

Citation:

Date:  
File No: 0617863  
Registry: North Vancouver

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA**  
Civil Division

BETWEEN:

**DONALD WILLIAM JAMES SIPES**

CLAIMANT

AND:

**MUNICIPALITY OF WEST VANCOUVER**

DEFENDANT

PROVINCIAL COURT OF  
BRITISH COLUMBIA  
SEP 15 2009  
NORTH VANCOUVER  
SMALL CLAIMS

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE C. BAIRD ELLAN**

Counsel for the Claimant:

L. Track

Counsel for the Defendants:

A. Srivastava

Place of Hearing:

North Vancouver, B.C.

Dates of Hearing:

May 7, 26, and June 8, 2009

Date of Judgment:

September 15, 2009

[1] Mr. Sipes seeks a finding of liability arising out of an encounter with a West Vancouver police officer in January 2006.

### IDENTITY OF THE PARTIES AND NATURE OF THE CLAIM

[2] The defendant pointed out in submissions following the trial that the proper defendant is the Municipality of West Vancouver. The claimant had included the West Vancouver Police Department as a party, but it is not a legal entity. The case law establishes that in the case of a claim relating to police conduct, the employer, in this case the Municipality, is the proper defendant.

[3] This is a point that perhaps ought to have been raised and settled at the settlement conference; nonetheless the Department must be struck as a defendant, and I have therefore not included it in the style of cause, in these reasons.

[4] The defendant also takes issue with the characterization of the claim. While conceding that the pleadings have raised the issue of wrongful detention, the defendant says that false imprisonment, breach of *Charter* rights, and harassment are not open to Mr. Sipes to raise, for a variety of reasons.

[5] Mr. Sipes was not represented at the time when he filed his claim. The level of disclosure between counsel and the discussion of the claim that would have taken place at the settlement conference will have provided the defendant with some notice of the nature of the claim and the facts on which it is based: *Cappos v. Zurich Canada*, [1996] B.C.J. No. 2552. It was eminently clear after the claimant's evidence was led that his complaint arises out of a confrontation with Cst. Palmer of the West Vancouver police on a particular date, and as well that he alleges at least as background a history

of such confrontations, in particular with of a Cpl. Johal of that department. This much would have been clear, likely, after the settlement conference as well.

[6] In submissions, defendant's counsel argued however that no causes of action apart from wrongful arrest or detention were properly before the court. No adjournment was sought at the end of the claimant's case to address any deficiencies in the pleadings, nor did the defendant move for a non-suit in respect of any aspect of the claim. Counsel relied upon *Priority Building Services Ltd. v. Ali*, 1999 CanLII 5329 (BCSC), in arguing that although Small Claims pleadings are generally permitted some imprecision, the Notice of Claim in this case is insufficient to raise separate causes of action beyond wrongful arrest or detention.

[7] In submissions claimant's counsel advanced claims of false arrest and false imprisonment, submitting that there is little distinction between them: *Chopra v. T. Eaton Company*, [1999] A.J. No. 277. Essentially, the claimant alleges that Cst. Palmer's actions were an unauthorized trespass to his person, and that the detention was motivated by malice on the part of Cpl. Johal, arising out of his history of dealings with the claimant. The latter allegation would arguably be covered by the claimant's use of the term "harassment" in the Notice of Claim.

[8] The issue of whether harassment or breach of *Charter* rights are separate causes of action that must be specifically pleaded is one I find I need not decide here. As I characterize it, and indeed as it is characterized by both counsel, the claim is one of wrongful arrest or detention arising from the interaction between Mr. Sipes and Cst. Palmer on January 25, 2006. Further I agree with claimant's counsel that the tort of

false imprisonment goes largely hand in hand with one of false arrest, and arises on the facts, the pleadings, and pre-trial proceedings in this case. No prejudice or unfairness will arise from a decision addressing both of these causes of action. I do agree with defendant's counsel that no separate causes of action called "harassment" or "breach of Charter rights" should be considered in this case, though both of those issues are relevant as background and context to the claim.

[9] During the trial, defendant's counsel took issue with the admissibility of a printout from the police computer of reported inquiries about Mr. Sipes. I agreed that this documentary evidence did not itself establish that encounters had occurred between officers and Mr. Sipes, and I agree with the defendant's submission that it does not form the foundation of a separate claim of harassment nor does it raise separate causes for complaint. As pointed out by the defendant, many or all of those encounters are statute-barred, in any event.

