

**THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

**Claim No. BVIHCV 2013/44
Between:**

CHARMAINE ROSAN-BUNBURY

Claimant

And

- 1. ATTORNEY GENERAL**
- 2. COMMISSIONER OF POLICE**

Defendants

Appearances: Mrs. Charmaine Rosan-Bunbury, In Person and Unrepresented
Ms. Maya Barry, Mrs. Isis Potter, Ms. Miglisa Cupid, Counsel for the
Defendants

2015: November 9th

JUDGMENT

- [1] **ELLIS J:** By Claim Form filed on the 12th February, 2013, the Claimant sought damages for malicious prosecution as well as costs and further and other relief. Although the Claim initially proceeded against the Commissioner of Police and the Director of Public Prosecutions, the Attorney General was later substituted as a party in place of the Director of Public Prosecutions. He is sued in his representative capacity under the Crown Proceedings Act.
- [2] It is clear that the Claim includes allegations against those for whom the Commissioner of Police and the Director of Public Prosecutions may be vicariously

responsible. It has not been disputed that the relevant investigating police officers would have been acting under the general oversight of the Commissioner of Police, while the actions of the vetting and reviewing crown counsel would appropriately be attributed to the Director of Public Prosecution by virtue of his office.

- [3] The Claimant's Statement of Claim alleges that on the 17th January, 2012, while she was a Magistrate in the Territory, the Commissioner of Police through a complaint signed by Brewadney Howe, a police prosecutor, maliciously and without probable cause laid a charge against her for driving her Motor Jeep PV 119098 without due care and attention.
- [4] The Claimant contends that this charge was later withdrawn and discontinued by the Director of Public Prosecutions but by that time she had already suffered damage and harm to her reputation.
- [5] A joint Defence was filed on 13th March 2013 in which the Defendants averred that all reasonable and sufficient care was taken in the execution of duties of the parties involved in proffering the charge against the Claimant. They state that the charge was only laid after investigation and after examination of all of the evidence gathered during that investigation. The Defendants contend that there was reasonable and probable cause for laying the charge against the Claimant based on all the evidence.
- [6] The Claimant filed a Reply on 28th March 2013 in which she essentially joined issue on the Defence and reaffirmed the pleadings set out in her Statement of Claim.

- [7] During the trial of this matter, the Claimant relied on her own evidence as well as that of one witness, her husband Alec Godwin Bunbury. The Court heard the evidence of four witnesses for the Defence.
- [8] In her witness statement filed on 16th July 2013, the Claimant recounts the factual background which precipitated the criminal charges laid against her. She states that on 9th September 2011, she parked her vehicle next to Panchie's Chicken Van which is located directly across from the LIME building next to the Bus Stop. Also in the vehicle was her husband, Alec Godwin Bunbury who sat in the front passenger seat.
- [9] She left her vehicle to purchase some food. She eventually returned to the vehicle and began to drive unto the public road going in the direction towards the Court House. After moving into the public road she stopped in front of the building which houses Money Gram. She stopped to allow a young man who was speeding on a motor cycle and who cut across in front of her vehicle to pass. Instead of passing on the right side of her, the motor cycle passed in the left lane on the left driver's side of her vehicle. After that motorcycle passed she looked both behind her and in front of her. There was nothing coming behind her and the traffic in front of her permitted her to go ahead so she continued to drive towards the direction of the Court House.
- [10] While driving, her vehicle was suddenly struck by PI89 which is registered in the name of Dian Cameron and driven by Michael Cameron. The Claimant contends that she was driving at a moderate pace when Mr. Cameron's vehicle flew past striking her vehicle, ripping off the left half of the fender of her vehicle. Mr. Cameron eventually stopped his vehicle in front of the Road Town Fire Station, 59 yards from the point of impact. Mr. Cameron then exited his vehicle and approached her in an angry and confrontational manner and with a Guinness bottle in his hand.

- [11] She reported the accident to the Police and sometime later Police Constable (PC) Nakal attended the scene together with PC Davis. PC Nakal took verbal statements from Mr. Cameron, the Claimant, her husband and an eyewitness who was pointed out to him. He also took measurements. The Claimant states that PC Nakal also drew her attention to a video camera on a nearby utility pole which recorded the incident and he undertook to obtain the footage. She pointed out that on more than one occasion at the scene, PC Nakal told her that the accident was not her fault, however he was reprimanded by PC Davis who told him that this was not appropriate.
- [12] The Claimant states that PC Davis indicated that he would be taking Michael Cameron to the Hospital because he appeared to be under the influence of alcohol. She later learned that this was never done.
- [13] A short time after the incident, PC Nakal informed the Claimant via the telephone that (together with his seniors) he had watched the video and had found her to be at fault. She explained to PC Nakal on more than one occasion that the video could not demonstrate this. Despite her repeated requests, the Police failed to disclose a copy of the video to her. It was only after she made a personal request to the Director of Public Prosecutions that she was eventually able view the video in the company of the DPP, Crown Counsel Herbert Potter and PC Nakal.
- [14] According to the Claimant the video discloses that her vehicle was struck by the vehicle driven by Michael Cameron and not the other way around. She stated that the video clearly shows Mr. Cameron's vehicle speeding forward and striking her vehicle. He then came to stop several yards from the point of impact.
- [15] On 27th July 2012, the Claimant wrote to the DPP and requested a withdrawal of the charge based on the video evidence. A Notice of Discontinuance was later filed in the Magistrate's Court on 15th August, 2012.

[16] The Claimant alleges that the prosecution was malicious from the start. She states that the investigation was not conducted with a view to gathering the truth, but rather to secure a charge and conviction against her and to tarnish her name. She states that Defendants did not take sufficient care in the execution of their duties so as not to cause her unwarranted harm. There was no reasonable and probable cause for her to be charged and based on the video evidence, the Defendants could not hold an honest belief in her guilt.

[17] The Claimant contends that PC Davis operated with malice because at the time of the incident he was a defendant in a civil claim adjudged by her. She had had several bench warrants issued to secure his attendance at court during these proceedings. She states that PC Davis therefore had a conflict of interest which meant that he should not have had conduct of the investigation.

[18] She also states that the Crown prosecutor who vetted the charge which was eventually laid against her was Herbert Potter. She alleges that he is the brother of Clyde Potter, the personal security detail of Valerie Stephens, who was at the time a defendant in civil proceedings commenced by her. She further states that the complaint was signed by Bewadney Howe on behalf of the Commissioner of Police. She contends that while she was a Magistrate, she convicted Bewadney Howe's son of drug possession.

[19] In summary, the Claimant contends that

“In the absence of all the conflicts of interest giving rise to ulterior motives on the parts of the agents; neither the Director of Public Prosecutions or her against or the Commissioner of Police or his agents could hold an honest belief of her guilt based upon the evidence including and in particular the video.”

[20] She also states that sufficient care was not taken so as to cause her unwarranted harm. She stated that in laying this criminal charge against her, the Defendants caused great harm to her reputation and more so her reputation as a legal

professional. She contends that the charge remains a matter of public record throughout the world and there is a stigma which remains, notwithstanding that the proceedings were later discontinued.

