

## 12. Civil jury trials

### 12.1 When is a jury trial ordered?

This is governed by s.66 County Courts Act 1984 (CCA). (A comparable provision can be found in s.69 Supreme Court Act 1981.)

Section 66 provides for the following categories of proceedings:

1. Certain specified proceedings (admiralty proceedings and some proceedings under housing legislation) where trial will always be without a jury.
2. In all other county court proceedings, trial to be without a jury unless the court otherwise orders on application: this application must be made within 28 days of service of the defence. (A jury trial can thus result only from a judicial decision.)
3. There is trial with a jury (unless the court is of the opinion that the trial requires any prolonged examination of documents or accounts, or any scientific or local investigation which cannot conveniently be made with a jury), where the court is satisfied that there is in issue:
  - (a) a charge of fraud against the party making the application; or
  - (b) a claim in respect of libel, slander, malicious prosecution or false imprisonment; or
  - (c) any question or issue of a kind which may be prescribed.

Jury trials in cases other than those for which s.66 specifically provides for jury trial can be expected to be rare. Circumstances would have to be exceptional, for example, a personal injury action to be tried by jury. However, where false imprisonment is alleged and there is also a claim of assault, it is appropriate for both claims to be tried together by a jury.

### 12.2 The jury

The following points apply:

1. A jury of eight is provided for by s.67 CCA.
2. A verdict on which only seven agree is acceptable, by virtue of s.17(2) Juries Act 1974. A majority verdict of seven may only be accepted if it appears that the jury has had such period of time for deliberation as seems to the court reasonable, having regard to the nature and complexity of the case.
3. Also to be noted is that, by virtue of s.17(5) of the 1974 Act, parties may consent to a majority less than just referred to, or agree to proceed with an incomplete jury, for example, if a juror becomes ill.

### 12.3 Points of practice

Bear in mind the following points:

1. Most county court trials involve claims against the police for false imprisonment, often with associated claims for battery. The claimant is usually legally aided and represented by counsel.
2. A jury trial will generally be allocated to the multi-track.
3. Where, in particular, a trial is in a combined court centre, the jury may be expecting to try a criminal case, and may well have tried criminal cases already.
4. Once the jury have been empanelled, it is helpful to explain the difference between a jury trial in the county court and in the crown court, to give a thumbnail sketch of the issues likely to arise, and, in a police case, to explain why the chief constable is the defendant. The jury are also likely to be helped by information about sitting times, the estimated length of trial, and the possible need for legal submissions in the absence of the jury.
5. The jury ordinarily tries both disputed issues of fact on liability as well as damages. It is a conventional practice for the jury to be asked to determine liability first, and only to retire again to consider damages in the event that they find in favour of the claimant. (A split trial may on occasion be ordered, and it may even be ordered that a jury determine the issues of fact on liability, with trial on quantum then to be by judge alone.)
6. Disclosure of documents extends to such documents held by the police as custody records and charge sheets.

### 12.4 Special verdicts

A principal difference between civil and criminal jury trials is that in civil trials, the jury is required to answer certain specific questions. It is for the judge to decide whether there is sufficient evidence to go to the jury on a particular issue.

The judge has the ultimate responsibility for separating fact from law and identifying the issues of fact in the case, and for the consequential framing of the specific questions for the jury to answer. In practice, counsel may agree the questions and submit them for approval, or may submit to the judge rival questions to pick from or amend. It is generally helpful for the judge to consider with counsel the wording of questions ahead of closing speeches, and as early as seems appropriate.

According to which party has the burden of proof on a specific matter, a question should be posed such as: 'Has/have the claimant/police proved that it is more likely than not that...?' (There is something to be said for referring to the name of the claimant (instead of 'the claimant'): *Igwemma v Chief Constable of Greater Manchester Police* [2002] Q.B. 1012.)

If there is a case to go to the jury, closing speeches should reflect the questions identified, and the judge then sums up the relevant law and facts.

### 12.5 The legal framework – arrest

Police cases often centre on torts which involve trespass to the person, namely assault and battery and false imprisonment. If a claimant is able to prove that he was probably assaulted or detained, there is then an onus upon the defendant to establish lawful justification for this. Common defences are lawful arrest and the use of reasonable force in the execution of an arrest. Thus many cases turn on powers of arrest and the lawfulness or otherwise of an arrest. A wrongful arrest is not itself a tort – where a person is detained unlawfully, there is false imprisonment.

A police constable has a common law power to arrest for an actual or imminent breach of the peace.

#### *12.5.1 Arrests subsequent to 31 December 2005*

The key statutory provisions on arrest are s.24 and s.24A Police and Criminal Evidence Act 1984 (PACE) – a new s.24, together with s.24A, having been substituted by the Serious Organised Crime and Police Act 2005.