[10] The claimant relied upon the document as support for his belief in a pattern of harassment. He also testified, based on the printout, as to his own recollection of a number of the encounters documented in it, in particular several with Cpl. Johal. I ruled that the printout was admissible for the truth of its contents only to show the number of police computer inquiries that had been made about Mr. Sipes, but is admissible as well to refresh his memory and support his recollection of the number of encounters.

[11] Therefore, although I agree that the claimant has not raised separate causes of action arising from prior encounters between Mr. Sipes and the police, the court is not prevented from considering the printout with Mr. Sipes's evidence as background to the

events of January 25, 2006, nor is the defendant relieved from the evidentiary burden of responding to it, if it raises issues relevant to the claim of false arrest or imprisonment.

## **FACTS**

[12] Mr. Sipes was walking west on Marine Drive in West Vancouver shortly after 11 a.m. on January 25, 2006, when Cst. Palmer approached him and asked to talk to him. Cst. Palmer testified that he was investigating a complaint of an attempted fraud at Park Royal Shopping Centre, from which he had a description of an individual with short spiky dark hair and a leather or shiny jacket, along with other general characteristics.

[13] Mr. Sipes said he had been waiting for a bus at Park Royal but left on foot at about 11 a.m. after checking to see that the next bus arriving there was not for another 15 minutes. He walked briskly as was his habit. He was wearing running shoes, jeans, a red hoodie, and a black puffy ski jacket. He had his hood up as it was raining lightly.

[14] Mr. Sipes has lengthy dark, wavy hair, extending below his collar bone, which he said would not have been completely covered by the hood. He believed that the front part of his hair would have been waving in the breeze as he walked along.

[15] Before Cst. Palmer approached him, Mr. Sipes noticed a marked police car pass him heading east. He said he recognized the driver as Cpl. Johal, an officer with whom he'd had several prior encounters. He said he believed that Cpl. Johal had been warned not to stop or confront Mr. Sipes because of a complaint he had made previously. Mr. Sipes said he "freaked out" when he saw him, but carried on walking down the street. Shortly after that, Cst. Palmer came westbound in his police car from behind Mr. Sipes to go and park ahead of him in the lot of a service station.

[16] As he crossed the street toward the station, the officer rolled down his window and yelled, "Hey you, come here." Given his history of experiences with the police and in particular Cpl. Johal, Mr. Sipes said, he thought, "Oh no, here we go again." He replied "no" and kept walking, past the service station. Cst. Palmer followed him on foot, saying, "I want to talk to you."

[17] Mr. Sipes said something like, "I have nothing to say," or "I decline to participate in your questionnaire," and, "Leave me alone unless I am under arrest." Cst. Palmer asked why he would not talk to him and Mr. Sipes said he didn't have to unless he was under arrest, and asked Cst. Palmer if he was under arrest. They went back and forth like this for a while, and then Cst. Palmer told Mr. Sipes he was under arrest for investigation, or something like that, but did not offer any further information, and seemed confused as to the reason.

[18] Cst. Palmer's evidence was largely consistent with Mr. Sipes's regarding the nature of their interactions. He said he was responding to a complaint from Park Royal, the nature of which I will relate in more detail shortly. Cst. Palmer said he had been alerted to Mr. Sipes's presence in the area by Cpl. Johal who told him over the radio that he had seen someone who might be "a good check" in relation to the Park Royal investigation. Cpl. Johal did not identify this individual as Mr. Sipes.

[19] Cst. Palmer said he could not see Mr. Sipes's hair initially, as Mr. Sipes walked toward him while he was in his car. He said his purpose in asking to talk to him was to get a closer look at the hair to confirm whether the hair style was anything resembling the description.

[20] Cst. Palmer said he was surprised at Mr. Sipes's anger when he approached him. He recalled that he told him he did not have to talk to him unless he was under arrest and to "fuck off," and continued to walk. Cst. Palmer said when he followed Mr. Sipes on foot he was continuing his investigation of the Park Royal incident, but was also concerned by Mr. Sipes's demeanour.

[21] Cst. Palmer said he asked Mr. Sipes for identification, and Mr. Sipes said he would have to arrest him. Cst. Palmer then told Mr. Sipes he was under detention for investigation of a suspicious person. He said that Mr. Sipes "indicated" he intended to carry on, so Cst. Palmer grabbed him by the jacket sleeve and Mr. Sipes pulled back very suddenly. He told Cst. Palmer he had damaged his jacket. Mr. Sipes said that Cst. Palmer had grabbed him by both shoulders, ripping his jacket zipper open and popping off the zipper head. He brought a jacket with a broken zipper to court.

