaintiff and stated that in such circumstances the action would not be a trespass case but simply negligence. Lord Denning stated that if there is an intention one can bring a claim, but found in *Letang* that there was no intention to make any contact at all.

38. Although Ms. Lewis stated that Lord Denning's observations are regarded as being "*a long held principle*" the authors of Clerk & Lindsell, highlighted that there was an alternative ratio offered by Lord Denning in the case and went on to opine that:

"It is not yet finally established that direct injuries inflicted via negligence are not actionable in trespass."

The case is an indication of the importance of pleading a case properly, especially when it comes to the issue of intention.

39. The Court of Appeal reviewed *Letang* in *Wilson v Pringle* [1986] EWCA Civ 6, a case in which two 13 year old boys were taking part in horseplay and one was injured when the other jumped on him and pulled his bag. Lord Justice Croom-Johnson set out the words of Lord Denning and highlighted that Lord Diplock LJ in *Letang* had agreed that it was a case where the injury had been caused

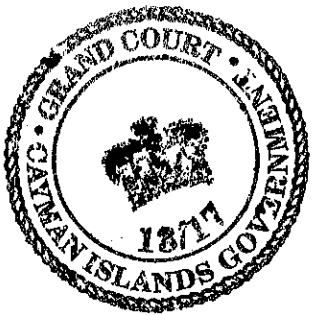
unintentionally and that due to the facts as pleaded her action had to be brought in negligence. Lord Justice Croom-Johnson importantly added that:

“It is the act and not the injury which must be intentional. An intention to injure is not essential to an action for trespass to the person. It is the mere trespass by itself which is the offence.”



40. Lord Justice Croom-Johnson went on to consider the case of *Williams v Humphrey* (unreported) where a boy pushed the plaintiff into a swimming pool and caused him injury. In that case the judge awarded damages after finding that the defendant had acted negligently. There was also a claim in trespass and the judge rejected the submission that the action would not lie unless there was an intent to injure. The Learned Judge in *Williams* held that it was sufficient, if the act was intentional, that there was no justification for it. Lord Justice Croom-Johnson felt that the reasoning in the *Williams* case did “*not go far enough*”. He felt that it failed to give effect to the reasoning in the oft quoted and long standing authorities of *Tuberville v Savage* (1669) 1 Mod. 3 (86 ER 654) and *Williams v Jones* (1736) Cas. 7 Hard 299 (95 ER 193) which provided that for there to be an assault or battery there must be “*something in the nature of hostility*” which may be “*evinced by anger, by words or gesture*”. Lord Justice Croom-Johnson stated that the element of hostility must be a question of fact for the Court and added that it may be imported from the surrounding circumstances.

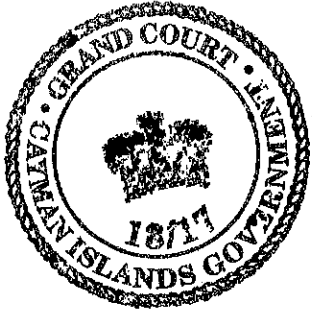
41. A better approach may be that stated by Goff J in *Collins v Wilcock* [1984] 1 WLR 1172 who stated that touching will only amount to a battery where it does not fall within the category of physical contact ‘generally acceptable in the ordinary conduct of general life’. Although this approach was criticised as ‘impractical’ in *Wilson v Pringle*, Goff LJ restated his views in *Re F (Mental Patient: Sterilisation)* (1990) [2 AC 1] and explicitly rejected any requirement of hostility as unnecessary when he stated:



“It has recently been said that the touching must be ‘hostile’ to have that effect, ...I respectfully doubt whether that is correct. A prank that gets out of hand, an overfriendly slap on the back, surgical treatment by a surgeon who mistakenly thinks that the patient consented to it - all these things may transcend the bounds of lawfulness, without being characterised as hostile. Thus, being jostled at the bar in a nightclub would not be a battery - it being conduct generally acceptable in a busy club - although... having your bottom pinched while waiting at the bar would....”

