

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
GRENADA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2010/0083

BETWEEN:

RITA RICHARDS

Claimant

and

**(1) ATTORNEY GENERAL OF GRENADA
(2) POLICE CONSTABLE AMANDA CHARLES No. 648**

Defendants

Appearances:

Mrs. Winnifred Duncan-Phillip for the Claimant

Mr. Adebayo Olowu for the Defendants

2012: April 18;
October 24.

JUDGMENT

- [1] **ELLIS, J.:** By claim form and statement of claim filed on 26th January 2010, the claimant claimed against the defendants damages for assault, exemplary and aggravated damages, interest and costs.
- [2] The claimant alleges that on 17th January 2009, while vending at St. John's Street, St. George's, the second defendant approached her, held on to her trolley with one hand and violently pushed her with her other hand. As a result, the claimant fell into a nearby drain containing filthy and dirty waste water and sustained injuries, loss and damage.

[3] The claimant contends that the second defendant acted maliciously, oppressively with the deliberate intention of publicly humiliating her. She claims aggravated and exemplary damages. The aggravating particulars are pleaded as follows:

1. The second defendant pushed the claimant causing her to fall into a drain for no justifiable reason in the presence of several members of the public.
2. As a result of the fall, the claimant suffered injuries and her clothing became wet and soiled from filthy drain water.
3. The second defendant failed to assist the claimant when she fell into the drain but only stood looking on.

[4] Later on that same day, the claimant attended the General Hospital for medical treatment. She claims that she suffered:

1. Bruise to left elbow
2. Bruise to left knee
3. Bruise to right foot
4. Tenderness to left side of head
5. Left wrist swollen and tender
6. Pain in neck and back.

[5] The defendants filed a defence and counterclaim on 29th March 2012, in which the second defendant denied that she violently or in any way pushed the claimant. They contend that while in the process of issuing a warning to the claimant, the claimant violently manoeuvred the trolley pushing it forward causing its front wheel to collide with and run over the second defendant's foot. In that instant the second defendant held on to the trolley to prevent further assault. The claimant then violently pulled her cart away causing both the cart and herself to fall into the nearby drain. She claims that she acted properly at all times and contends that she is not responsible for any damages, aggravated, exemplary or otherwise arising from the claimant's fall.

[6] By way of counterclaim, the second defendant claims general damages and costs in respect of the alleged assault by the claimant.

[7] At the trial, the claimant gave evidence on her own behalf and called three other witnesses. The defendants called two other witnesses in addition to the second defendant.

The Claimant's Case

[9] In her witness statement, the claimant states that on 17th January 2009, she was on the sidewalk on St. John's Street in St. George's with a trolley of goods when an Officer Gibbs spoke to her about vending on the sidewalk. About 30 minutes later the second defendant came up to her and said good morning, but she did not respond.

[10] The claimant stated that the second defendant then held on to the trolley. At that point the claimant was behind the trolley holding on to the handle. She stated that the second defendant was on her right side.

[11] The claimant stated that she then said 'excuse me please' but the second defendant did not move. Instead, the second defendant violently pushed the trolley with one hand and pushed the claimant on her chest with the other hand. As a result, the claimant fell head first with her feet in the air into a nearby drain which contained dirty water. The trolley also fell, and the goods scattered in the drain and on the road. This occurred in the presence of several persons who were on St. John's Street, including her husband who was on the opposite side of the street.

[12] The claimant states she had to be assisted by her husband and two other men, who lifted her out of the drain as she was unable to get up on her own. A crowd gathered; she was embarrassed and her clothes were wet with dirty drain

water. She stated that the second defendant stood watching and made no effort to help her after the fall.

[13] She stated that she felt terrible pain and her body received bruises to the left elbow, left knee and right foot, pain to the left side of her head; her left wrist was swollen and tender and she also had pain to her neck and back. She attended the Emergency Department of the General Hospital where she was told to obtain a police medical form. She later returned to the hospital where she was examined by a medical practitioner. Her bruises were bandaged, medication prescribed.

