

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MUTAZ ELMARDY

Plaintiff) *Andrew J. MacDonald,*
) for the plaintiff

- and -

TORONTO POLICE SERVICES BOARD
and POLICE CONSTABLE PAK

Defendants) *David A. Gourlay,*
) for the Defendants

) HEARD: April 27 - 30, 2015

F.L. Myers J.

REASONS FOR DECISION

Background

[1] Mutaz Elmardy sues Police Constable Andrew Pak and his employer, the Toronto Police Services Board, for assault, battery unlawful arrest, and for violation of his rights under the *Canadian Charter of Rights and Freedoms*. Mr. Elmardy says that he was detained by Constable Pak for no reason apart from the colour of his skin. He says that Constable Pak punched him in the face and beat him. He was handcuffed and held outside on a cold winter's night for 30 minutes without any legal basis.

[2] For the reasons that follow, I find that Mr. Elmardy has proven much of his case on a balance of probabilities. Constable Pak committed battery on Mr. Elmardy. Constable Pak violated Mr. Elmardy's constitutional right to be secure from arbitrary detention. He violated Mr. Elmardy's constitutional right to be secure from unreasonable search and seizure. He

violated Mr. Elmardy's rights under ss.10 (a) and (b) of the *Charter* that arose upon his detention. In all, Mr. Elmardy is entitled to damages to compensate him for his injuries and to deter similar incidents in future. He is also entitled to declarations that his rights were violated to make clear statements by the court vindicating Mr. Elmardy's rights.

[3] I wish to make clear at the outset that I make no findings about the constitutionality or wisdom of the process of "carding." Carding was the focus of much of the evidence at the trial. Whether carding is a useful policing policy or just serves to increase the risk of hostile interactions between police and innocent members of the public, as appears to have occurred in this case, is beyond my ken.

[4] I also do not make any finding that Mr. Elmardy was discriminated against on the basis of his race or that he was the victim of "racial profiling" as alleged. The police were entitled to try to chat with Mr. Elmardy. While it is tempting to try to ascribe motives, there was no evidence that the decision to stop him was based on his race. Mr. Elmardy did not prove on a balance of probabilities that the actions of Constable Pak were racially motivated. Nor was there a basis in the evidence to draw that inference.

The Facts

Mr. Elmardy's Evidence

[5] Mr. Elmardy came to Canada as a refugee in 2005. He was 32 years old when he arrived. He was 38 years old on January 15, 2011.

[6] On that night, Mr. Elmardy left evening prayers at his mosque between 6:40 and 6:45 p.m. He walked south on Parliament Street for a couple of minutes to a convenience store at the southeast corner of Parliament and Shuter Streets. After spending no more than five minutes in the store, Mr. Elmardy continued east along the south side of Shuter for 5 to 8 minutes. At approximately 6:50 to 7:00 p.m. he saw a police car driving toward him down the opposite side of the street.

[7] As the police car drove by, Mr. Elmardy saw Constable Pak driving the car looking "deep into my eyes". Mr. Elmardy says he averted his eyes to continue walking although he had a thought that the police may turn around to come and talk to him. They did so. As the police car pulled up alongside him, Constable Poole, sitting in the passenger seat, rolled down her window and asked "Where are you going?"

[8] Mr. Elmardy says he responded, "Why?"

[9] He says that the officer responded, "It's a dangerous raping area".

[10] Then, the police car stopped. The driver, Constable Pak, left the car and walked around in front of the car to come face-to-face with Mr. Elmardy. Mr. Elmardy says that Constable Pak asked "Are you fucking with me?" Then, with no warning, Mr. Elmardy says Constable Pak punched him in the face, kicked him, and threw him to the ground. Mr. Elmardy got up.

Constable Pak punched him in the face again, kicked him again and knocked him down. Mr. Elmardy says that throughout the beating, Constable Pak kept repeating, "Don't be mad at me."

[11] Mr. Elmardy was clear that he does not recall the precise forensic details of the incident. As he noted, he was in a fight. He was not a third-party witness with the luxury of recording details.