However, the hostility of a party is still one of the surrounding circumstances to be taken into account when determining whether there was an intention.

42. When considering the requirement concerning P’s reasonable apprehension of immediate and direct application of unlawful force, the act of D1 must have been such that a reasonable person might fear that violence was about to be applied to him or her. This means that the fact that he is a police man, who some may feel as a consequence of his work is less likely to be scared by such actions, is irrelevant.



43. If the Court finds that a defendant (i) intends that a plaintiff apprehends the application of unlawful force, and (ii) that a plaintiff reasonably apprehends the immediate and direct application of unlawful force; that force will be unlawful unless there is something that makes it lawful. What would make it lawful are the established defences to assault, which include, for example, self-defence or consent. In the matter before me, there is no defence claimed that the actions were lawful, the defence is that the other elements for an assault have not been met.

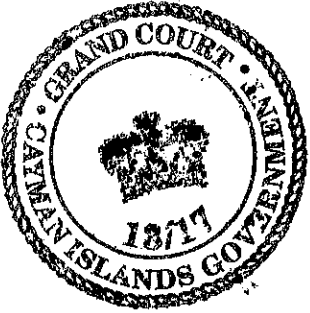
The Facts

(i) The First Alleged Assault

44. The first allegation of assault concerns events which P states occurred on 1 June 2011, just under two years before the issue of the Writ of Summons and Statement of Claim. It is contended that D1 wanted to see P and the vehicle that he was driving. At D1's request, P handed him a copy of the vehicle's logbook. D1 noted that the logbook had not been updated and he asked P why this was. P said that he informed him that logbooks often could not be found due to the number of different officers using the vehicles and the lack of any proper system being in place. P said that D1 was not happy with this reply and aggressively threw what he pleaded was a "reasonably heavy logbook" at him through the open door of a police car whilst saying "go and get this up to date". P told the Court that D1 was very aggressive in the way that he talked to him and that when

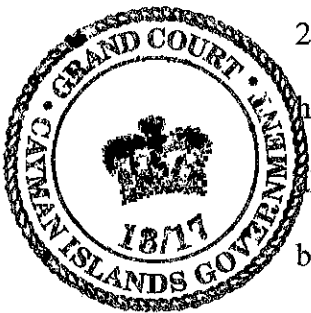
he threw the book he was very loud. Although not specifically pleaded, P stated in his undated Witness Statement that the logbook had been deliberately thrown at him by D1 and added in his oral evidence that the book had been thrown "*as a weapon*". P said that he was sitting on the left-hand side of the vehicle in the driver's seat at the time and the book caught him in the face and chest. P said that he felt "*very ashamed, very humiliated and discriminated against by the manner in which (D1) had treated (him) in front of (his) colleague, PC Peart*". P said that D1 then made him come up to his office where he made other derogatory marks about P's work assignments and told him that he was "*high on his radar*".

45. His evidence was supported by the consistent evidence from PC Michael Peart. In his Written Statement, PC Peart stated that P asked D1 to give him his logbook. He said that P got into the vehicle and sat with his legs hanging out of the driver's door on the left side of the vehicle and handed the logbook to D1. He said that he was standing next to D1 by the open car door, about an arm's length away from him. He said that D1 turned "*very red*" and said in a "*loud and angry*" voice: "*This book is not updated. What is this you giving me?*" PC Peart said that he heard P give the explanation about other people driving the vehicles and the difficulty in locating logbooks. He said that D1 started shaking the book in his right hand which he had in front of him, close to his body. He said he heard D1 say: "*This is rubbish*" and saw him then fling the logbook into P's face whilst saying: "*Get this book up-to-date*". PC Peart said that the book fell into P's lap,



as it fell from his face. He said that P remained seated in the car but had a shocked look on his face.