[14] The claimant claimed that she felt pain all over her body, especially her neck and left foot. She rested at home for three weeks and had to be assisted by her husband. She claims that she developed severe pain to her left hip and left ankle, and now walks with a limp. An X - ray done in September 2009, some nine months after the fall, revealed a fracture in her left pelvis. She claimed to have had suffered no falls following the incident.

[15] The claimant denies pushing the trolley on the second defendant's foot. She states that the second defendant was standing at the side of the trolley and not in the front of it.

[16] Under cross-examination, the claimant stated that she has been a vendor all of her life. She indicated that she did not know and had never before been warned that it is an offence to vend on St. John's Street. She stated that the first time that she had been warned about vending on that street was on the morning of 17th January 2009.

[17] On that morning she was warned by a lone male police officer. However, she stated that she refused to move because although everybody else had been told not to vend there, no one else moved. She stated that after she spoke to him, the officer replied, said 'God bless you' and went away. He did not return.

- [18] She further testified that she was later approached by the second defendant, who greeted her saying 'good morning' and she did not respond. The claimant states that the second defendant said nothing further to her but then took hold of her trolley. She denies that the second defendant ever told her that she was not supposed to be vending in that area.
- [19] She testified that she told the second defendant 'excuse me please' because she wanted to move away from her. Her evidence is that she wanted to go because she did not want to have anything else to do with second defendant. She denies, however, that she ever attempted to move her trolley because of the position of the second defendant, she was unable to move. She stated that she could not have pushed the trolley over the second defendant's foot because the trolley never moved.
- [20] The claimant's evidence is that she was standing behind the trolley holding the handle when the second defendant who was standing on the right side of the trolley held on to the trolley with her left hand and pushed her on her chest with her right hand. She stated that the second defendant pushed her down into the drain (which she described as very big drain and very deep). She stated that when the second defendant pushed her the trolley fell onto the road and all the contents were lying in the drain. She denied that she fell over because she lost her balance as a result of moving the trolley.
- [21] She indicated that after she fell she was 'dotish', and unable to get up on her own. Although she could not recall who assisted her in getting up from the drain, she did recall that she was not assisted by the second defendant.
- [22] Nathaniel Richards, the claimant's husband, gave evidence in support of the claimant. In his witness statement he states that on 17th January 2009, between 9:00 a.m. – 10:00 a.m. he saw the claimant was standing with her hand on her

trolley. The second defendant left the male officer at the end of St. John's Street and came up to the claimant on her side. He states that he saw the second defendant rest her hand on the trolley and push the claimant with her other hand. The claimant fell back and the trolley capsized in the road and everything fell out. Mr. Richards stated that at the time of the fall, he was on the other side of the road and that when he saw his wife fall he went to pick her up from the drain. He was assisted by two men.

[23] He indicated that when the second defendant pushed the claimant, the claimant's hand was on the trolley handle but she did not move it.

[24] After the fall, he states that he observed a bruise on the claimant's left knee and left elbow which were bleeding. He states that his wife was in pain for several days following the incident and that he had to rub her down. She could not get off the bed and until today she walks with a limp.

[25] Under cross-examination Mr. Richards stated that on the morning in question, he and the claimant were standing together on St. John's Street (facing Aboud's) loading the trolley, which was between them. He stated that he has been assisting his wife for a long time since they have been together 25 years. He stated that he has heard that vending is not permitted in that area. He stated that the claimant told him a long time ago (before this incident) that vending is not permitted in that area. He further stated that his wife, (the claimant), knows better than him that vending is not permitted there because she has been vending before him.

[26] The claimant then moved the trolley to lower St. John's Street, a distance of some 40 feet, in order to avoid the sun. She later returned to the first place where they had loaded the trolley. When she returned, he was on the opposite side of the road, with the width of the road between them.