[21] When she took the witness stand, the Claimant first amplified her witness statement. In relation to paragraph 32 of her witness statement, she stated that there was no evidence upon which PC Nakal or Herbert Potter could rely to find any wrongdoing or carelessness on her part. Instead, she testified that they acted pursuant to an improper purpose, intending to embarrass and injure her in the eyes of the public.

[22] She testified that at the time of the accident, she was involved in a very nasty court battle which involved members of the magistracy; principally the former Senior Magistrate Valerie Stephens and the current sitting Magistrate Tamia Richards. She stated that Clyde Potter acted as the police escort for both of these magistrates and that he was actively involved in the dispute. She further testified that she became a target of the State and had been prosecuted on the evidence of these three persons – Valerie Stephens, Tamia Richards and Clyde Potter. According to the Claimant, this gave rise to a conflict of interest for Herbert Potter (the brother of Clyde Potter) who should have recused himself from dealing with her matter.

[23] When she was cross examined, the Claimant maintained (even in the face of the categorical denial set out in his witness statement) that Inspector Howe signed the complaint on oath. In regard to PC Davis, she testified that he did more than simply attend the scene of the accident. She stated that the investigation was a group effort and that PC Davis was involved. In particular, the Claimant noted that PC Davis objected to PC Nakal's declaration that she was not at fault in the accident. Her view is that this was not a premature declaration because both drivers had been interviewed, measurements had been taken and the accident

scene had been preserved and investigated. She insisted that her history with PC Davis would have given rise to a “conflict of interest” which demanded that he recuse himself from the investigation.

[24] She reiterated that it was the duty of the investigating officers to investigate the accident fully and impartially taking into account all issues raised by both parties as well as any defence which would have been made by the accused at the time. In her words, she was entitled to draw to the attention of the officers, all issues or defences which would indicate that she was not at fault.

[25] She stated that during the investigation, neither PC Nakal nor PC Davis provided statements which indicated that Michael Cameron may have been under the influence of alcohol, when it was clear that this issue had been raised at the scene. This evidence was subverted or ignored by the officers in order to facilitate the charge against her. She concluded that although all of the evidence showed that Mr. Cameron was speeding and drinking alcohol, she was the one who was charged.

[26] When it was put to the Claimant that the threshold test was intoxication and not merely being tipsy, she stated that the failure to investigate and to include their suspicions as part of their reports, shows a lack of impartiality and an improper motive because the police had a duty to follow up on any explanation given by the Parties that could provide a defence to the charge.

[27] In itemizing the matters which pointed to a lack of reasonable and probable cause on the part of the Defendants, the Claimant noted the following:

- i. That it was her vehicle which was struck. She testified that there were a number of judicial authorities which prescribe who should be charged in such circumstances.

- ii. That the CCTV footage discloses that Mr. Cameron's vehicle was moving at a speed which exceeded the 20 mph limit in that zone. She contended that if he had been driving at a slower speed, Mr Cameron would not have collided with her vehicle.
- iii. That Mr. Cameron was in a drunken state and yet refused to go to the Hospital. This was relevant information which should have been taken into account by the investigators. At the very least he should have been charged for failure to provide a blood sample.
- iv. That in negotiating the road, she paused, which is indicative that she was a prudent and cautious driver.
- v. That Mr. Cameron ought to have been aware of what was taking place in front of him so that he could take decisions as a prudent driver.
- vi. In these circumstances, no charge was brought against Mr. Cameron notwithstanding that he was the one who hit her vehicle.

[28] She further stated that the Defendants could have no honest belief in her guilt. She based this contention on the fact that there were in her words "conflicts of interest" which impaired their ability to impartially investigate and on the fact that there was important evidence which was ignored or not pursued.

[29] During the course of the trial, the Court granted permission for the CCTV footage to be viewed. The Claimant was recalled and she then testified that she was not attempting to change lanes in front of Panchie's Chicken Van. Rather she drove all the way up to the section which allows vehicles to change lanes. The collision took place when she had almost completed changing lanes. At the time, her car was travelling the line in the center of the road i.e. the broken line which divides the road into two lanes. She vehemently denied that there were four lanes in Fish Lock Road. Instead she testified that there were only divisions at the mouth of the

road directly opposite the gas station which allows traffic to separate and proceeded in three different directions; straight, left and right.

[30] When Counsel for the Defence questioned her about whether she had the greater obligation to yield in circumstances where she was seeking to join the lane in which Mr. Cameron was correctly proceeding, the Claimant asserted that Mr. Cameron had the greater duty to yield because he came speeding onto the scene meeting the traffic in the condition that it was. He had the duty to stop and allow her to complete what she was doing. In her words, he could not have simply “mowed down” everybody who he felt was in his way.

[31] Although she later conceded that she also had a duty to exercise due care and attention in moving from right side of the road to the left side, she asserted that she did in fact exercise that duty. She denied that she had been driving on the wrong side of the road when the motor cycle cut in front of her vehicle to pass. She denied that the CCTV video shows that she was drove in the wrong direction into oncoming traffic in front of MoneyGram. Indeed, she testified that she was just as entitled to use the road as the driver who struck her vehicle.

[32] Finally, she concluded that the accident was the result of Mr. Cameron’s speeding, the fact that he was under the influence and the fact that he failed to exercise due care and consideration.

[33] The Claimant’s husband, Alec Godwin Bunbury filed a witness statement in the matter on the 16th July 2013. He related that on the night of the 9th September 2011, he was in the vehicle along with the Claimant and their child travelling along Fish Lock Road heading in the direction of the High Court. He was in the right passenger front seat while the Claimant was driving. He states that the Claimant was in the process of completing a change in lane from the right lane to the left lane; there was no vehicular traffic behind them but they were forced to make an

emergency stop to avoid a head on collision with a motor cycle that was speeding towards them and suddenly cut across them from the right lane to the left lane along Fish Lock Road.

- [34] The motor cycle passed their vehicle on the left hand or driver's side. Seconds after the motor cycle cleared their vehicle, he heard an impact from the left side of their vehicle which caused it to shake from side to side. He heard the sound of metal tearing and when he looked to the left side of the vehicle he saw a gold/brown Toyota Mark II Motor car grazing the left side of the vehicle squeezing between their vehicle and the yellow guard rail that forms a protective barrier over the ghut. He states that the incident occurred in the vicinity of the Money Gram on the Fish Lock Public Road.
- [35] The driver of the other car eventually came out of his vehicle and approached them. Mr. Bunbury states that he observed the driver with a beer or Guinness bottle in his hand which gave him the impression that the driver was under the influence of alcohol. He states that this impression was confirmed when he smelled alcohol on the driver's breath and when he became loud and aggressive.
- [36] He also states that the police later arrived on the scene and took statements from the Claimant, the other driver and an eyewitness.
- [37] When he was cross-examined, Mr. Bunbury essentially confirmed his witness statement. He confirmed that they were parked in the bus lane which is in front of the chicken van and on the right side of the road facing the Court House. The Claimant's car was positioned in the bus lane facing the oncoming traffic which would be travelling in the direction of the gas station. Mr. Bunbury disagreed that there were four lanes of traffic on that road. Instead he stated that there were parking lanes on both sides of the road.