[22] Cst. Palmer said he then again told Mr. Sipes he was under detention, at which point Mr. Sipes gave his name and date of birth. Cst. Palmer checked him on the police computer.

[23] Cst. Palmer said in cross-examination that when he first saw Mr. Sipes he could see that his hair was black but not whether it was spiky. However, he later agreed that Mr. Sipes's hood had come off his head at some point while he was walking and while Cst. Palmer was following him on foot before he stopped him. He also agreed that once he saw his hair, Mr. Sipes was no longer a suspect. When asked why he then continued to pursue him, Cst. Palmer said he had not "decided to exclude" him from the Park Royal investigation, and he was concerned about his angry demeanour. He later

admitted he had also arrested and handcuffed Mr. Sipes, apparently after he had determined he did not match the Park Royal description, and that he had not written this in his notes, though he agreed it was an "important detail". He said he took responsibility for leaving it out but "it was not intentional."

[24] Once Mr. Sipes's name was cleared on the computer, Cst. Palmer unlocked the handcuffs and let him go. He agreed he expected Mr. Sipes to make a police complaint. He said he did not have the opportunity to apologize to him, because Mr. Sipes left as soon as he told him he was free to go.

[25] In relation to the Park Royal complaint, Cst. Palmer identified a "General Occurrence" computer printout of an entry he made. It outlined a complaint received from a security guard that a suspicious male without identification or business cards had "attempted to obtain cash from store employees in Park Royal Village, offering 90 percent discount on service at 'Naomi's Waxing Studio'." The entry describes the male as "Caucasian, approximately 25 years of age, 5'10" 160 lbs, skinny, with black spiky hair gelled and short, wearing a black leather jacket, black pants, black shoes, and ...observed to emphatically gesture with his hands when speaking". It notes that the male was "gone on arrival", that patrols were negative, and members on patrol were told to be on the lookout for the male. The entry also states, "File generated to record description of subject male for future reference," and ends with, "File Concluded."

[26] Cst. Palmer testified that the entry was made contemporaneously with his taking the complaint from the security guard. He did not make notes in his notebook, prepare a police report, or conduct interviews of anyone at Park Royal, other than speaking to the



security guard who he said had received the complaints from “store employees” about this individual, and asking a police dispatcher to check the name of the waxing studio in a West Vancouver business registry. The names of the stores are not included in the computer entry, nor does it contain a note regarding the business registry check.

### **CREDIBILITY**

[27] As will be clear from this brief summary, there were several significant internal inconsistencies and admissions against interest in Cst. Palmer’s evidence regarding the sequence of events, the actions he took, and his reasons for doing so. Significantly, he conceded that he had grounds on which to rule out Mr. Sipes as a suspect in the Park Royal complaint, prior to stopping him, when he saw his hair with his hood down. He testified that prior to that he could not tell whether the hair was spiky though he could see the colour.

[28] I had some trouble with accepting that he could see enough hair to tell the colour but not see whether it was spiked, particularly in light of the type of hair that Mr. Sipes has and the distinct likelihood that it was not fully confined under his hood. In any event, however, Cst. Palmer admitted he had seen that the hair style did not remotely match the description before he stopped Mr. Sipes and placed his hands on him.

[29] He failed to even make a note that he had arrested and handcuffed Mr. Sipes, even though he anticipated that Mr. Sipes would file a complaint, and he declined to mention these details in his testimony in chief. He provided no grounds whatsoever for an arrest.

[30] While defendant's counsel pointed to inconsistencies, imprecision and overstatement in parts of Mr. Sipes' evidence, I find that none of the bases on which his evidence was challenged raised significant concerns regarding his credibility as to the events of January 25, 2006, or the fact and general nature of his prior interactions with Cpl. Johal.

[31] With all due respect, therefore, I find that where there are conflicts in the evidence, although there were relatively few, I accept the evidence of Mr. Sipes over that of Cst. Palmer. I find as well that there is little basis on the evidence given by Cst. Palmer or provided by the defendant on which to reject the version of events regarding their interaction provided by Mr. Sipes, and I accept his version.

[32] I also have some difficulty with whether Cst. Palmer and Cpl. Johal were engaged in an active investigation of the suspect from the Park Royal incident when Mr. Sipes was stopped. Cst. Palmer did nothing at Park Royal to investigate the complaint other than take a hearsay statement from a security guard. The entry he made in the police computer noted only that the file was generated to record the description "for future reference". Cst. Palmer had no leads on where the suspect had gone, and collected no further evidence regarding the description or complaint before leaving Park Royal. If the intention was to look for and interview a person connected with an offence, I would have expected that the first thing Cst. Palmer would have done would be to interview the merchants involved and confirm the details of the complaint. It appears from the documentation filed that this was never done.