46. D1's pleaded defence in relation to this alleged incident, contained in his written Defence dated 9 August 2013, was simply to not admit nor deny the relevant paragraphs in the Statement of Claim. In his Written Statement dated 19 June 2014 D1 said that he could not recall such an incident. D1 said that the allegations had only been drawn to his attention in full detail almost two years after the alleged event, in March 2013, when he was served with a notice of investigation by the Police Standards Unit ("PSU"). He denied ever throwing the logbook at P stating that *"it's just not my way of doing things"*.



47. During cross-examination of D1, he confirmed that he had stated in his Written Statement that he did not recall the logbook incident and added:

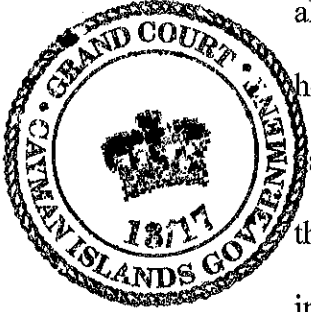
"I never throw books at officers and to clarify, I am not saying the incident did or did not happen. No senior officer spoke to me or ask (for a) report in relation to this matter. It may have occurred, it may not. What I can deny is that I threw the logbook in the manner....I am not in the habit of throwing books at people...I can't recall the incident, you could say Mother Theresa was there for all I know."

He seemed to question the weight to be placed on the evidence given by PC Peart, whom he said was a good friend of P and adding that he had a history with PC Peart due to issues with his performance at work.

48. During cross-examination of P it was put to him that the logbook had not been thrown but it had been given or handed to him. It is unclear on what evidential basis that was put because no witness, including P, stated that in oral or written evidence. P denied the assertion put to him. Interestingly it was then put to P that the “*whole incident*” never took place and that he was “*lying about the whole of that incident*”. P also denied those two suggestions. D1’s oral and written evidence was that he could not recall the incident taking place.

49. Having carefully reviewed the evidence, and upon noting the high level of consistency between the oral and written evidence of P and PC Peart, I prefer P’s evidence in relation to whether the incident occurred and I find that the incident did happen. It is clear that the logbook had not been completed and that this angered D1. I am satisfied that D1 did not hand P the logbook, but from close proximity, from about an arm’s lengths away, he threw the logbook at P, whilst at the same time telling him to complete the logbook properly. I am satisfied that the logbook hit P in the face. I am satisfied that, although D1 intended to throw the logbook to P, he did not intend the logbook to strike P in the face or in the chest. The logbook was shown to me during the hearing and it was a light book and I find that P was exaggerating when he referred to it as being “*a reasonably heavy book*”.





50. With these findings in mind, I am satisfied, on the balance of probabilities, that D1 assaulted P when he threw the logbook at him from a short distance. I note that the logbook did not cause any physical injury at all to P. I am satisfied that although D1 intended to throw the logbook at P, and was angry when he did so, he did not intend to actually inflict physical injury. An intention to injure is not essential to an action for trespass to the person, it is the trespass by itself which is the offence. The throwing of the logbook with a degree of hostility was intentional, and although D1 was angry by what he viewed to be the inefficiencies in the workplace by D1, that was no justification for his inappropriate conduct.

51. Having made that finding, I deem it important to add the following. This was a technical assault of a very minor nature, right at the lower end of the scale of seriousness. It is not uncommon for there to be such disputes in the workplace, especially one where the specific workplace involves discipline being enforced by senior ranks. This is no doubt why the then DPP felt, and I concur with her, that this matter would have been more effectively dealt with using the established internal investigation and disciplinary procedures within by the Police. It really is the type of incident, especially in light of some of the wider evidence, which would have been more effectively remedied by prompt management input from the RCIPS' Human Resource Unit to address the nature of the fractured working relationship between P and D1, rather than it being disproportionately elevated to grounding an application for civil financial redress in the Grand Court.

52. I need not go on to consider the issue of vicarious liability of D for D1's actions. This is because of the sensible concession made by Mr. Brady at paragraph 9 of his Closing Written Submissions, which he adopted and reiterated in his oral Closing Submissions.