- [38] He explained that the Claimant was moving from the right lane of the road to the next or left lane and he agreed that a vehicle moving in that direction would have to exercise more care and attention. He stated that the Claimant was aware of her surroundings prior to proceeding into the road because they both looked at the traffic in both lanes. They looked left and right, signaling an intention to proceed. The left lane was clear of all vehicles. The only vehicular traffic was motor bike that was proceeding in the right lane in the vicinity of the Fire Station travelling towards the gas station.
- [39] He disagreed that the Claimant was driving in the wrong direction and sought to proceed onto the main road notwithstanding that there was oncoming traffic. He also disagreed that the Claimant did not do what was necessary to ensure that the road was clear prior to proceeding.
- [40] Mr. Bunbury opined that where the driver of a vehicle was coming from behind is able to see that a vehicle in front of him is making a manoeuvre and indicating an intention to turn, that driver has a duty to exert and exercise due care and attention not to run the vehicle down notwithstanding that he was proceeding in his correct lane. He stated that a driver who was not intoxicated would have been sober enough to stop.
- [41] Mr. Bunbury disagreed that the Claimant had an even greater duty to exercise due care and attention taking into account that she was seeking to proceed or cut across to the lane in which the other vehicle was travelling. He testified that when the Claimant was proceeding into that lane it was free of traffic. Before they merged, they allowed a motor cycle to cross in front of them and then seconds later the accident occurred. According to him, their vehicle was not moving at the time that it was struck.

- [42] When he was re-examined, the Claimant referred him to several still photos which had been printed from the CCTV footage. Mr. Bunbury pointed out that the bus lane does not run along the entire length of Fish Lock Road. He stated that at the point when the collision occurred, the road was separated into two lanes and vehicles are permitted to change lanes where there are broken traffic lines in the road.
- [43] And when he was referred to the time stamps on the photos he testified that it took under a second or within a second for the white vehicle (driven by Mr. Cameron) to come on the scene and strike the Claimant's jeep.
- [44] The first witness of the Defence was Inspector Bewadney Howe. In his witness statement filed on 16th July 2013; he indicated that he had been attached to the Criminal Investigations Division of the RVIPF for the past 8 years. Since this attachment he stated that he has had no involvement in the investigation of traffic accidents as he deals strictly with robberies and burglaries.
- [45] He stated that on 26th February 2013, he attended a meeting where he was presented with a copy of a complaint without oath filed in the Magistrate's Court on 17th January 2012 naming the Claimant as a defendant. He stated that he did not sign the complaint; that his signature does not appear anywhere on the document and that he does not recognize the signature printed on the complaint. He concluded that prior to this meeting he had no knowledge of the collision which occurred between the Claimant and the other driver.
- [46] When he was cross examined by the Claimant, Inspector Howe stated that he has been a member of the RVIPF for the past 31 years. He agreed that the Claimant would have seen his handwriting over the years. He stated that he has had one signature over the years which he has maintained over the years.

- [47] He agreed that one of his sons had been convicted of a criminal offence and had been sentenced by the Claimant. He admitted that he loved his son and that he was not pleased about the fact that he had a criminal record.
- [48] He stated that he was not aware of the traffic accident involving the Claimant. He also told the Court that he has no knowledge of having signed the complaint in which the Claimant was a defendant. And finally, when the specific complaint was put to him, he denied that the signature imprinted on it belongs to him.
- [49] The next witness was Crown Counsel Herbert Potter. His witness statement was filed on the 16th July 2013. He stated that when the relevant file was referred to the office of the DPP, he was assigned to vet the same under the supervision of a reviewing senior counsel. He read the file, weighed the evidence and examined the file in a manner which would allow him to determine what charge would be appropriate.
- [50] He stated that the evidence presented disclosed that the Claimant was on the side of the road across from Panchie's food van, opposite the LIME building. That area of the road has 4 lanes of traffic. These include the bus lane, the lane which allows vehicles to proceed towards the roundabout, the lane which allows vehicles to proceed towards the Riteway and the lane which will allow vehicles to proceed to the Court House. After examining the evidence, he understood that the Claimant was parked in the bus lane in the opposite direction to the flow of traffic and she attempted to cross the two lanes (that is the lane which leads towards the roundabout and the lane which leads towards Riteway) and proceeded to enter unto the fourth lane leading towards the Court House.
- [51] Crown Counsel Potter stated that in his estimation the angular journey to that lane, contrary to the flow of traffic required due care and attention to avoid hitting or being hit by vehicles travelling lanes one to four. The fourth lane was rightfully

occupied by the driver Michael Cameron. Having considered the evidence he concluded that evidence matched the draft complaint which had been supplied by the RVIPF. His decision to charge was reviewed by the Senior Crown Counsel. The crown prosecutors had carriage of the matter and the laying of the charge would have been pursuant to instructions of the Director.

[52] He stated that he carefully considered the evidence and that all reasonable and sufficient care was taken in the execution of his duties in determining whether there was sufficient evidence to proffer the charge against the Claimant. He therefore concluded that there was reasonable and probable cause for laying the charge against the Claimant.

[53] When he took the witness stand, Crown Counsel Potter was permitted to amplify his statement. He told the Court that, he did not believe that he had reviewed the CCTV video footage prior to laying the charge. He stated that the events happened sometime ago and without having refreshed his mind from the file, he could say at this point, that he did not view the video footage before laying the complaint because in his view a *prima facie* case was already made out on the statements and the evidence provided in the file.

[54] In explaining the *prima facie* case, Crown Counsel Potter stated there were several triable matters which arose from the file. First, the Defendant was parked next to Panchie's Food van in an area where there is a **No Parking** sign and a **Bus Stop** sign. There are four lanes of traffic in the area where the Claimant was parked. The four lanes do not extend all the way down to the Court House. There are three lanes of traffic all going in the same direction and then there is a fourth lane which is next to the LIME Building which leads to the Court House.

[55] To attempt to get from where the Claimant would have been parked, she would have to cross two opposing lanes of traffic against the flow of traffic contrary to

section 17 of the Road Traffic Act. At the time the lanes were demarcated by white solid lines which prohibited crossing.

- [56] If the Claimant were to complete the manoeuvre which she was attempting in a left hand drive vehicle, she would have a blind spot. She would be able to see in front of her, but in order to see anything coming from her side; she would have to turn her head to the side which would take her attention away from traffic in front of her. According to Crown Counsel Potter, the Claimant violated several traffic rules and regulations including: no parking; being in a bus lane; going against the flow of traffic; crossing the solid white lines and entering the fourth lane of traffic without first ensuring that it was safe to do so and without ensuring that the other driver is aware of her intention to enter the lane.
- [57] He stated that he discussed his decision to charge with the DPP and with reviewing Senior Crown Counsel and she agreed with the decision to lay the complaint. He admitted that Clyde Potter is his brother. But he told the Court that he had never discussed a case with him. He stated that he was neither influenced by Ms Valerie Stephens or by Mr. Clyde Potter or anyone else.
- [58] When she cross-examined Crown Counsel Potter, the Claimant put the public prosecution charge vetting form to him. He identified his signature as the vetting counsel and Ms Benjamin's signature under reviewing counsel. Mr. Potter noted that there were a number of instructions directed to the investigating officer, PC Nakal. One of the instructions directed PC Nakal to send a copy of the CCTV footage to the DPP's office. Mr. Potter testified that notwithstanding that the outstanding matters raised in the action list, he was satisfied on the basis of the evidence presented that there was enough evidence to justify the complaint.
- [59] Mr. Potter agreed that the reviewing Counsel, Ms. Benjamin indicated on the charge vetting form that he should review the CCTV footage because the parties'

accounts differ. He was very clear that when he agreed that such footage could be very important evidence which could be added to the existing evidence in the case. However, he was of the view that even if it was not viewed, a prima facie case had already been made out on the existing evidence.