[12] As it was -10 degrees Celsius outside that night in January, Mr. Elmardy says his hands were in his pockets. On retelling the story in chief, with greater detail, the story changed a little. Mr. Elmardy testified that the first punch hit him under his left eye. The blow knocked him down. He got up. Constable Pak punched him again on the lip. He fell again. Then Constable Pak started kicking him in his knees and feet and, "he jumped me."

[13] While Mr. Elmardy was on the ground or, perhaps, on his knees, Constable Pak handcuffed him and left him lying on wooden decking in front of a house on Shuter. The decking was covered with ice and Mr. Elmardy's hands were against the ice while handcuffed behind his back.

[14] Constable Pak pulled Mr. Elmardy up to his feet. He says that Constable Pak pulled his winter jacket down to his wrists and began searching his pockets. Constable Pak went through the contents from his pockets and threw them on the ground. He then picked Mr. Elmardy up, took the wallet from his back pants pocket, and threw him down on the deck again. He says Constable Pak went through his wallet and tossed all of his cards and papers onto the street.

[15] He says that Constable Pak asked him, "Where you from?"

[16] Mr. Elmardy responded, "Africa."

[17] Constable Pak asked, "How long have you lived here?"

[18] Mr. Elmardy responded, "Six years."

[19] Then Constable Pak asked, "Do you like it?"

[20] Mr. Elmardy said, "Yes. Do you have a problem with that?"

[21] It was Mr. Elmardy's evidence that throughout this time, the second police officer, Constable Poole, remained in the passenger seat of the police car. Two other police cars pulled up in the meantime. One of the policemen, who just arrived, saw Mr. Elmardy's chewing tobacco that Constable Pak had taken from his pocket. The officer asked if it was a Somalian drug called "chat". It was not. The officer inquired as to why Mr. Elmardy was making such an angry face and asked, "Are you mad at me?"

[22] Mr. Elmardy says he responded "No. I'm mad at [Constable Pak] because he slapped me in the face."

[23] Constable Pak apparently interjected, "I didn't slap you; I punched you."

[24] Mr. Elmardy said that he was glad that Constable Pak admitted that in front of the new officers who had not witnessed the events. One of those officers then asked him, "Where you from?"

[25] Mr. Elmardy responded, "Sudan."

[26] To which the officer apparently responded, "I knew it."

[27] According to Mr. Elmardy, Constable Pak then said that he was going to uncuff Mr. Elmardy and let him go. Mr. Elmardy asked to be taken to the police station to make a complaint. He said, "I know my rights." Constable Pak told him to walk to the station.

[28] Mr. Elmardy says the entire event took 30 to 45 minutes. He was never told why he was handcuffed. His hands were kept behind him on the icy deck for a long time. No one pulled up his jacket up to keep him warm. He was not read his rights.

[29] Mr. Elmardy says that when he came to Canada, he was told that he would have rights like everyone else here. He came to this country, he said, "for the feeling of the law."

[30] Mr. Elmardy says that when he was released by Constable Pak, he walked directly to the police station at Parliament and King Streets. The walk took no more than 15 minutes. He says he had bruises on his face, a cut lip, his hands were frozen, his knees hurt, his ribs and stomach hurt. More serious though, he says, was the feeling that he was not worthy of being human.

[31] At the police station, Mr. Elmardy spoke to the intake officer and then to a supervisor – Staff Sgt. [now Inspector] Crone. The supervisor told him to go to the hospital to get a medical report as the first step in the complaints process. When Mr. Elmardy tried to show his driver's license, he realized it was missing. Inspector Crone was able to determine and tell Mr. Elmardy that his driver's license had been seized by Constable Pak because it was expired.