Under the new provisions, a constable may arrest without a warrant:

- (a) anyone who is about to commit an offence
- (b) anyone who is in the act of committing an offence
- (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence
- (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.

Further, if a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty. In addition, if an offence has in fact been committed, a constable may arrest without warrant anyone who is guilty of the offence, and anyone whom he has reasonable grounds for suspecting to be guilty of it.

The police powers referred to above are not restricted to any particular categories of offence (a significant difference from s.24 as originally enacted, with its provision for categories of ‘arrestable offence’). However, the power of arrest is only exercisable if the constable has reasonable grounds for believing that for any of the several reasons mentioned in subsection (5) of s.24 it is necessary to effect an arrest. These reasons include allowing the prompt and effective investigation of the offence or of the conduct of the person in question, and the prevention of any prosecution for the offence from being hindered by the disappearance of the person in question.

It remains the case that there are significant differences between powers of arrest for police officers and powers for other persons, such as, for example, store detectives. For those other than police officers, powers under s.24A PACE depend upon whether an offence is an indictable offence.

A person other than a constable may arrest without a warrant anyone in the act of committing an indictable offence, or whom he has reasonable grounds for suspecting to be committing such an offence. Further, where an indictable offence has been committed, a person other than a constable may arrest without warrant anyone guilty of the offence, or whom he has reasonable grounds for suspecting to be guilty of it. And in each of these cases, the power of arrest is only exercisable if two requirements are met:

1. The person making the arrest has to have reasonable grounds for believing that for any of certain specified reasons it is necessary to make an arrest.
2. It must appear to the person making the arrest that it is not reasonably practicable for a constable to make it instead.

### *12.5.2 Arrests prior to 1 January 2006*

For arrests prior to 1 January 2006, s.24 PACE, as repealed, provides that a police officer is protected if (among other circumstances) he has reasonable grounds for suspecting that an arrestable offence has been committed, and that it has been committed by the person whom he has reasonable grounds for suspecting to be guilty of the offence. Thus an arrestable offence is not required to have been committed – this contrasts with the position of someone such as a store detective.

## 12.6 Trial

### *12.6.1 False imprisonment*

It is for the claimant to prove on a balance of probability that he was physically detained. This is not normally in dispute. The onus then shifts onto the defendant.

The defendant has to prove the existence of facts amounting to reasonable grounds for suspicion, where such grounds are said to have given rise to the power to arrest. Perhaps surprisingly, whether there were reasonable grounds is a question for the judge alone to decide, and not a question of fact for the jury (*Dallison v Caffery* [1965] 1 QB 348).

If there is no dispute as to the relevant facts and the only issue on the arrest is the reasonableness of the arrest, the judge thus proceeds alone to a decision on this. However, if the facts amounting to reasonable grounds for suspicion are in dispute, they require to be determined by the jury by answering specific questions.

The defendant must also prove that the power of arrest was properly exercised and true reasons for arrest were given to the claimant, unless it was impracticable to do so. Any disputed facts here are for the jury to determine.

### ***12.6.2 Malicious prosecution***

In practice, this is much less frequent than trials for false imprisonment.

The claimant bears the burden of proving every element of the tort as well as damage. The claimant must prove the following:

1. That the claimant was the subject of a criminal prosecution which eventually terminated in his favour, whether by abandonment, verdict or on appeal. (Query the position where there was a stay for abuse of process.)
2. The prosecution was initiated or continued by the defendant. (Even if the decision to prosecute was made by the CPS, a police officer can be liable if he deliberately misled the CPS. And someone who falsely and maliciously gives information to a police officer can be liable in circumstances addressed in *Martin v Watson* [1996] 1 A.C. 74.)
3. The defendant acted without reasonable and probable cause. This involves these two distinct elements:
  - (a) The absence of objective facts giving rise to a reasonable and probable cause to justify the commencement or the continuation of the prosecution.
  - (b) That, notwithstanding the existence of reasonable and probable cause in an objective sense as determined by the judge, the defendant did not honestly believe that the facts justified the prosecution.
4. The defendant was activated by malice, i.e. a motive other than a proper desire to initiate the criminal process. This might be proved by showing that an officer lied, or planted or fabricated evidence – all issues for the jury to determine.

### **12.7 Damages**

Quantum of damages is ordinarily for the jury to determine. Although at one time no monetary guidance could be given, directions to juries on damages are now subject to the guidelines set out in *Thompson v Commissioner of Police of the Metropolis* [1997] Q.B. 813.

If the jury finds for the claimant on liability, by deciding disputed issues of fact in his favour, the judge hears submissions from counsel on quantum in the absence of the jury. The judge then directs the jury on damages, and the jury retires again to decide the issue or issues of damages.

The heads of damage are:

1. basic – otherwise referred to as ordinary
2. aggravated
3. exemplary.