[60] But when he was asked whether he in fact viewed the footage prior to the charge being laid, Crown Counsel Potter's evidence was inconsistent and equivocal. When PC Nakal's statement was put to him, it became clear that PC Nakal had uplifted the footage on 12th September 2011. Crown Counsel Potter testified that he first viewed the footage on the computer at the Road Town Police Station shortly after the Officer was asked to make a copy. He stated that they later experienced problems getting the video to play. He instructed PC Nakal to take it to the specialist so that it could be repaired. It was eventually repaired but it could not be viewed on the computers at the DPP's offices. However, they eventually managed to view the video in the DPP's personal office.

[61] He testified that he honestly could not recall whether he had viewed the footage before instructing that the charges should be laid and he was unable to say whether the charges had already been laid by the time he viewed the footage at the Police Station. When he was re-examined, he indicated that the determination to lay charges against the Claimant would not have been different if he had been able to view the CCTV footage because it would simply have reinforced his position.

[62] However, in an erratic turn, when he was questioned further by the Court, Mr. Potter testified that he complied with the instruction of reviewing Counsel Ms. Benjamin and that he had viewed the CCTV footage before the charge was laid on 17th January 2012.

- [63] Turning to the Collision Report, he agreed that the final resting place of Michael Cameron's vehicle was 177 feet from the point of impact. He agreed that this was a significant distance which could lead to the conclusion that Mr. Cameron was speeding. He agreed that Mr. Cameron was not charged for reckless driving on account of his speeding or on suspicion that he was intoxicated. He agreed that at one point he had instructed that Mr. Cameron be charged for refusing to give specimen but he later withdrew this instruction when he recognized that there was no evidence that specimen had in fact been requested.
- [64] Mr. Potter denied that he took a one-sided view of the evidence or that he ignored the exculpatory evidence pointing to Mr. Cameron as the offender. He was of the opinion that there was no evidence upon which Mr. Cameron could be charged with reckless driving.
- [65] He agreed that careless driving is a traffic offence which would be recorded as part of one's antecedents. He agreed that the charge would require the Claimant, then a sitting magistrate to appear in court to stand in the Prisoner's dock in order to defend the charge, but he denied that he prosecuted the Claimant because of that improper purpose. He denied that his unwillingness to view the CCTV footage was consistent with an agenda of ensuring that the Claimant was charged at all costs.
- [66] He denied that he was aware that the Claimant had been interdicted from her post. He stated that he was not aware of any conflict in the magistracy which would mean that her colleagues could not adjudicate on the matter. He denied that his brother, Clyde Potter discussed the problems within the magistracy with him and he denied that such discussions would have led him to be conflicted. And he denied that he did not honestly believe in the Claimant's guilt.

- [67] The next witness for the Defence was Police Constable Andrew Davis. In his witness statement he stated that he reported to the scene of the accident along with PC Nakal at about 12:00 p.m. He testified that while he assisted with the investigation at the scene in the taking of measurements, PC Nakal was the primary investigating officer. Although he not recall PC Nakal making any declaration about who was at fault in the accident he stated that police officers are trained not to draw any conclusions prior to completing their investigations.
- [68] PC Nakal noted that from his assessment Mr. Cameron seemed a bit tipsy but not drunk. He stated that the normal practice is that the investigating officer would make an assessment of the driver's condition and if he was of the view that the driver was under the influence of drugs or alcohol then, he would take the driver to the Hospital to be analyzed.
- [69] A few days later, he was at work when PC Nakal was reviewing the CCTV footage of the accident in the presence of Inspector Gumbs. He happened to take a brief look at the footage but he made no suggestions. He had no further involvement with the matter. According to him, PC Nakal was the police investigator and he would have discussed the matter with his supervisor prior to laying the charge. PC Davis categorically denied that he had any influence whatsoever in whether the Claimant was charged because in accordance with police procedures, the investigating officer would prepare the file and make his recommendation. That file would be sent to the sergeant in charge of his shift who would review the file and send it through to the Inspector who would also review the file. The file would then go back down through the channels to the investigating officer with appropriate changes. The file would then go back up through the chain to the Inspector who would then forward it to the police court prosecutor. If there were any changes, the file would then be sent back to the inspector. Thereafter the file would go to the Director of Public Prosecutions who is ultimately responsible for all prosecutions.

- [70] He indicated that while he was a personal bodyguard for Magistrate Valerie Stephens, he appeared before the Claimant in a civil matter. He did not dispute that the Claimant had cause to issue a few bench warrants to secure his attendance in court; however he asserted that he held no malice towards the Claimant because she was simply doing her job.
- [71] When he was cross-examined PC Davis confirmed the evidence in his witness statement. Although he viewed the CCTV footage, he stated that he formed no opinion as to the Claimant's culpability. Although he was senior to PC Nakal in terms of years in the Force, he testified that they both hold the same rank and he denied that he influenced PC Nakal to take the view that the Claimant was at fault. He also stated that he holds no ill will against the Claimant and that he did not feel empowered when he was asked to investigate.
- [72] The final witness for the Defence was Police Constable Vidyanand Nakal. In corroborating PC Davis' evidence, he testified that he was assigned by his supervisor as the investigating officer and that PC Davis (who was merely senior to him in years) merely assisted him. He stated that after 9th September 2011, PC Davis had no further involvement in the investigation.
- [73] As part of his investigation, PC Nakal stated that he interviewed both drivers at the scene of the accident. The Claimant told him that she drove off from Panchie's Food van and stopped in front of Money Gram to let an oncoming vehicle pass. The Claimant further stated that she was stationery when the vehicle driven by Michael Cameron overtook her on the left hand side. She stated that when Mr. Cameron realised that he was going to collide with the bridge, he pulled to the right, hitting the front side of her vehicle. On the other hand, Mr. Cameron told him that he was not at fault because it was the Claimant who drove into him. According to Mr Cameron, he came around the roundabout and then made a right turn onto Fisk Lock Road. When he reached the Money Gram, he suddenly felt an

impact to the right side of his vehicle. He stated that he moved his vehicle from the actual scene of the collision and parked in the parking lot of the Fire Station because he was blocking traffic.

[74] PC Nakal stated that he interviewed no other witnesses at the scene. However he took measurements and examined the damage to both vehicles in the presence of both drivers. There was damage to the front left panel and the front left indicator light and front bumper of the Claimant's vehicle, while Mr. Cameron's vehicle sustained damage to the right rear passenger door and the right front passenger door and the right front panel.

[75] PC Nakal stated that after hearing the explanations of both drivers, he expressed the view that Mr. Cameron was at fault. PC Nakal admits that this was an error of judgment. PC Davis cautioned him against this and informed both drivers that after further investigations, the investigating officer would determine culpability.