[32] Mr. Elmardy says that he walked from the police station to St. Michael's Hospital where he was seen in the ER. He told the doctor about his headache, jaw pain, swelling under his eye, cut lip, and the pain in his ribs and stomach. The ER doctor's note documents swelling above Mr. Elmardy's his left cheek bone and a small, 2 mm, laceration on the inside of his lip. There is no mention of abdominal pain in the medical report although the doctor notes that Mr. Elmardy told him that he was punched multiple times in the face and abdomen and kicked in the foot.

[33] Mr. Elmardy produced a number of photographs that he took of himself when he got back to his house later that night after midnight. They do indeed demonstrate swelling above his cheekbone and an abrasion and swelling on his lip.

[34] In cross-examination, Mr. Elmardy resolutely maintained his story. He was obviously both intelligent and a very well prepared witness. He denied conspicuously trying to avert his gaze away from Constable Pak during the first encounter when the police car drove by him. He

denied reacting nervously or aggressively. He says that he tries to help people get their jobs done. Although, in this case, he knew his rights and he was not willing to help the police by providing the information they sought. Nevertheless, he was never rude. He denied shouting or swearing at the officers.

[35] Mr. Elmardy says he never saw the first punch coming. His hands were in his pockets and he was struck by a closed fist with sufficient force to knock him down onto his back. While he was not positive about the exact order of blows, he was clear that he was punched a second time in the lip by Constable Pak with a closed fist and that it was this second punch that cut his lip. This punch put him on the pavement again.

[36] He added that once he was on the ground Constable Pak started to knee him and kicked him. Constable Pak's knee hit him in the ribs and stomach and Constable Pak kicked him.

[37] Mr. Elmardy concedes that he had no bruises in his abdomen area. The ER doctor did not examine his abdomen at the hospital although Mr. Elmardy says that he started to lift his shirt to direct him to do so. He had no broken ribs or broken bones. The ER doctor did not order an x-ray. Mr. Elmardy got his own x-rays in subsequent days.

[38] Although Mr. Elmardy says that Constable Pak punched him in the mouth, he had no problems with his teeth and his lip laceration was not big enough to require stitches. The defendants' counsel fairly put to Mr. Elmardy many of the discrepancies that he expected to raise in the evidence of his clients. Mr. Elmardy stuck to his guns. At one point he admitted speaking, "loudly" to the officers, but he subsequently made it clear that he denied that there was any further discussion other than the few words discussed above. He did then add a memory, when prompted in cross-examination, that near the end of the incident, Constable Poole ran Mr. Elmardy's name through her computer. He recalls that this was almost the last thing done before the police let him go. The computer records show that computer searches occurred between 7:26 p.m. and 7:31 p.m. This is consistent with the commencement of the incident at 6:50 to 7:00 o'clock as Mr. Elmardy said and with the events lasting 40 to 45 minutes as he said.

[39] Mr. Elmardy was clear and resolute that after he was released, he went directly to the police station which was some 12 to 15 minutes away on foot. He did not deviate from his path or stop to speak to anyone. Therefore, he should have arrived at the police station by no later than about 7:50 p.m.

[40] However, Inspector Crone recorded speaking to Mr. Elmardy at the police station at 8:30 p.m. That is, approximately 30 to 40 minutes are unaccounted for by Mr. Elmardy. Mr. Elmardy says he spoke to Inspector Crone for 30 minutes before walking to the hospital. Inspector Crone's notes agreed. The hospital recorded his arrival and triage at 9:26 p.m. If Mr. Elmardy left the police station at about 9:00 or 9:05, getting to St. Mikes in perhaps 10 - 15 minutes and then having a brief wait for triage and check-in that timing would seem right. That still leaves a period of time unaccounted for after Mr. Elmardy was released by Constable Pak and before he arrived at the police station.

[41] When cross-examined on whether he told Inspector Crone the full extent of the story that he recounted in court, Mr. Elmardy confirmed that he may not have done so. He may have just given a few brief details because he hoped that the supervisor would send him in the "right direction." That is, he wanted to be told how to make a complaint. Apparently, Inspector Crone did so. However, it seems odd to me, and inherently improbable, that in making a contemporaneous complaint to a senior police officer, Mr. Elmardy would have left out important incriminating facts like the fact that he was kicked and kneed or, more significantly, that he says that Constable Pak admitted punching him in front of the other officers who arrived at the scene later. All of those officers testified and none recalled hearing that admission.