- [27] He stated that he was able to see his wife when she started vending. He stated that he saw three officers (including the second defendant) talking to his wife although he could not hear what they were saying. After a while he saw the officers leave.
- [28] He stated that he was sitting on a bench on the other side of the road when he later saw the second defendant approach the claimant. He stated that although he could not hear what the second defendant said to the claimant, he saw that the second defendant was close to the claimant's side with her hand resting on the trolley. He states that his wife was on the left side of the trolley and the second defendant was on the right. The trolley was in the middle of them and the front of the trolley was facing the roadside. The back of the trolley was facing the back of the building. He stated that there is a drain on the left side of the trolley which runs behind the trolley along the building.
- [29] He testified that he saw the second defendant rest her right hand on the trolley and push the claimant on her chest with her other hand. The second defendant pushed the claimant on the next side and she fell into the drain. When he saw this he came over and along with two male passers-by; he helped to pull the claimant out of the drain.
- [30] He stated that at that time the other officers were not around. One of the male officers was at the end of St. John's Street facing the terminal. When that officer saw a crowd gathering he came to ask him what had happened.
- [31] He stated that he never saw the claimant move the trolley because the second defendant was standing with her hand on the trolley and as trolley never moved, it could not have moved on the second defendant's foot.
- [32] Mrs. Mary Lewis also gave evidence on behalf of the claimant. She is a market vendor and claimed that she has known the claimant for over 20 years. In her witness statement she states that on the day in question she was talking to the

claimant when a female police officer approached and told the claimant good morning. At the time the claimant was putting items in her trolley and did not respond to the officer.

[33] She states that the claimant was standing with her hand on the handle of the cart when the female police officer held on to the cart with one hand and pushed the claimant with the other hand, causing her to fall into the nearby drain. The cart capsized and the contents fell out of the cart.

[34] She indicated that she was sure that the claimant did not push the cart on the second defendant's foot.

[35] In cross-examination Mrs. Lewis stated she stopped to talk to the claimant, who was vending in St. John's Street. At the time the claimant was alone, stooping next to her trolley to put something in it. She stated that she spoke to her about 5 minutes and that while talking to her, the claimant told her that she had to go because the police had told her that she could not sell there and she felt that they would soon return.

[36] She stated that while the claimant was packing to go she was approached by a female police officer. Her evidence is that she was standing on the right side of the trolley and the officer stood close to her on the right. Mrs. Lewis was however unable to identify the second defendant as the police officer who stood side by side and next to her that day. She indicated, however, that there was no one standing to the front of the trolley and that the claimant was standing to the back of the trolley.

[37] She stated that the female officer said good morning twice to the claimant and that the claimant did not respond. She stated that the officer then said 'the lady you didn't hear me say good morning' but the claimant never responded. Mrs. Lewis' evidence is that the second defendant then rested her hand on the cart and

pushed the claimant, causing her to fall into the culvert. Mrs. Lewis was unable to say which of the second defendant's hands was on the trolley and which hand was used to push the claimant.

[38] She testified that the second defendant was very polite to the claimant. She was unable to proffer any reason why the second defendant would react so violently after she had been so pleasant.

[39] Mrs. Lewis denied that the claimant ever pushed the trolley or that the trolley ever rolled on the second defendant's foot. She stated that the trolley lost balance and fell when the officer let it go causing the goods to capsize on the ground.

[40] She also stated that she saw a male police officer came up from down, from the end of St. John's Street after the incident. All the officers left soon after the claimant fell into the drain.

[41] Under the court's examination, Mrs. Lewis stated that she did not know which hand the second defendant used to push the claimant but she is certain that she saw her push the claimant into the drain. Initially Mrs. Lewis was also unclear as to what part of the claimant's body was touched. After some questioning she indicated that the officer's hand touched the claimant's chest but she was unable to specify the precise area.

[42] Ms. Patricia Fletcher was the final witness for the claimant. She stated that on the day in question she saw the policewoman talking to the claimant. She heard the claimant tell the female officer 'excuse me'. The officer then held on to the trolley and pushed down the claimant with her other hand, which caused her to fall into the nearby drain. She states further that the officer also pushed down the trolley and all the goods fell down.