[76] He stated that although he did observe that Mr. Cameron smelled slightly of alcohol, he did not consider that he behaved in a manner which suggested that he was under the influence of alcohol or any other substance. He stated that he appeared to be coherent and responsive. However, at the Claimant's insistence, he obtained Mr. Cameron's consent to undergo a blood test and they proceeded to the Hospital. While at the Hospital, Mr. Cameron refused to provide a blood sample.

[77] As part of his investigation PC Nakal obtained the CCTV footage on 12th September 2011 as well as a formal statement from Mr. Cameron. When he attempted to obtain a statement from the Claimant she refused to provide one. She also refused to provide her insurance documents or the estimates for the damage to her vehicle.

- [78] After reviewing the CCTV footage, PC Nakal stated that he made the determination that the explanation given to him by the Claimant at the scene of the accident was not the truth. He also determined that the Claimant was at fault because she drove into Mr. Cameron's path through a lane of oncoming traffic. It also appeared that she had parked in a "**No Parking**" bus only lane facing the direction of the High Court. The Claimant ought not to have been on that side of the road facing that direction because she was clearly facing oncoming traffic.
- [79] In order proceed in the direction of the High Court; the Claimant cut through a lane of oncoming traffic to get into the lane in which Mr. Cameron was travelling. At the time Mr. Cameron was in the proper and left lane.
- [80] After he reviewed the footage in the presence of Sergeant Gilbert, and Inspector Hedley, his position was reinforced. He then informed the Claimant of his findings and informed her that that the matter would not be pursued provided that she paid for the repairs to Mr. Cameron's vehicle. She however continued to insist that she was not at fault and she demanded to view the video.
- [81] Based on his determination that there was reasonable and probable cause to lay the charge against the Claimant, he prepared a file and submitted it to Sergeant Gilbert for vetting. The file would thereafter be sent to Inspector Headley and then the police prosecution department and then to the office of the Director of Public Prosecutions. He testified that he carried out the investigation to the best of his knowledge and with no intention of tarnishing anyone's name; he was simply his job. He asserted that no one influenced him in any way in the matter and that he came to his findings after his own investigation.
- [82] When he was cross examined, PC Nakal testified that in accordance with police protocol which prescribes that two officers are to attend an incident report, PC Davis accompanied him to the scene of the accident. He denied that PC Davis

attended the scene because he was a senior officer. He also denied that when PC Davis cautioned him at the scene he was “pulling rank” as a senior officer of many years. He stated that although PC Davis assisted with the taking of measurements, he had no input in deciding whether the Claimant was culpable. He stated that he never requested a statement from PC Davis because he did not believe that it was necessary as PC Davis had not become involved in the investigation.

[83] He stated that although the Claimant pointed out an eyewitness on the scene, he was unable to obtain a statement from that witness or indeed his contact information because by the time he got around to interviewing the individual he had left the scene. He has been distracted by the fact that Mr. Cameron had moved his vehicle.

[84] He confirmed that while he initially concluded that Mr. Cameron was at fault, after reviewing the CCTV footage he took position that it was the Claimant who was at fault. He stated that all traffic in the BVI must drive on the left hand side of the road. In order for the Claimant to proceed in the direction where she was going, she would have had to join the left lane. He stated that the Claimant was moving into the path of Mr. Cameron who was proceeding on his proper side of the road. He stated that the CCTV footage revealed that it was the Claimant’s vehicle which hit Mr. Cameron and not the other way around.

[85] PC Nakal also corroborated the evidence of Crown Counsel Herbert Potter. He confirmed that he did not provide the CCTV footage when he submitted the file because it was on a jump drive and not a DVD. He stated that Mr. Potter eventually viewed the video at the Police Station. He could not however recall if it was this was prior to 17th January 2013.

[86] He denied that he discarded any evidence which would exculpate the Claimant and point to Mr. Cameron as the offender. He stated that he could not conclude that Mr. Cameron was speeding and he denied that he discarded evidence that Mr. Cameron was speeding. Although he detected the faint smell of alcohol on Mr. Cameron, he testified that he did not think that it was necessary to mention it in his statement.

[87] He denied that he conducted the investigation in biased manner, or that he was improperly influenced to charge the Claimant. He also denied that he did not follow the evidence which pointed away from the Claimant's guilt. In fact, he stated that all of the evidence pointed towards the Claimant's culpability and not away from it.

[88] Finally, PC Nakal testified that he had no knowledge that the prosecution had been discontinued. He stated that he heard nothing further about the matter after the initial mention in Magistrate's Court.

COURT'S ANALYSIS AND CONCLUSIONS

[89] The classic rationale for the tort of malicious prosecution is set out in the case of **Wills v. Voisin**¹ :

"Now, as to the law relating to the claim for malicious prosecution, it is in the public interest, and it is a public duty, that offenders should be brought to justice. It is the obligation, as well as the right, of every individual to set the courts in motion whenever infringements of the law occur. The burden of so doing lies especially upon the police officers who are paid appointed guardians of the public peace. Nonetheless, it is entirely wrong that anyone should be subjected to legal process without reasonable and probable cause. Thus, the duty to prosecute and the right to be protected against unwarranted prosecution may often be so balanced as to make it difficult to resolve which ought to prevail. Hence, in the public interest, the law will stand by him who essays to discharge the duty against him who

¹ per Wooding CJ [1963] 6 WIR 50 at page 57

seeks to enforce the right, provided that in essaying to discharge the duty the prosecutor has not been actuated by malice.”

[90] It is well established that, there are four (4) elements which constitute the tort of malicious prosecution. These were identified by Wooding CJ in **Wills v. Voisin**:

“Accordingly, in an action for the vindication of the right to be protected against unwarranted prosecution, which is the action for..., malicious prosecution, a plaintiff must show

- (a) that the law was set in motion against him on a charge for a criminal offence;
- (b) that he was acquitted of the charge or that otherwise it was determined in his favour;
- (c) that the prosecutor set the law in motion without reasonable and probable cause; and that in so setting the law in motion the prosecutor was actuated by malice.”

[91] The burden of proof for malicious prosecution lies on the Claimant, and remains there throughout the case.² It is also well established that these ingredients must be proved by the Claimant on a balance of probabilities.

[92] In these proceedings, there was no dispute that the Claimant has discharged her burden of proving the first two elements. It is common ground that in Criminal Case No. 5 of 2012, the Claimant was charged on the 17th January, 2013 with the offence of driving without due care and attention contrary to section 30 of Road Traffic Act Chapter 218 of the laws of the Virgin Islands. This charge was later discontinued by a Notice of Discontinuance filed by the Director of Public Prosecutions on the 15th August 2014.

[93] The issues which arise for the Court’s determination are therefore:

1. Whether the Claimant has proved that the Defendants lacked reasonable and probable cause to proffer the charge against the Claimant.
2. Whether in so doing the Defendants were actuated by malice.