[42] It is clear that Mr. Elmardy's physical injuries were very minor. He was unemployed at the time so he did not miss any work. He has no out-of-pocket expenditures. His bruises all healed within several days to a week. His knees healed although he now complains of knee pain he concedes that he cannot ascribe cause for that pain to the incident in question.

[43] Mr. Elmardy raises emotional concerns regarding his feelings of dignity and his current nervousness or suspicion in dealing with the police in light of the events to which he attests. But there is no medical report supporting significant psychological injury and no specific damages are sought on that basis.

[44] When he was asked if Constable Pak read him his rights after handcuffing him, Mr. Elmardy at first argued about what good is being told about the right to a lawyer after the beating is finished? This sounded like he was conceding that he had been told of his right to counsel. However, he then clearly denied that this was the case.

The Evidence of Police Constable Andrew Pak

[45] Police Constable Andrew Pak has been a member of the Toronto Police Service for over 12 years. In January, 2011 he was assigned to the Toronto Anti-Violence Intervention Strategy team - TAVIS. This was a provincially funded new unit designed to combat gun violence.¹ Members of TAVIS were assigned to a different division each night to have high visibility uniformed patrols in high crime areas.

[46] Constable Pak testified that at approximately 7:00 p.m. on January 15, 2011, he and Police Constable Candice Poole were on duty in a marked scout car. He was driving. Constable Poole was in the passenger seat. They were driving westbound on Shuter Street when they noticed Mr. Elmardy walking toward them on the south sidewalk. Mr. Elmardy "rubbernecked" or conspicuously turned his head to watch them as the police car passed. Although he initially indicated that he did not recall making eye contact with Mr. Elmardy, Constable Pak later agreed with Mr. Elmardy's lawyer that he did. He saw that Mr. Elmardy was black.

¹ Interestingly, the six former members of TAVIS who testified all had different descriptions of TAVIS. Nothing turns on the descriptions except that it is clear that TAVIS members cannot articulate its purpose or mandate with any consistency.

[47] Constable Pak advised that TAVIS officers did not take normal dispatched assignments in a division like regular duty officers. Rather, they are a self-initiated team. They dig around to find their own investigations. They look for information and try to show a presence in high crime areas.

[48] Constable Pak was interested in Mr. Elmardy because Mr. Elmardy seemed to follow the police car as it went by. He thought he should speak to Mr. Elmardy and run his name through the computer to see if Mr. Elmardy might have bail or other conditional sentence issues. Constable Pak steered the car through a U-turn and pulled up beside Mr. Elmardy. Constable Poole rolled down the window and Constable Pak spoke to Mr. Elmardy with a greeting and told him that he and Constable Poole were from TAVIS.

[49] Constable Pak says that Mr. Elmardy responded, "What the fuck do you want?"

[50] Constable Pak says that in his experience, verbal aggressiveness is often a strategy adopted by people who have done something wrong and hope to discourage police contact by making it seem to the police officers that contact will be difficult and unpleasant. An aggressive person can be hoping that the police will just go away and leave them alone.

[51] Constable Pak noticed Mr. Elmardy's hands were in his pockets. Rather than responding to his belligerent behaviour, Constable Pak says that he got out of the car and walked around the front of the car towards Mr. Elmardy on the sidewalk. Constable Pak felt it would be safer to get out of the car so he would be able to react in case something untoward happened.

[52] Constable Pak says that as he came around the front of his car, Mr. Elmardy was facing the scout car and Constable Poole. Mr. Elmardy turned to his right from facing Constable Poole in the car toward Constable Pak on the sidewalk. In fact, he turned his body somewhat more than 90° so that the right side of Mr. Elmardy's body was facing slightly away from Constable Pak. This is known as "blading". According to Constable Pak, blading is a sign that a person may be hiding something in his pocket such as a weapon.