- [43] Ms. Lewis stated that when the claimant was taken out of the drain by two men she saw blood on her knee and elbow. The claimant's clothes were also wet, and she was dirty.
- [44] After the claimant fell she stated that she witnessed the policewoman walk a short distance to a male officer and tell him that she did not push down the lady.
- [45] In cross-examination Ms. Fletcher stated that on the day in question she was talking to the claimant for about 1½ hours. During that time she stated that the claimant told her that she had been warned not to vend there and that she needed to move. She stated that she was standing on the same side as the claimant, right next to her. She stated that throughout the period of 1½ hours there were three people next to the trolley: the claimant's husband Mr. Richards, another lady and herself. Mrs. Fletcher stated that the claimant's husband was sitting right next to her on the right. Under the court's examination she stated that Mr. Richards was next to her when the push and the fall took place. She stated that Mrs. Lewis was also there.
- [46] Ms. Fletcher testified that she witnessed a female police officer approach the claimant and say good morning three times but the claimant did not respond. She was however unable to identify the second defendant in the courtroom as the police officer who approached on that day.
- [47] She stated that she saw the officer rest her right hand on the trolley and push the claimant with her left hand whereupon she fell down in the drain. The claimant did not get up by herself but had to be assisted by her husband and another man.
- [48] In response to defence counsel, Ms. Fletcher indicated that she found it strange that a police officer would be nice one time and then get violent. She stated that it was the first time that she had seen that.

- [49] She stated that after the officer pushed the claimant, the officer let go of the trolley and it fell to the ground. The officer then walked off to speak to a male police officer. She testified that she followed the female officer and asked her 'why she pushed the lady down' but she merely looked at her and did not respond.
- [50] She recalled that she heard the claimant say 'excuse me' because she was packing her things on the trolley in order to move. However, before she could move the officer put her hand on the trolley.

The Defendant's Case

- [51] The second defendant's evidence is that while on patrol with PC 72 Mitchell and PC 696 Gibbs at 10:15 on the morning in question, she witnessed PC 696 Gibbs issue a warning to the claimant in relation to the offence of leaving goods on a footpath. She claimed that she heard the claimant walk away from PC Gibbs saying 'satan is your father'.
- [52] At 10:45 a.m. she noticed that claimant vending in the same area in which she had been warned. She approached the claimant and said 'good morning, miss'. The claimant replied 'good morning'. She then asked the claimant how she was doing but she did not reply.
- [53] The second defendant then informed that claimant of her offence and issued a warning to her, to which the claimant replied, 'satan sent you, you is a devil child'. She stated that the claimant was displeased, angry and attempted to walk away from the second defendant and in doing so pulled the trolley back to herself, turned left and pushed the trolley between the second defendant and the nearby drain. In this aggressive attempt to pass her, the claimant's trolley rolled on the second defendant's foot. The trolley toppled over and she fell into the drain. The second defendant denies ever touching the claimant or causing her to fall into the drain.

- [54] Following her fall, the claimant accused the second defendant of pushing her into the drain, to which the second defendant replied, 'Miss, I did not touch you, I didn't push you into the drain'.
- [55] Because of the crowd which had gathered, the second defendant stated that she was advised by PC Mitchell to leave the scene.
- [56] In cross-examination she testified that she approached the claimant about 30 minutes after she had been warned by PC Gibbs. She stated that when she informed the claimant of her breach, the claimant responded in an aggressive manner making use of the following words: 'satan sent you, you is a devil child'.
- [57] She indicated that in an attempt to move away, the claimant then pushed the trolley on her foot. The second defendant stated that her immediate reflex was to put out her right hand to prevent the trolley from causing further injury to her. She stated that she put her right hand on the front narrow end of the trolley to avoid further assault. She indicated that she did not put her hand on the trolley to prevent the claimant from moving away.
- [58] She stated that at that time she was standing to the front of the trolley. The handle of the trolley was facing the claimant and the claimant pulled the trolley back to herself attempting to turn left, trying to force the trolley between her and the drain. At the time the trolley was half-full of produce, and by her forceful and aggressive push on the trolley, it went off-balance and both the claimant and the trolley fell.
- [59] The second defendant later clarified that the trolley rolled on her foot but did not bump into her body. When questioned by the claimant's attorney as to how this was possible, the second defendant indicated that she always stands with her right foot out and with her hands behind her back. Further she was not directly in front

of the trolley but was standing at a slightly diagonal angle in front of the trolley. In re-examination she indicated that because the claimant angled the trolley to the left pushing it diagonally, her body would not have been bumped.

[60] She further testified that when the trolley rolled on her foot, she immediately said 'Miss, you rolled the trolley on my foot'. She indicated that contrary to what is indicated in her witness statement she did not inform the claimant that she had assaulted a police officer.