² see the dictum of Lord Justice Diplock in *Dallison v Caffery* [1965] Q.B. 348 at paragraphs 371 C-D

Reasonable and Probable Cause

[94] Turning to the first limb, the Court notes that the term “*reasonable and probable cause*” was defined by Hawkins J. in **Hicks v Faulkner**³ and approved by the House of Lords in **Herniman v. Smith**⁴ in the following way:

“I should define “reasonable and probable cause” to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”

[95] At page 192, Hawkins J continued as follows:

“The question of **reasonable and probable cause depends in all cases not upon the actual existence, but upon the reasonable bona fide belief in the existence of such a state of things as would amount to a justification of the course pursued** in making the accusation complained of.” Emphasis mine

[96] In **Cecil Kennedy v. Donna Morris & the Attorney General of Trinidad and Tobago**⁵ Sharma CJ applied the Halsbury’s definition of “reasonable and probable cause”:

“The absence of reasonable and probable cause is a question to be determined by the judge. The burden of proving it lies on the plaintiff. Halsbury’s Laws Vol. 45 (2) states:

“Reasonable and probable cause for a prosecution has been said to be an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of an accuser, to the conclusion that the person charged was probably guilty of the crime imputed.””

³ (1881) All ER 187 at 191

⁴ [1938] AC 305 at 316

⁵ Civil Appeal No. 87 of 2004

[97] Sharma CJ continued at paragraph [18] in this way:

“Further, as noted in **Fink et. al. v. Sharwangunk Conservancy Inc.** probable cause consists of “such facts and circumstances as would lead a reasonably prudent person in like circumstances to believe the plaintiff guilty.”

[98] Later, Sharma CJ again referenced the learning in Halsbury’s Laws of England He stated further that:

‘The grounds for the prosecutor’s belief therefore depend more on a reasonable belief in the existence of the facts to justify prosecution rather than the actual existence of such facts. The following passage from Halsbury’s Law is instructive in this regard:

“The presence of reasonable and probable cause for a prosecution does not depend upon the actual existence, but upon a reasonable belief held in good faith in the existence of such facts as would justify a prosecution. It is not required for any prosecutor that he must have tested every possible relevant fact before he takes action; his duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution. The belief in the existence of such facts as would justify a prosecution, or the belief in the accused’s guilt, may arise out of the recollection of the prosecutor, if he has always found his memory trustworthy, or out of information furnished to him by others and accepted by him as true.” Emphasis mine

[99] This statement of the law is critical because it is wholly inconsistent with the Claimant’s strongly held view that the Prosecution was obliged to investigate any defences which she could have advanced in respect of the charge.

[100] In **O’Hara v Chief Constable**⁶ the Court discussed the requirements which comprise ‘*reasonable grounds for the suspicion which the officer has formed*’ and stated the following at page 139:

“It is the arresting officer’s own account of the information which he had which matters, not what was observed by or known to anyone else.”

⁶ (1997) 1 All ER 129

[101] Looking first at the elements of the offence of driving without due care and attention it is clear that the Road Traffic Act does not define the terms “without due care and attention”. Fortunately, the Courts have filled that gap.

[102] In **McCrone v Ridgway**⁷ Lord Hewart CJ, held at page 158:

‘The words of the section are that it is an offence when a person drives a motor vehicle without due care and attention or without reasonable consideration for other persons using the road.

That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver.’ Emphasis mine

[103] In **Simpson v Peat**⁸ Lord Goddard CJ, delivering the judgment of the Court, stated at pages 27 – 28:

“The expression “error of judgment” is not a term of art; it is in fact one of the vaguest possible descriptions: it can be used colloquially to describe either a negligent act or one which, though mistaken, is not negligent. When one is considering Section 12, the marginal note of which is “careless driving,” it is in our opinion clear that a driver may not be using due care and attention although his lack of care may be due to something which could be described as an error of judgment. If he is driving without due care and attention it is immaterial what caused him to do so. **The question for the justices is: was the defendant exercising that degree of care and attention that a reasonable and prudent driver would exercise in the circumstances? If he was not they should convict; if, on the other hand, the circumstances show that his conduct was not inconsistent with that of a reasonably prudent driver, the case has not been proved.**” Emphasis mine

[104] It follows therefore that where a driver was exercising the degree of care and attention which a reasonable prudent driver would exercise, he ought not to be convicted of careless driving.

⁷ [1938] 1 All E.R. 157

⁸ [1952] 2 QB 24

- [105] In **DPP v Cox**⁹ Clarke J held that for justices to convict for driving without due care and attention, the prosecution must prove beyond a reasonable doubt that the defendant was not exercising the degree of care and attention a reasonable and prudent driver would exercise. This standard is objective, impersonal and universal, fixed in relation to the safety of other road users. Where the facts are such, in the absence of explanation or there is an inadequate explanation the defendant is careless.
- [106] So that in deciding whether to prosecute the Claimant, the Defendants would have had to determine that she departed from the standard of a reasonable, competent and prudent driver in the circumstances of the case. Therefore, in applying the test prescribed in **Hicks v. Faulkner**, the Court must first consider the subjective element, that is to say the knowledge held by the Defendants when they took the decision to prosecute.
- [107] It is apparent that the PC Nakal attended scene shortly after the accident. He interviewed both drivers and got a sense of their description of how the accident took place. He took the necessary measurements and prepared a collision report. He later obtained a statement from Michael Cameron and importantly, he obtained and viewed the CCTV footage of the accident.
- [108] Against this backdrop, is the bald declaration of innocence by the Claimant, who neglected or refused to provide her formal statement about the accident and refused to provide particulars of the damage to her vehicle.
- [109] In any event, the Police were able to provide their summary of the facts of the case when the file to the Director of Public Prosecutions. This summary indicated that:

⁹ (1993) 157 JP 1044

- i. The Claimant's vehicle was parked next to Panchie's food van facing the direction of the Fire Station.
- ii. The Defendant emerged from a parked area, driving her motor jeep on the opposite and wrong side of the road.
- iii. She stopped on the right side and wrong side of the road to let an oncoming vehicle pass.
- iv. She then drove to the proper and left side of the road into the path of Michael Cameron who was the driving in the same direction and who had the right of way on Fish Lock Road.
- v. The Claimant's vehicle collided with Mr. Cameron's vehicle causing damage.

[110] The investigation file was submitted to the Director of Public Prosecutions and reviewed by at least two crown attorneys.

[111] The knowledge which must be imputed to the ordinarily prudent and cautious man and which must be considered through the eyes of the police officers involved and the attorneys who reviewed the relevant file. They would have studied the evidence and determined that:

- i. The Claimant was emerging from a parked position on the right side of the road driving in the direction of the Court House. She was attempting to cross the two lanes to enter unto the left lane of traffic proceeding in the direction of the Court House.
- ii. In order for her to join the left traffic lane, she drove across the right lane of traffic into oncoming traffic where she narrowly missed colliding with a motor cycle rider driving in the opposite direction.

- iii. In attempting to join the left lane of traffic, the Claimant drove into the path of oncoming traffic, which would have been proceeding in both the right and left lanes. It is readily apparent that she intended to join the left traffic lane and in doing so, her vehicle was positioned in the path of the motor car driven by the Michael Cameron.
- iv. A collision occurred between the Claimant's car and the car driven by Michael Cameron.

[112] In these circumstances, the question arises whether an ordinarily prudent and cautious investigator would have concluded that the Claimant was probably guilty of the offence. It is now well established that the prosecutor is not required to be certain of the guilt of the person who is being prosecuted. The prosecutor is concerned only with the question of whether there is a case fit to be tried.