[53] Constable Pak says that he asked Mr. Elmardy to remove his hands from his pockets and Mr. Elmardy did not do so. In light of Mr. Elmardy's verbal hostility, blading, and refusal to remove his hands from his pockets, Constable Pak says he formed the belief that Mr. Elmardy had a weapon.

[54] In view of Constable Pak's belief, he grabbed Mr. Elmardy's right arm and pulled it out of Mr. Elmardy's pocket. Mr. Elmardy did not resist. Constable Pak believes that Constable Poole might have gotten out of the car and been on Mr. Elmardy's left side. He has no recollection of how Mr. Elmardy's left hand was dealt with or how it got into the handcuffs. He was not sure if Constable Poole took Mr. Elmardy's left hand or if he did. He says that he had "tunnel vision" as he was focusing on Mr. Elmardy's right hand.

[55] Constable Pak was clear that he detained Mr. Elmardy by putting him in handcuffs and he did so for the safety of the officers - to ensure that Mr. Elmardy had no weapon. He says that once things settled down, he advised Mr. Elmardy, generally, of his right to counsel. First

however, he cleaned the snow off the wooden ledge of a retaining wall of the house fronting on Shuter Street and he helped Mr. Elmardy to sit down on the ledge. He also did a pat-down of Mr. Elmardy to ensure that he had no weapons. The pat-down involved just feeling Mr. Elmardy's clothing from the outside.

[56] Constable Pak did not let Mr. Elmardy go because he felt that Mr. Elmardy was at risk of violence. He was saying things like, "The police have too much power" and he was calling the police officers, "assholes."

[57] Constable Pak says that he asked Mr. Elmardy for his name but Mr. Elmardy would not speak to him. Constable Pak wanted Mr. Elmardy's ID to run it through the computer to see if he was in breach of any court-ordered bail or sentencing conditions. He told Mr. Elmardy that he thought Mr. Elmardy had a weapon. He said, "I always say what I'm doing and why."

[58] Constable Pak said that no other force was used on Mr. Elmardy. He denied kicking, kneeling, or punching Mr. Elmardy. He denied throwing Mr. Elmardy to the ground. He denied pulling Mr. Elmardy's jacket down to his wrists. He does not know how Mr. Elmardy's injuries happened.

[59] Constable Pak says that the when he asked Mr. Elmardy for his name, Mr. Elmardy belligerently responded, "Check my wallet." Constable Pak took this to be an invitation to take Mr. Elmardy's wallet from his pocket which he did. Constable Pak denies throwing any of Mr. Elmardy's items on the ground.

[60] Constable Pak agreed with Mr. Elmardy that the entire incident took approximately 30 minutes. He says that the initial interaction that led to his decision to put Mr. Elmardy into handcuffs happened very quickly. He says that he did not search Mr. Elmardy's pockets. He had no information or conversation about any chewing tobacco. In fact, Constable Pak does not recall seeing any chewing tobacco at all. Rather, after Constable Poole ran Mr. Elmardy's name through the computer, he took the handcuffs off and sent Mr. Elmardy on his way.

[61] Constable Pak agreed that Mr. Elmardy said that he wanted to be taken to the police station to complain about the contact. Constable Pak declined to take Mr. Elmardy but says he wrote down his name and badge number on a piece of paper for Mr. Elmardy.

[62] In cross-examination, Constable Pak agreed that it is the role of all Toronto police officers, including TAVIS officers, to obtain "208 cards." These are intelligence gathering forms providing details of contacts between the police and members of the public. The process of gathering these forms is known publicly as "carding." Constable Pak agreed that he tries to complete as many 208 cards as he can to prove he is interacting with people as required for an officer in his position in Toronto.

[63] Constable Pak agreed with Mr. Elmardy's counsel that his concern that Mr. Elmardy might be violating a bail condition was a "hunch." He reiterated that the TAVIS unit is responsible for self-generating work. That is, they investigate, talk to people, show a presence in the community, and card people in high risk areas.