(ii) **The Second Alleged Assault**

53. The second allegation of assault concerns events which occurred on 15 February 2012. This was at a time when there had been a series of robberies which resulted in police officers being placed on special duties, which included high visibility foot patrols in George Town.

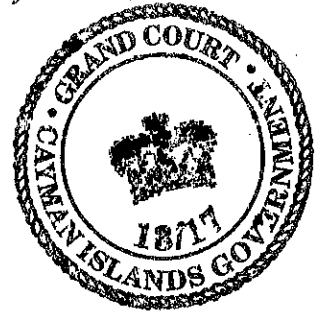
54. P said that he heard D1 on the police radio, seeking to verify the location of officers and, as a consequence, he made his way to the area where D1 was. P said that D1 asked him where he was coming from and that he pointed out to D1 where that was. He said that D1 then responded aggressively and did not accept where P had said he had been located. He said that D1 spoke in a loud voice and was "*extremely agitated*". P said that he offered to, and did, take D1 to the location by a bank where he said he had come from. D1 questioned P about what he was doing at the bank. P said that D1 then made two aggressive steps towards him. In the Statement of Claim P said that D1's head was pushed in towards P's face an inch away from his nose with his finger also pointing at P's face and screaming: "*Don't try me, don't try me, Cardiff*".

55. In his Written Statement he said that D1's head was less than half of an arm's length from his face. At paragraph 39 in the Statement of Claim P pleaded that he moved his head from side to side to avoid spit from D1's mouth catching him in the face. I note that he did not plead that D1 actually spat in his face, or that any spittle landed in his face. However, in his Written Statement he said that:

"Whilst (D1) was shouting into my face a lot of spit from his mouth, which caught me in my face; I then tried to twisted (sic.) and turned my head away to avoid (D1's) spit from catching me in my face."

During his evidence in chief P said that:

"The closeness of him, spit from his mouth in my face."



56. P said that he stepped back as he anticipated that D1, whose face was *"livid with rage"*, was going to hit him. He said that he became fearful of D1, as he thought he was going to hit him. P said that D1 still advanced towards him. P said that the incident came to an end when D1 told him to go and patrol on the waterfront before walking off. P said that he was badly shaken and was in tears.

57. P called Donald McLaughlin ("M") as a witness. M's Written Statement dated 19 April 2013 was before the Court. M was operating a stall and catering business in the area where the alleged incident took place. He said that he heard persons arguing nearby and he looked. He said that they were two police officers and that the white officer was *"shouting"* and *"was really loud"*. M said that he heard

them discussing where P had come from. M's recollection of the content of the explanation given by P to D1 and the exchange is consistent with P's evidence in that regard. M said that D1 advanced up to about six inches from P's face and shouted at him repeatedly saying "Don't give me that". M said that "(D1) was right up in (P's) face". He said that "(P) backed up to the concrete slab on the sidewalk and could not go any further". He said that what he saw shocked him and he was upset because D1 would not listen to the explanation that was being given to him by P. He said:



"I shouted to them, referring to (P) "Spit in his face". I did so a total of five times, because it was so upsetting and rude for an officer to conduct himself that kind of way in public".

58. It is clear that M was not saying that he saw D1 spit in P's face, but rather he was rather unattractively suggesting on a number of occasions that P spit in D1's face. M said that the incident lasted 3 to 5 minutes and that the parties walked off, with P in front like a child that was just chastised. M added that P came back to him and had tears in the eyes confirmed that he had seen what had happened and that he was willing to testify on the behalf of P.

59. M adopted the content of his Written Statement at the outset of his examination in chief. He stated that he had a reaction, as D1 was right in P's face, shouting. M confirmed that he said to P three to five times that he would spit in D1's face and



that he did not see D1 spit in P's face. M's evidence was not challenged as no questions were put to him in cross-examination.