[61] She testified that the claimant fell down as a result of her own actions and negligence. The trolley fell down because of the force used by the claimant. She stated that when the claimant fell down she did not offer her any assistance because as soon as she fell the claimant got up immediately on her own and began falsely accusing her of throwing her down the drain. When the claimant accused her of pushing her down, she stated that she responded 'Miss, I did not touch you, I didn't push you into the drain'.

[62] She stated that there were many other people around that morning since it was a Saturday, market day. A crowd gathered and she heard people mumbling to each other and to themselves but she heard no one berate her.

[63] The second defendant's evidence is that when the fall took place, PC Gibbs was at the lower end of St. John's Street around Flavours, now the Beer Garden, approximately 25 - 30 feet away and that PC Gibbs and PC Mitchell were standing together.

[64] In his witness statement PC 696 Junior Gibbs states that on the day in question he was on patrol together with PC Mitchell and the second defendant when he issued a warning to the claimant on St. John's Street. He recalls that in response to his warning, the claimant walked away saying 'satan is your father'. He stated that this was not the first time that he had had to issue a warning to the claimant. He

recalls that she is one of the vendors who give a lot of problems to move from the sidewalk.

[65] In the course of their patrol, they returned to St. John's Street and again saw the claimant vending. The second defendant went to talk to the claimant on her own. He and PC 72 Mitchell were standing by Flavours at the end of St. John's Street.

[66] He indicated that he witnessed the trolley with the lemons and other goods fall to the ground but did not witness the claimant's fall.

[67] In cross-examination PC Gibbs stated that he warned the claimant about vending on St. John's Street on the day in question. He cannot say where PC Mitchell and the second defendant were standing at the time that he issued the warning to the claimant.

[68] Sometime later they returned and saw the claimant vending in the same area. He stated that the second defendant left PC Mitchell and himself and went to talk to the claimant, who was about 15 - 20 feet away. He stated that from where he was standing he saw the trolley fall and the goods coming down the street but he did not see the claimant fall.

[69] He stated that he along with PC Mitchell immediately went to assist the second defendant and to 'put peace' because the claimant was behaving in a disorderly manner. He stated that a crowd started to gather because of the noise the claimant was making, and members of the public began to chide and berate the second defendant for what had happened.

[70] Finally, PC 72 Mitchell's evidence was that he knows the claimant and that he witnessed PC Gibbs issue a warning to the claimant in response to which he heard the claimant say to PC Gibbs 'satan is your father'.

- [71] Later at about 1:40 p.m. while on patrol with PC Gibbs and the second defendant he observed the claimant still vending in the same area. At the time they were standing by Flavours and the claimant was vending in the area opposite Abouds.
- [72] The second defendant left and went to issue a warning to the claimant. PC 72 Mitchell states that he saw the second defendant approach the claimant and he further heard the claimant say in a loud voice 'you is the devil child, satan send you'.
- [73] He stated that when he heard this exchange he left the area where he was standing and headed towards the second defendant. When he was about 3 - 4 feet away he stated that he saw the claimant push her trolley to move away but one of the wheels rolled on the second defendant's shoes. The claimant lost control of her trolley and ended up falling into the nearby drain. The claimant then got up accusing the second defendant.
- [74] He stated that at no point did he see the second defendant make physical contact with the claimant.
- [75] In cross-examination PC 72 Mitchell said after being warned by PC Gibbs, they returned half an hour later to see the claimant vending in the same area. He says that at the time the claimant was the only vendor vending there.
- [76] He stated that when the second defendant went in the direction of the claimant he was standing with PC Gibbs close to Flavours which is located at the bottom of St. John's Street. He stated that the distance between Flavours, and where the incident took place is about 50 - 60 feet. Given that distance he stated that he was able to hear every word the claimant said because she was speaking very loudly. He testified that when he heard the loud talking, he advanced immediately. He was therefore able to see the claimant lose control of the trolley and fall into the drain.

[77] He stated that when he arrived at the scene the only person he spoke to was the second defendant. He never asked anyone else what had happened.