[33] It is not the court's job to second-guess police procedures, but in the absence of any further documents supporting the existence or pursuit of an investigation of this complaint, I have difficulty accepting entirely the genuineness of Cst. Palmer's or Cpl. Johal's reliance on this investigation as a basis for the stop of Mr. Sipes. Indeed, Cst. Palmer's own description of the allegation was that it "seemed suspicious".

## ANALYSIS

[34] The defendant takes the position that Cst. Palmer had articulable cause, based on objective and subjective grounds, to detain Mr. Sipes. Defendant's counsel submits that the allegation of an attempted fraud at Park Royal, coupled with the description of the suspect, provided a basis on which to conclude that there was a "nexus" between Mr. Sipes and a recent criminal offence, and that his reaction to the officer raised further suspicions and concerns for officer safety, and thwarted Cst. Palmer's efforts to rule him out as a suspect.

[35] There is no question that Mr. Sipes was detained in this case: *R. v. Suberu*, 2009 SCC 33. The issue here is whether the detention was lawful. As pointed out by the defendant in submissions, the law requires that in order to be Charter-sanctioned, a detention must be based on a "clear nexus between the person stopped and a recent or ongoing criminal offence": *R. v. Mann*, 2004 SCC 52. In addition, it is well established that a detention or arrest must be based upon reasonable objective and subjective grounds: *R. v. Storrey*, [1990] 1 S.C.R. 241. The claimant has alleged in this case that the detention was made without grounds, and the burden falls upon the defendant to establish that there were grounds.

[36] I have already indicated my difficulty in completely accepting that Cst. Palmer was pursuing an investigation at the time when he stopped Mr. Sipes. Claimant's counsel challenges whether the officer in fact believed an offence had been committed and submits that the defendant has therefore not established that Cst. Palmer had the required subjective belief to support a detention, under *Mann*. It is difficult in light of the evidence to disagree. In the absence of any details beyond the hearsay report of the complaint recipient as to what he had been told about the offence, it is far from clear what Cst. Palmer would have expected to achieve by speaking with the suspect before performing an investigation of the crime. Even without the description issue, therefore, support for a stop would in my view have been tenuous.

[37] However, the real problem for the defendant in this case is that before Cst. Palmer detained, grabbed, and then arrested and handcuffed Mr. Sipes, he admittedly had information which, in his own mind, ruled him out as a suspect. By Cst. Palmer's own admission, Mr. Sipes' hood had come off at that point, and once he saw his hair he did not believe him to be a suspect. While he justified his actions on the basis that he had not "decided" to eliminate him, his subjective belief, if he had any at that point, was devoid of objective support. The "shiny" jacket alone was entirely insufficient. The rest of the description was either generic or dissimilar.

[38] I find that there was no basis for a conclusion that Mr. Sipes was connected with any criminal activity at the point when Cst. Palmer stopped him, placed his hands on him, arrested and then handcuffed him.

[39] Cst. Palmer also stated he was concerned with and “distracted by” Mr. Sipes’s angry demeanour. I have indicated that with respect to their interaction I accept the evidence of Mr. Sipes. It appears he was resistant, but not confrontative or aggressive.

[40] A hostile reaction to the police in those circumstances would not provide grounds for detention. Mr. Sipes’s reaction amounted to verbal and assertive resistance to Cst. Palmer’s request to speak to him. It was no more than a challenge to the officer’s basis for wishing to speak with him. He did not flee; he simply resisted by questioning the officer’s authority and continuing on his way.

[41] There was no basis in Mr. Sipes’s behaviour for a concern for officer safety, nor if there were could that alone provide justification for a stop, let alone arrest and handcuffing, in the absence of a separate cause to detain.

[42] Mr. Sipes said he was not told he was under detention for investigation of the Park Royal incident, which I accept, nor was he asked to remove his hood. Had Cst. Palmer simply explained that he wanted to rule him out and asked to see his hair at the outset, Mr. Sipes may have complied, and there would have been no need to go any further. In my view, Mr. Sipes’s resistance and hostile demeanour was at least partly explained, and then exacerbated, by the officer’s actions.