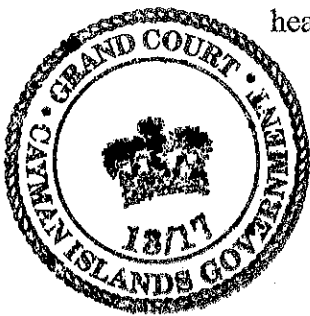
60. D1's pleaded defence in relation to this alleged incident, contained in his written Defence dated 9 August 2013, was again simply to not admit nor deny the relevant paragraphs in the Statement of Claim.

61. In his Written Statement D1 informed the Court that there was a need for the special patrols in George Town in February 2012, due to the quantum and nature of recent robberies in the area. He said that he had received complaints from Chief Superintendent Jones that the Police Commissioners had not seen uniformed officers on foot patrol in the area as directed. He had also been informed that local businesses had a similar complaint. D1 indicated that it was his responsibility to monitor and make checks on those officers who were supposed to be on patrol.

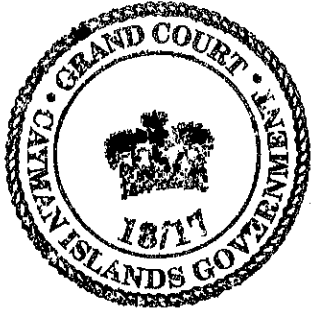
62. D1 said that he was in George Town and, having not seen an officer on patrol for about 10 minutes, he went on to his police radio and made a request for verification about who was on foot patrol at the time. He said that at first nobody answered, but after he called again, P did so, stating that he was on foot patrol. He asked P where he had been, and because of the explanation given, he did not believe what he was being told. During D1's oral evidence, D1 said at that stage P

raised his voice saying: "You calling me a liar, you calling me a liar". He said that P was "angry and annoyed". D1 then said that, he pointed out to P what his responsibilities were and warned him that if his actions were repeated, disciplinary action would be considered. He said that he then instructed P to go out on patrol and they parted. He denied during cross-examination that he was shouting at him, although he accepted that he had raised his voice. He said that he was not six inches in front of P's face, or that he was so close that he could spray him with spit from his mouth. He estimated that they were about two to three feet apart.

63. D1 said that he considered the incident to be a minor performance issue where he admonished the officer and gave the necessary advice. D1 summarised the incident in his witness statement (which he adopted as his evidence in chief at the hearing) as follows saying that he had:



"Admonished the officer as I am required to do and he did not like it. The Royal Cayman Islands Police Service is a disciplined service governed by the Police Law and Standing Orders. Senior police officers are allowed to ask officers questions about their patrol duties; in particular when they suspect they may be neglecting their duties. My verbal discipline appeared to displease PC Robinson and his reaction to my questioning was aggressive and unprofessional. At no time did I speak with PC Robinson in an intimidating manner speak with him 1 inch from his face or allow my saliva to hit his person. I certainly did not display any type of behaviour which would make PC Robinson fearful of me. I reject any suggestion that my actions went beyond that which was necessary or appropriate in the

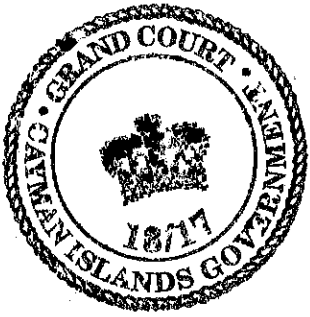


circumstances....The truth of the matter is that I had question PC Robinson's whereabouts with good reason, as his senior commanding officer and he was displeased to have had his conduct questioned and his dishonesty revealed. His allegations are no more than attempt to hide his unprofessional and insubordinate attitude, undermine my authority and ultimately to undermine the good order and discipline in the RCIPS."

D1 characterised his interaction with P as being "*firm but fair*" and that their conversation "*was not cordial and there was no laughing or joking*".

64. A disproportionate amount of time was spent in cross-examination seeking to ascertain whether D1's view about where P had come from on that day was right and whether P's explanation given was wrong. On the evidence before me, I am unable to make a finding on that point and, in any event, such a finding is not required when determining whether there was an assault on that day. What is evident is that both parties were in a heated exchange as a result of their disagreement.