[78] In re-examination he stated that when the incident occurred, members of the public started to quarrel. They were upset and the situation was unsafe so he thought it better to leave the scene.

Issues and Law

[79] The Parties' pre-trial memoranda disclosed the following issues:

1. Whether the second defendant assaulted the claimant as alleged
2. Whether the claimant assaulted the second defendant as alleged
3. Whether the claimant is entitled to any of the relief claimed
4. Whether the second defendant is entitled to any of the relief claimed

[80] Although the claimant and the counter claimant/second defendant have grounded their claims in assault, it is clear that what is in fact alleged is the tort of battery.

[81] An assault is an act of a defendant which causes a claimant reasonable apprehension of the infliction of a battery on him by the defendant. As distinct from battery, assault does not involve actual contact; it only needs intent and the resulting apprehension. The tort of battery, on the other hand, occurs where there is a voluntary act by the defendant intended to bring about contact with the claimant. There must be an intentional application of force to the claimant in a harmful or offensive manner and without consent.

[82] Like assault, battery is an intentional tort. In the case of battery, the requisite intent is merely to touch or make contact without consent. A defendant may be liable for a battery even if he or she did not intend to harm the claimant, but in

order to constitute battery, a claimant must prove that the defendant intended to make contact with his or her person.

[83] In order to succeed in their claims both the claimant and counterclaimant must satisfy the court on a balance of probabilities of the merits of their case. In applying the standard of balance of probability the court was guided by the dicta of Baroness Hale in the House of Lords decision **Re B (Minors)** [2008] EWCA Civ. 282 and by Lord Nicholls in **Re H (Minors)** (Sexual Abuse: standard of proof) [1996] AC 563 at 586 D-H:

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his underage stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established.”

[84] If the claimant’s version of events is to be believed the court must accept that the second defendant having approached the claimant for the purpose of issuing a warning and after apparently politely greeting her, deliberately and violently pushed her into the drain for no legitimate reason. The court finds it implausible that the second defendant, a police officer, would have chosen to respond in such a deliberate, violent and clearly unlawful way in full view of several witnesses and on what was clearly a busy street and time of day.

- [85] Further, having reviewed the witness statements of all the witnesses and after listening to their oral testimony and observing their demeanour in court, the court is not satisfied that on a balance of probabilities that injury suffered by the claimant was the result of the intentional battery committed by the second defendant.
- [86] The court was of the view that the claimant was not a completely credible witness. She gave evidence that before that day, she had never in her life been warned about vending on St. John's Street. This was clearly contradicted in the witness testimony of her husband Nathaniel Richards. The court has no doubt that the claimant was well aware that vending was not permitted in that area. She was an experienced vendor of over 25 years. Both PC Mitchell and PC Gibbs were familiar with her and the court believes PC Gibbs who stated that she was 'one of the vendors who gives a lot of problems to move from the sidewalk'. The court has no doubt that she reacted in a belligerent manner when warned by the police.
- [87] In addition, although three witnesses appeared to have corroborated the battery, there were numerous inconsistencies and/or gaps in their evidence which left the court in some doubt as to the accuracy of their recollection and their veracity.
- [88] In the case of Nathaniel Richards, the evidence discloses that he was across the street during the interaction between the claimant and the second defendant. He, while he could not hear the conversation between them, he stated that he witnessed the incident and was adamant that he saw the second defendant push the claimant. However, during his oral testimony, Mr. Richards stated that his wife, (the claimant), was on the left side of the trolley and the second defendant was on the right; the trolley was in between with the front of the trolley facing the roadside and its back to the building behind it. He further stated that from his vantage point across the street he was able to see the second defendant rest her right hand on the trolley and pushed the claimant with her other hand. This evidence was clearly at variance with that of the claimant and other witnesses for the claimant.