[43] It is relevant that Mr Sipes did not offer physical resistance once Cst. Palmer told him he was under detention. The ensuing arrest and handcuffing of Mr. Sipes, even on the evidence of Cst. Palmer himself, was made without any grounds at all, and can only be seen as retaliation for Mr. Sipes’s lack of cooperation.

[44] I go on to consider whether there is any relevance to the prior involvement of Cpl. Johal in instructing Cst. Palmer to stop Mr. Sipes. Having seen Cpl. Johal minutes before explains Mr. Sipes's anxious state of mind, but it also raises significant issues as to the motivation for the stop. Given their prior dealings, it seems likely that Cpl. Johal would as easily have recognized Mr. Sipes as Mr. Sipes recognized him. We know from Cst. Palmer's evidence that Cpl. Johal did see Mr. Sipes, because he alerted Cst. Palmer to his presence.

[45] Surprisingly, Cpl. Johal did not testify, so the court is without explanation regarding his motivation for telling Cst. Palmer to stop Mr. Sipes, or whether he did in fact recognize him. Coupled with what I find to be tenuous support for the genuineness of the investigation, the court is left to question not only the existence of legal justification for the stop, but whether it was indeed, as Mr. Sipes suspects, prompted by improper motives.

[46] Mr. Sipes alleged that he believed Cpl. Johal had been told not to stop him because of the number of times he had previously done so. This allegation was not refuted by the defendant. If true, it underscores the question of whether Cpl. Johal recognized Mr. Sipes, or if he did not, why not. In the absence of testimony from Cpl. Johal, there is an available inference that he intentionally directed Cst. Palmer to stop Mr. Sipes and used the complaint from Park Royal as a convenient justification.

[47] Defendant's counsel argues that the court should not subject the police to a standard of perfection and should make reasonable allowances for the exigencies of police work. At the same time, counsel concedes that it is for the defendant to justify the

detention and arrest and to establish on the evidence that they accorded with the applicable legal standard of reasonable objective and subjective grounds.

[48] Far from perfection, I find on the evidence that the standard in this case fell well below the threshold for investigative detention, let alone arrest. The claimant has established that he was falsely arrested and imprisoned.

### CONTRIBUTORY NEGLIGENCE

[49] The defendant submits that Mr. Sipes was partly responsible for the wrongful detention because of his unreasonable resistance to Cst. Palmer's request to speak to him. The defendant relies upon *Teece v. Honeybourn*, [1974] 5 W.W.R. 592 (BCSC), in which a young man who was shot and killed in the process of resisting arrest was found 80% at fault within the meaning of that term in the *Contributory Negligence Act*, R.S.B.C. 1960, c. 74. That case has been followed in a number of BC cases involving unjustified and excessive use of force by police, to find that plaintiffs engaged in unlawful activities at the time of a lawful arrest were partly at fault for their injuries: *C.(T.L.) v. Vancouver* (1995), 13 B.C.L.R. (3d) 201 (S.C.); *Berntt v. Vancouver (City)*, [1997] 4 W.W.R. 505 (reversed on other grounds: 1999 BCCA 345); *Anderson v. Port Moody (City) Police Department*, 2000 BCSC 1194.

[50] In my view this line of authorities has no application to the facts of this case. The claimant cannot be said to have been acting unlawfully or negligently in resisting what I have found to be an unlawful detention. He bears no fault in the circumstances.

[51] The issue of contributory negligence in a case of false arrest was considered in *Al-Harazi v. Niagara (Regional Municipality) Police Services Board*, [2005] O.J. No.

1859. At para. 19, L.J. Walters J. stated:


The defendant argues that but for the negligence of the plaintiff in not having his bail papers with him, this entire incident would have been avoided and asks that I find the plaintiff contributorily negligent. This claim must fail. There was no obligation on the plaintiff to carry the papers with him. The plaintiff owes no duty of care to the defendant. Without a duty of care there can be no breach, and therefore no liability.

[52] I find there is no basis for a finding of fault on the part of the claimant.

## CONCLUSION

[53] I conclude that the defendant is liable for the false detention, arrest and imprisonment of the claimant on January 25, 2006. Cst. Palmer has not been sued personally so I need not consider at this stage whether he was malicious or grossly negligent such that he may be fixed with personal liability.

[54] The existence of malice or intent on the part of Cpl. Johal or both officers may however have relevance to the issue of damages. As that aspect of the trial has been severed from the question of liability I will leave my conclusions in relation to those issues until after I have heard the further submissions of counsel.

  
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The Honourable Judge C. Baird Ellan  
Provincial Court Judge