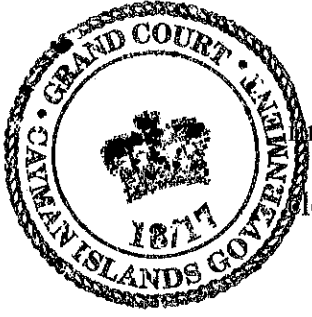
65. Having carefully reviewed the evidence, and upon noting the consistency between the oral and written evidence of P and M, I prefer the majority of P's evidence in relation to the incident and find that an incident did happen. I am satisfied that D1 genuinely believed, whether he was actually right or wrong to do so, that P had not been appropriately patrolling on that day. It is clear that this angered him and that he felt, as the responsible senior officer, that P needed to be admonished and



told that he needed to perform his duties. I am satisfied that P felt that he had been performing his duties adequately and that the admonishment was not appropriate because D1's conclusion had been wrongly reached. At that stage of the exchange I am satisfied that both parties were angry and both had raised voices. I reach that conclusion because M stated in his evidence that his attention was drawn to the area where P and D1 were because he heard "*persons arguing*".

66. The RCIPS is a quasi-military organisation whose members hold different ranks, the senior ranks ordinarily having a duty to discipline and monitor the junior ranks. In such organisations it is not unusual for raised voices to be used, whether that be on the parade ground or when addressing a disciplinary issue. In this case, whether rightly or wrongly, D1 felt that P was not performing his duties appropriately and that this needed to be addressed. I am satisfied that D1 raised his voice and was shouting at P, not to put him in fear, but only to admonish him. I am satisfied that when doing so he approached P and used his finger-pointing at him.

67. Although M's evidence was not specifically challenged in cross-examination, I have a degree of caution when accepting it in totality. It is clear that he was impassioned by what he saw on that day, which led him to make the unattractive suggestion to P, on a number of occasions that he should spit in D1's face. His evidence was not impartial. Although, I accept that D1 was close up to P, I do not



and that it was precisely only six inches away. On the other hand I find that it was closer than the three feet suggested by D1.

68. I am satisfied that D1 did not intend P to apprehend the application of unlawful force. I am satisfied that he spoke in a loud disciplinary manner, not uncommon in organisations such as the police, to P in order to address what he perceived to be a failure of duty, whether he was actually right or not to hold that view. What might be questionable, with hindsight, was for him to have done that in such a public place. It would have been better for such an exchange to have taken place away from the public and on police ground. It is clear that P understandably found this clear and loud admonishment given in such a public forum to be upsetting and embarrassing.

69. I am not satisfied that P has proved that he reasonably apprehended immediate and direct application of unlawful force, because I do not find that a reasonable person might fear that violence was about to be inflicted upon him, having regard to all of the circumstances including the employment relationship between the parties and the nature of the subject matter of the dispute and the content of the parties' verbal exchange on that day.

70. I do not accept P's evidence that D1 spat at him. M said that he did not see this happen and I note that in P's Statement of Claim, although it was pleaded that P

had to move his head to the side to prevent spittle coming from D1's mouth hitting him, it was not plead that D1 had actually spat at him.

71. Accordingly, I do not find that the claim in relation to the alleged second assault is proved.

Footnote

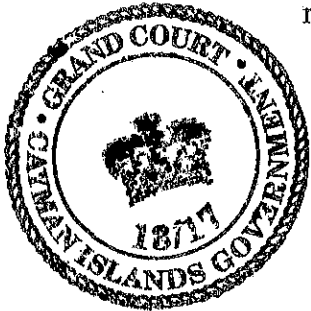
72. As already mentioned, this case has taken an inordinate amount of time to reach its conclusion. I note that P states that, upon reviewing a criminal complaint in relation to the alleged assaults, the Director of Public Prosecutions ("the DPP") ruled that:

"Although a criminal charge of common assault had been made out against (D1), it was not in the public interest to prosecute the D1 and recommend that the matter be dealt with through the RCIP's disciplinary process."