[113] In the Court's judgment, (having considered the totality of the evidence presented as well as the Virgin Islands Road Traffic Act) an ordinary prudent and cautious investigator would have concluded that it was probable that the Claimant was guilty of driving without due care and attention.

[114] Further, the Claimant has failed to establish that PC Nakal or Herbert Potter lacked an honest belief that the Claimant was probably guilty of the offence for which she was being prosecuted. The Court has taken cognizance of the so called "exculpatory evidence" pointing to the culpability of other driver involved in the collision. There is some evidence that Mr. Cameron was drinking on the night in question. Unfortunately, without consent, it is not possible to compel a blood sample and so there would be no way of knowing whether his alcohol level exceeded the statutorily prescribed levels or indeed whether it affected his driving.

[115] What is clear is that having observed Mr. Cameron, PC Nakal formed the view that he had not behaved in a manner which suggested that he was under the influence

of alcohol or any other substance. According to PC Nakal, Mr. Cameron appeared to be coherent and responsive. Nevertheless, (and no doubt prodded by the Claimant) PC Nakal continued this investigation by taking Mr. Cameron to the Hospital be tested. It is not disputed that Mr. Cameron later refused to submit to the blood alcohol test. It is also not disputed that he could not be legally compelled to do so under the laws of the Virgin Islands. The only course open to a prosecutor would be to charge him under section 26 of the Road Traffic Act and Crown Counsel Potter told the Court that while he had initially directed that Mr. Cameron be charged for failure to provide a blood sample, he was forced to reconsider. No doubt, in light of section 26 (2) of the Road Traffic Act.

[116] The Claimant has also contended that Mr. Cameron's speeding was ignored by the prosecutors. She submitted that the lapse of time in the CCTV footage is indicative of this. She contends that had he been driving at an appropriate speed he would have had sufficient time to prevent the collision. The Claimant suggested to the Court that the seconds which it took for Mr. Cameron's vehicle to arrive on the scene is indicative of the excessive speed at which he was travelling.

[117] Even if the Court accepts this inexperienced assertion, it could only mean that both drivers may have contributed to the collision through their failure to drive with due care and attention. It would not in the Court's judgment automatically exclude the Claimant's culpability.

[118] The Court finds that the Defendants had reasonable cause to believe that the Claimant drove her vehicle contrary to the directional flow of the traffic narrowly missing a collision with an oncoming vehicle. The Court further finds that at the time of the accident she was still proceeding along the right side of the road attempting to join the left traffic lane. While Mr. Cameron may have been obliged to keep a proper lookout on the road, the Claimant also had a duty to take care that she could safely enter the left lane of traffic in which he was proceeding.

[119] Moreover it does not detract from the contention that the Defendants had reasonable belief, held in good faith in the existence of sufficient facts as would justify prosecution. Judicial authorities all prescribe that a prosecutor is not required to test every possible relevant fact before he takes action; his duty is not to ascertain whether there is a defence, but whether there is reasonable and probable cause for a prosecution.

[120] In the Court's view, PC Nakal provided forthright evidence of the investigation and there was no evidence to suggest that his belief in the existence of the state of circumstances was anything but honest. It is also apparent that he the police laid the facts fully and fairly before legal counsel in the Office of the DPP who advised them that a prosecution was justified. In such circumstances and consistent with the dictum of Upjohn LJ in **Abbott v Refuge Assurance Co. Ltd**¹⁰ the Court finds the Police had reasonable and probable cause for the prosecution.

[121] Further, although the evidence of Herbert Potter was not consistent as to exactly when he viewed the CCTV footage, he plainly took the view that even without the footage, there was sufficient evidence to warrant prosecution. There really was no evidence from his conduct that he knew it was a groundless charge and yet persisted. Accordingly, it is the Court's view that the Claimant has failed to prove an absence of reasonable and probable cause on the part of the Defendants.

Malice

[122] Turning now to the second limb, the Claimant must also prove on a balance of probabilities that the Defendants were actuated by malice. According to the learned authors of the Fifth Edition of **Halsbury's Laws of England**¹¹:

¹⁰ [1962] 1 QB 432 at page 454 -455 and see *Burroughs v Attorney General* (1990) 1 TTLR 135 (High Court of Trinidad and Tobago)

¹¹ *Halsbury's Laws of England* Volume 97, (2010), 5th Edition at paragraph 639

“A claimant in a claim for damages for malicious prosecution or other abuse of legal proceedings has to prove malice in fact indicating that the defendant was actuated either by spite or ill-will against the claimant, or by indirect or improper motives.”

[123] In **Glinski v McIver**¹² the Court agreed that malice "*covers not only spite and ill-will but also any motive other than a desire to bring a criminal to justice*". This was by no means a novel statement of the law. The court in **Browne v Hawkes**¹³ considered the issue of malice as an element of malicious prosecution. Malice was defined by Cave J in the following way:

“Malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.”

[124] The Claimant relies on both aspects of the definition of malice. She highlighted a number of matters which she contends give rise to a finding that the Defendants were actuated by malice. First, she points to the involvement of Inspector Brewadney Howe. Having had an opportunity to observe his demeanour on the witness stand, the Court is satisfied that he was sufficiently truthful in his responses. He was not shaken in cross examination and his evidence was not successfully traversed by the Claimant. The Court therefore finds that he did not execute the complaint on oath and took no part in the investigation and prosecution of the Claimant.

[125] The Claimant then contended PC Davis would have been motivated by spite or ill-will as a result of his interaction with her. Again, having had an opportunity to observe his demeanour on the witness stand, the Court is satisfied that PC Davis was truthful in his responses. He testified credibly that he bore the Claimant no ill will and more importantly, he testified that he had no significant role to play in the

¹² [1962] AC 726 per Lord Devlin at 766

¹³ [1891] 1 QB 718

investigation or prosecution of the Claimant. This evidence was corroborated by PC Nakal and Claimant was unable to successfully disgorge their testimony. The Court therefore finds that PC Davis' role in the investigation was confined to the night of 9th September 2011. The Court further finds that PC Davis had no improper motive in cautioning PC Nakal against drawing premature conclusions at the scene of an accident prior to completing full investigations. This was entirely prudent and consistent with proper policing. The Court does not agree that the PC Davis in any way influenced PC Nakal in his investigations.

[126] The Claimant then asked the Court to consider the motives of Crown Counsel Potter. She contended that he would have had knowledge of matters relative to her interdiction and the conflicts within the magistracy and she alleged that such knowledge would have been shared by his brother who at the time worked for Magistrate Stephens. As a theory, this allegation is unsubstantiated and far-fetched. The Claimant asks this court to infer an improper purpose simply because of the relationship between these brothers. There is plainly no evidence to support a contention that Clyde Potter actually had any discussions with Herbert Potter relative to the Claimant. There is also no credible evidence that Herbert Potter would have been motivated to lay the charge by any collateral or improper purpose.

[127] The Court finds that the Claimant has failed to prove that there were any "conflicts of interest" or ulterior motives which could lead to the conclusion that Inspector Howe, PC Davis or Crown Counsel Potter had no honest belief in she committed the offence.