- [89] Mrs. Lewis claimed to witness the battery but could not definitively identify the second defendant as the batterer. Although she testified that she witnessed the alleged battery, her evidence vacillated and under examination by the court she could not decisively recall which hand was used to push the claimant and what part of the claimant's body was touched. The court is unable to rely on her evidence. She also testified that when she met the claimant packing her trolley, she was alone. This contradicts Patricia Fletcher who testified that she and the claimant's husband were present before the incident.
- [90] Patricia Fletcher's evidence also contradicts the evidence of Nathaniel Richards and the claimant. During cross-examination she adamantly averred that Nathaniel Richards was next to her when the incident occurred. Both Nathaniel Richards and the claimant gave contrary evidence that he was on the other side of the road when the incident occurred. In addition, her unequivocal evidence that the second defendant pushed the claimant with her left hand was at odds with the claimant's own evidence. The court found Ms Fletcher's evidence to be unreliable in the circumstances.
- [91] Of critical importance was the fact that three eyewitnesses to the alleged battery contradicted the claimant's own testimony that she was struck by the second defendant's right hand.
- [92] The court is also not convinced on a balance of probabilities that the second defendant has made out her counterclaim. Having reviewed the witness statements and after listening to their oral testimony and observing their demeanour in court, the court is not satisfied that on a balance of probabilities that the claimant committed any battery against the second defendant.

The Second Defendant's Counterclaim

[93] The claimant and her witnesses all deny that she rolled the trolley over the counterclaimant's/second defendant's foot at all. It is clear from the evidence that PC Gibbs did not witness the interaction between the claimant and the second defendant or the fall of the claimant. He is therefore unhelpful in determining any liability arising out of the claims. The only witness who corroborated the counterclaimant's testimony was PC Mitchell, and the court is not convinced in light of the evidence of PC Gibbs and the counterclaimant/second defendant that he could actually witness the alleged battery. PC Mitchell's evidence was not corroborated by either the counterclaimant/second defendant. They both gave evidence that he was at the lower end of St. John's Street standing together with PC Gibbs when the incident occurred. The court is therefore not persuaded that PC Mitchell could have witnessed the interaction between the parties.

[94] Further, even if the court were to accept that the claimant's trolley did roll on the foot of the counterclaimant/second defendant, in order for that act to amount to a battery, the counterclaimant/second defendant must demonstrate that this was an intentional act. Under the tort of battery a claimant must show that the aggressor either desired the contact or knew that the action in question would most likely lead to the contact. Unavoidable mistake (accident) can amount to a defence when the mistake negates the required element of intention - or, in other words, when the person did not intend the consequences of his or her act. It follows that where a person had no intention of coming into contact with another person but accidentally did so, there is no battery.

[95] The entirety of the second defendant's own evidence vitiates the element of intent which is critical in the tort of battery. At paragraph 8 of her witness statement she stated:

'As a result of her sudden aggressive attempt to get pass me the trolley rolled on my foot'.

[96] In cross-examination, she further testified that at the time that the trolley rolled on her foot, it appeared that the claimant was just trying to escape from her position. She testified that she did not see the claimant's action as deliberate.

[97] The court is therefore not satisfied that the second defendant has discharged her burden and has proved on a balance of probabilities that the claimant intentionally assaulted or battered the counterclaimant/second defendant as alleged.

Conclusion

[98] In the end the decisive factor in the determination of these claims is the burden and the standard of proof. The legal and evidential burden rests on the claimant and counterclaimant who must satisfy this court on a balance of probabilities of the merits of their case.

[99] It is not disputed that the claimant fell into the drain and sustained an injury as a result. It is the claimant's case that she was intentionally and deliberately pushed by the second defendant. This is a very serious allegation and the court would need strong evidence before it can conclude on a balance of probabilities that this occurred.

[100] In addition to the inherent improbability, the court found that there were numerous inconsistencies in the testimonies of persons who all (with the exception of PC 696 Gibbs) claim to be eye witnesses to the incident. Because of these inconsistencies on both the claimant's and defendants' side, the court had no confidence in the reliability of the evidence.

[101] Having reviewed all of the evidence and having observed the demeanours, the court is not satisfied that the second defendant assaulted or battered the claimant and thereby caused her pain and suffering as alleged by the claimant. Neither has the counterclaimant satisfactorily discharged her legal burden.

[102] Accordingly, both the claim and the counterclaim are dismissed. The court will exercise the discretion accorded to it under Part 64.6 of the Civil Procedure Rules 2000 and makes no order as to costs.



Vicki Ann Ellis
High Court Judge