[64] At first, Constable Pak did not detain Mr. Elmardy at all. Once the incident started, and in light of Mr. Elmardy's hostility, the Constable's hunch that he might be violating bail or a sentencing condition, turned into a belief that Mr. Elmardy had a weapon. I noted that the Constable never said that he thought Mr. Elmardy *might* have a weapon. He was clear, each time he repeated his belief, that he formed a belief that Mr. Elmardy actually had a weapon. He confirmed however that his hunch about bail or conditional sentencing continued until the very end - until Mr. Elmardy was cleared by the computer search. He kept Mr. Elmardy handcuffed throughout the period in order to prevent any escalation into a fight. That is, Mr. Elmardy was handcuffed due to his hostility, not due to Constable Pak's hunch.

[65] Although the Constable says he always tells people what he is doing, he agreed that he never told Mr. Elmardy his belief that Mr. Elmardy was violating a bail or sentencing condition. Constable Pak never asked Mr. Elmardy about whether he had any bail or sentencing conditions.

[66] Constable Pak has no recollection of Constable Poole being out of the car. He only recalls her in the car typing into the computer. He was quite clear in cross-examination that, "I cuffed Mr. Elmardy." He wrote this in his contemporaneous notes. It also says so in the contemporaneous incident synopsis that is Ex. 7. And Constable Pak swore on discovery to being the one who handcuffed Mr. Elmardy. Yet his memory of the handcuffing was vague enough that it is possible that Constable Poole might have taken control of Mr. Elmardy's left side. It seems to me that if Constable Pak believed that Mr. Elmardy had a weapon, he would not have left the use of one Mr. Elmardy's hands to chance by focusing so intently on just Mr. Elmardy's right hand so as not to see his partner a foot or two away from him helping with Mr. Elmardy's left hand. It was apparent that Constable Pak shaded his evidence to try to leave it possible to fit with Constable Poole's evidence when in fact Constable Pak has no recollection of her being involved as she now says.

[67] Constable Pak also denied opening Mr. Elmardy's jacket or pulling it down to his wrists as alleged. The 208 cards submitted by Constables Poole and Pak note Mr. Elmardy's shirt colour. Constable Pak was unable to remember how they determined Mr. Elmardy's shirt colour since they did not open or take his jacket down.

[68] Prior to redirect examination, I inquired of Constable Pak what Mr. Elmardy was doing in the 20 or so minutes between the time that Constable Pak handcuffed him and when he was released just after the computer search was conducted by Constable Poole 7:31 p.m. Constable Pak had no answer although he mused that there may have been some social time for the police officers when the two other police cars with TAVIS showed up.

Other Witnesses

[69] I set out the evidence of Mr. Elmardy and Constable Pak almost in full so as to express their competing stories. I refer to other witnesses only where their evidence is helpful to my analysis and conclusions. As will become apparent, in my view, both Mr. Elmardy and Constable Pak shaded the truth and exaggerated or under-estimated events to assist their

respective cases. It is the evidence of the other witnesses however that sheds light on the mid-ground which is the most probably rendition of events.

[70] Detective Constable Candice Poole testified for the defendants. She said that after she and Constable Pak drove by the plaintiff, he kept looking over his shoulder watching them drive away. She also said that she had been involved in a gun arrest in the neighbourhood approximately 10 days earlier so that she had heightened sensitivity for weapons in those days. Accordingly, when she saw the plaintiff turn to watch the police car drive away, she says that she and Constable Pak “together” decided to talk to the plaintiff about weapons. Constable Pak did not say that he spoke to Constable Poole at all about the decision to speak to Mr. Elmardy. He said he wanted to speak to Mr. Elmardy due to his hunch that Mr. Elmardy was breaking a conditional sentence or a bail condition. He did not mention any concern for weapons until he saw Mr. Elmardy’s hands in his pockets.