[128] The Claimant has not levied any specific allegation of spite or ill-will against PC Nakal. Instead, she contended that PC Nakal deliberately ignored or overlooked evidence which would have pointed to Michael Cameron's guilt. She also relied on the fact that Mr. Potter ignored the CCTV footage although he had been instructed

by his supervisor to view it prior to laying the charge. The Claimant referred the Court to the Jamaican case of **Earl Hobbins v The Attorney General & Constable Mark Watson CL 1998/H196** in which the Court found that there was overwhelming evidence pointing towards the Claimant's innocence and insufficient evidence to give the defendants reasonable and probable cause to prosecute.

[129] The Court finds that the case at bar is distinguishable on the facts. For the reasons already indicated, the Court finds that even if it could be said that the Defendants has paid scant regard to Michael Cameron's blameworthiness, this would not *without more* lead to the conclusion that the Defendants had no honest belief in the Claimant's guilt.

[130] In closing submissions, the Claimant also contended that there are a number of local authorities (of which the Director of Public Prosecutions ought to have been aware), which supports the culpability of the driver who strikes another even though that driver may have had the right of way on the road. According to her, a driver has a duty of care to all road users. This duty is owed to motorists joining a major road from a minor road¹⁴, a cyclist in the same lane as the driver¹⁵, and a pedestrian crossing the road¹⁶, all of whom a driver might claim are in his path. Mrs. Bunbury submitted that the Defendants would have been well aware of this legal principle.

[131] Mrs. Bunbury also submitted that the Director of Public Prosecution should have observed the prosecuting standards prescribed in the Code for Crown Prosecutors¹⁷:

"The duty of the crown prosecutors is to make sure that the right person is prosecuted for the right offence and that all relevant facts are given to the court. Crown Prosecutors must be fair, independent and objective. They must not let their personal views of the ethnic or national origin, sex,

¹⁴ R v McDonald Williams 2005 (unreported).

¹⁵ Cooksley v R 2003 CA

¹⁶ R v Wendall Varlack BVI unreported judgment No 27 of 2011

¹⁷ Blackstone's Criminal Code Appendix 4 and the Code of Crown Prosecutors 2010

religious beliefs, political views or sexual preference of the offender, victim or witness, influence their decisions. They must ... not be affected by improper or undue pressure from any source.”

[132] While this is certainly a laudable statement of principle, the Claimant has done little to prove that there has been any material breach by the Crown attorneys. The vetting procedures described by the police and the attorneys demonstrate that there would have been a multiplicity of persons who reviewed this matter. In order to find the Defendants liable, the Court would have to find that there was a global conspiracy or in the Claimant’s words a “common goal” to humiliate her and injure her reputation. In Court’s view the Claimant has done little to advance this implausible theory.

[133] Further, the Claimant referred the Court to the Code’s two stage test for prosecution - the evidential test and the public interest test. She submitted that where a case (such as this one) does not pass the evidential test, a prosecution should not proceed. In advancing these contentions, the Claimant has essentially circled back to her earlier argument that the relevant actors lacked reasonable and probable cause to prosecute her.

[134] It has been well settled, the absence of reasonable and probable cause may allow the Court to infer malice where the prosecution cannot otherwise be reasonably explained. In **Wills v. Voisin**, Wooding CJ stated that:

“...it might be well to state that no action lies for the institution of legal proceedings, however malicious, unless they have been instituted without reasonable and probable cause. In brief, malice and reasonable and probable cause must unite in order to produce liability...”

[135] While the Court accepts that in certain circumstances malice may be inferred from facts and matters relied on in support of the allegation of want of reasonable and probable cause, it is clear that a court must proceed cautiously. In **Browne v Hawkes**, Kay LJ said:

‘As I understand the argument for the plaintiff, it was said that the evidence to prove malice was that the defendant did not make proper inquiry as to the facts of the case. If that is all, and if that evidence is sufficient, the result would be that the finding on the first question put to the jury, that the defendant did not take proper care to inquire into the facts of the case, would, without more, determine the action in favour of the plaintiff. That cannot be so.’

[136] Like Kay LJ in **Browne v Hawkes**, this Court has carefully looked at the evidence in order to find any evidence of a sinister motive behind the Claimant’s prosecution. The Court has found none.

[137] The need for caution becomes even more critical when a claimant alleges that crown prosecutors have relied on poor evidence or have failed to investigate or make obvious and proper inquiries or have ignored relevant judicial precedents. The case of **Thacker v Crown Prosecution Service**¹⁸ is particularly instructive. In that case, the plaintiff appealed against dismissal of his claim for malicious prosecution brought against the Crown Prosecution Service. The English Court of Appeal held that actions for malicious prosecution, against the Crown Prosecution Service are to be examined closely to ensure that they are not a mere circumvention of negligence immunity:

‘The fact that someone in the Crown Prosecution Service may have been negligent or incompetent in the course of reaching a decision to commence or to continue the prosecution – whether by failing to evaluate the evidence correctly at the outset, or in failing to review the evidence after committal or in the light of new material – cannot, in itself, justify an inference of malice. If that is all the evidence that there is, the question of malice cannot be left to the jury. It is because, in many of these cases, that that will be all the evidence there is, an attempt to dress up a claim in respect of negligence or incompetence in the guise of malicious prosecution must fail.’

¹⁸ Times 29-Dec-1997; [1997] EWCA Civ. 3000

[138] In order to succeed in proving malice, the Claimant must show that a desire to secure the ends of justice was not the predominant motive of at least one of the Office of the DPP's employees involved in taking the steps necessary to progress the prosecution. There is in this case, no evidence upon which an alternative identifiable motive could be found on a balance of probabilities.

[139] The Court finds that positive evidence of mala fides is wholly absent in this case. For the reasons already set out herein, the Court does not agree that Defendant's lacked reasonable and probable cause to prosecute the Claimant. In light of this finding, the question of malice is simply not made out.

[140] In that regard, the Court is guided by the case of **Cecil Kennedy v. Donna Morris & the Attorney General**, where the Trinidad and Tobago Court of Appeal found that although the judge painstakingly went through the requirements and authorities for proving malice, the question of malice did not arise since there was sufficient evidence that the appellant was arrested for reasonable and probable cause.

[141] Accordingly, in the Court's judgment, the Claimant has failed to prove malice.

CONCLUSION

[142] It is apparent that the Claimant would have suffered some significant embarrassment as a result of a prosecution which was discontinued. Both the Claimant and her witness gave evidence that a search of the internet discloses the fact that she was charged and the fact that she was a magistrate at the time. She states that this will continue to affect her reputation in the legal profession indefinitely since this news remains a part of the World Wide Web. The Court has no doubt that this episode had the potential to impact her professional and personal life.

[143] However, having found that the Claimant has failed to prove two important elements of the tort of malicious prosecution on a balance of probabilities, this Court finds Claim must be dismissed.

[144] **In the premises, the Court's order is as follows:**

- 1. The Claim is dismissed.**
- 2. The Claimant is hereby ordered to pay to the Defendants' prescribed costs.**

[145] Finally, the Court conveys its sincere regrets for the delay in rendering the judgment in this matter and must thank Counsel and the Parties for their patience.

.....
Vicki Ann Ellis
High Court Judge