The Defendants agreed that the DPP wrote to D2 and informed him that it was not in the public interest to proceed with a criminal charge:

"In respect of a minor matter, particularly in a case with the option of internal complaints and discipline is available."

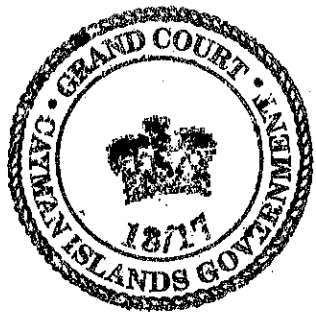
Of course, the relevant consideration of the DPP at the time would have been whether there was a prime facia case and the review would not have been as in-



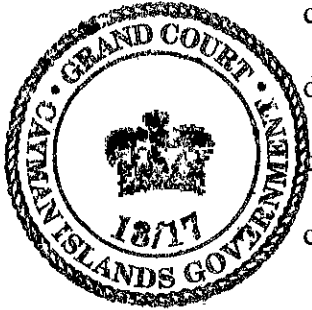
depth as the one conducted by this Court. I am, of course, not fettered by any opinion that might have been expressed by the DPP.

73. However, I entirely agree with the DPP that this is a matter that would have been better dealt with by internal disciplinary proceedings as the two relevant incidents as minor ones. This would have enabled not only the two incidents before me, but also the wider issues in the workplace between the parties to have been addressed. The wider allegations are not matters I must rule on due to the way that the case has been pleaded, but there may have been great merit in the Police's disciplinary body considering the 2 incidents in that context rather than them being elevated to being the subject matter of a civil claim before the Grand Court.

74. It is a great pity that P felt that he had no option but to initiate these drawn-out civil proceedings for there to be a proper investigation of his allegations. The DPP's views about the merit of an internal investigation approach were provided to D2 on 30 July 2012. Upon receipt of that advice, the police disciplinary body should have been directed to conduct and conclude a thorough and prompt internal investigation, something which would clearly have been in the interest of all the parties in these proceedings. Regrettably, this was not done and on 10 April 2013, a frustrated P felt compelled to issue a Writ and Statement of Claim. From what P has told the Court during these proceedings, it would have been highly unlikely that these civil proceedings would ever have been brought if his



complaints had been internally investigated and a conclusion reached. What is disconcerting is that in the Defendants' Defence filed on 9 August 2013, which was 12 months after receiving the DPP's views, it was plead that disciplinary charges had been laid against D1 in respect of the complaint and that those disciplinary proceedings had been adjourned pending the outcome of the civil claim. Those disciplinary charges and disciplinary proceedings should have been concluded, well before the Writ of Summons was issued on 10 April 2013.



75. As I touched on earlier, a great deal of written evidence, especially the medical evidence, is not relevant to the two allegations of assault but was filed on behalf of P in relation to a number of other separate incidents and the effect of nature of the relationship between P and D1 over an extended period of time. The bulk of that evidence is irrelevant to the Court's determination about whether the two pleaded assaults have been proved. The wider evidence dealt with allegations of bullying, a claim which had not been pleaded in the Writ and Statement of Claim. The wider evidence, also made mention of negligence on behalf of D1 and D2, again something that was not specifically pleaded in the Writ and Statement of Claim. Reference was also made in the wider evidence to long-running harassment; again it was not relevant to the pleaded case in relation to the two assaults. This was pointed out to P's Counsel, who had inherited the case and had not drafted the Statement of Claim, and he accepted that those issues need not be explored by the Court.

Costs

76. Neither party has been fully successful in this matter. Accordingly, my preliminary view is that no order for costs should be made. However, if a party wishes to be heard on the issue of costs he must file and serve a Summons for a costs hearing no later than 14 days after the delivery of this sealed Judgment.



The Hon. Mr. Richard N. Williams
Judge of the Grand Court