### **12.7.1 Basic damages**

These are entirely compensatory. There may be special damages, such as loss of earnings.

In cases where there is personal injury, it is useful to inform the jury of a range of awards for similar injuries. Reference can be made to the latest edition of the JSB's *Guidelines for the Assessment of General Damages in Personal Injury Cases*. These guidelines take account of *Heil v Rankin* [2001] Q.B. 272. In that case there was a general review of damages for pain, suffering and loss of amenity. There resulted no increase in awards then below £10,000, with a tapered increase up to a maximum of one third for awards then above that level.

In *Thompson v Commissioner of Police of the Metropolis* [1997] Q.B. 813, it was suggested that in a straightforward case of false imprisonment, the starting point was likely to be about £500 for the first hour. The sum to be awarded thereafter should be on a reducing scale, 'so as to keep the damages proportionate with those payable in personal injuries cases and because the [claimant] is entitled to have a higher rate of compensation for the initial shock of being arrested'. The *Thompson* case suggested a guideline award of about £3,000 for someone wrongly detained for 24 hours.

The starting figure of about £2,000 was suggested in *Thompson* for malicious prosecution cases, with an award of about £10,000 possibly being appropriate in the case of a prosecution continuing for as long as two years, the case being taken to the crown court. A conviction set aside on appeal would justify a larger award, to reflect the longer period of distress and being in peril.

The above figures are no more than guidelines and circumstances will of course vary from case to case. The Court of Appeal gave judgment in *Thompson* on 19 February 1997, and some allowance for inflation since then is appropriate.

### **12.7.2 Aggravated damages**

These are designed to compensate the claimant where heightened injury to hurt feelings or loss of dignity are caused by the defendant, whether by his manner of acting or his motive. For example, a wrongful arrest in demeaning circumstances, in a public location or accompanied by arrogance or aggression, may warrant aggravated damages.

A claim for aggravated damages, including the grounds for the claim, must be specifically pleaded: CPR 16.4(1)(c).

If the jury consider the case to be one for aggravated and/or exemplary damages, they should make a separate award for each category. The jury should not fix a total figure for basic and aggravated damages which exceed what they consider is fair compensation for the injury suffered.

In *Thompson* it was suggested that aggravated damages are unlikely to be less than £1,000. It was also suggested that aggravated damages would not be expected to be as much as twice basic damages, except perhaps where basic damages are modest.

In cases of assault, injury to feelings including indignity and distress are compensated by ordinary damages. Thus it is 'no longer appropriate to characterise the award for the damages for injury to feelings as aggravated damages, except possibly in a wholly exceptional case': *Richardson v Howie* [2005] P.I.Q.R. Q3.

### 12.7.3 Exemplary damages

These are essentially penal in nature. Exemplary damages may be awarded in the two categories of cases identified by Lord Devlin in *Rookes v Barnard* [1964] A.C. 1129. The category liable to arise in police cases is that of 'oppressive arbitrary or unconstitutional action by the servants of the government'. (The other category is of cases 'in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the (claimant)').

As with aggravated damages, the claim, including the grounds for it, must be specifically pleaded. And exemplary damages are only to be left to the jury where the judge considers there is evidence to support a claim for such.

It was suggested in *Thompson* that exemplary damages, where appropriate, are unlikely to be less than £5,000. The court further indicated that 'the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly officers of at least the rank of superintendent.'

The failure of a claimant to co-operate with the complaints procedure does not reduce an award of damages. Conduct was said in *Thompson* only to be relevant if a cause of the offending behaviour.

### 12.8 The Human Rights Act 1998 (HRA)

In a claim against the police, infringement of the European Convention on Human Rights may be alleged. There may be overlap with claims in tort. Articles of the Convention which may be invoked include Article 3, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment; Article 5, which provides for the right to liberty and security of the person; and Article 8 which provides for the right to respect for private and family life.

Section 6 of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Damages may be awarded subject to the constraints in s.8 HRA. In determining whether to award damages, and if so, in what amount, courts are to look to principles applied by the European Court rather than domestic precedents: *R (Greenfield) v Secretary of State* [2005] 1 W.L.R. 673.

### 12.9 Form of judgment

By virtue of CPR PD 40B, paragraph 14.1, Form 46 may be used for judgment after trial before a judge with a jury. Paragraph 14.2 provides that:

‘a trial judgment should ... have the following matters set out in a preamble:

- (1) the questions put to a jury and their answers to those questions;
- (2) the findings of a jury and whether unanimous or by a majority;
- (3) any order made during the course of the trial concerning the use of evidence;
- (4) any matters that were agreed between the parties prior to or during the course of the trial in respect of
  - (a) liability,
  - (b) contribution,
  - (c) the amount of the damages or part of the damages, and
- (5) the findings of the judge in respect of each head of damage in a personal injury case.’