[71] All of the police officers who testified wanted to downplay the role of “carding.” Yet they all agreed that it was part of their duties. Constables Pak and Poole spoke of obtaining credit from superiors for carding.

[72] Neither of the officers was able to articulate any reasonable basis to stop the plaintiff connected to investigating criminal behaviour on his part. There was no reason for Constable Pak to have a “hunch” about bail or sentencing conditions and none for Constable Poole to have a concern about weapons. Had she stopped every person in 52 Division for the prior 10 days because of her heightened sensitivity? Unless she did, she had no basis to single out Mr. Elmardy. Rather, I infer that they decided to talk to him to initiate what they refer to as an “interaction with the community” i.e. to card him. After things got out of hand, rather than admitting that it was a random stop – which would have been perfectly lawful – they both felt the need to backfill a purpose. However, their evidence as to their purposes conflict.

[73] Constable Poole supported her partner’s testimony that Mr. Elmardy used profanity in response to their approach. Having witnessed Mr. Elmardy’s intensity and his earnestness, I do not find the possibility that Mr. Elmardy responded curtly to be at all surprising. I found Mr. Elmardy’s testimony that he is never rude somewhat disingenuous. He says that he always tries to help people do their jobs but he quickly corrected himself because he was not willing to help the police that night.

[74] Constable Poole said that she was uncomfortable with Mr. Elmardy’s hands in his pockets and asked him to take his hands out of his pockets. She says that she got out of the car and asked him again to remove his hands from his pockets to make her feel more comfortable. He responded, “Why the fuck are you stopping me?”

[75] Constable Poole told the plaintiff again to remove his hands from his pockets. He did nothing. Therefore, she and Constable Pak took control of the plaintiff’s hands. Constable Poole says he resisted. It was not a big struggle. But he pulled his shoulders tight and would not release his hands from his pockets. The officers persisted and the plaintiff was quickly

handcuffed by the two officers together. As noted above, Constable Pak says that he was the one who put Mr. Elmardy in handcuffs.

[76] Constable Poole said nothing about “blading.” She could not because in her story, both the constables were out of the car coming at Mr. Elmardy from different directions. Constable Pak however, agreed that Mr. Elmardy was facing directly at Constable Poole in the car at the outset. He was not blading when he was standing right in front of Constable Poole’s face as she sat in the car with her head at the level of his pockets. It makes no sense that Mr. Elmardy would have been directly facing and very close to Constable Poole’s head but then “blade” only as Constable Pak came around the front of the car.

[77] Moreover, blading was not referred to in Constable Pak’s notes. This was a significant issue and as a well-trained constable, I am satisfied that Constable Pak would have noted it had it occurred. It follows that in light of Constable Pak’s evidence of Mr. Elmardy’s positioning when he was facing the car and Constable Poole’s evidence of very different body positioning as they both approached Mr. Elmardy, I am unable to accept Constable Pak’s evidence on this point. Constable Poole assisted in handcuffing Mr. Elmardy. There was no blading. Mr. Elmardy was between the two officers.

[78] Constable Poole was clear that her concern was with weapons throughout and that the plaintiff was subdued and handcuffed for officer safety. She took control of the plaintiff’s left arm and tried to get his hand out of his pocket. She says it did not take long to get the plaintiff into handcuffs. He was not taken down to the ground to do so. She did not punch the plaintiff.

[79] Constable Poole was asked *in chief* if Constable Pak punched the plaintiff. Constable Poole said she did not know. She was focused on Mr. Elmardy’s left side and does not recall what Constable Pak did. How can that be true? Constable Pak was on Mr. Elmardy’s right hand. Constable Poole was on his left. It is virtually physically impossible that she would not have seen her partner clock Mr. Elmardy in the face. But she does not say, “I was right there. That did not happen.” She just has no recollection.

[80] In closing argument, counsel for the defendants submitted that in accordance with the plaintiff’s testimony, if he was punched, it happened as soon as Constable Pak approached him and before Constable Poole would have reached him. In my view, this over-dissects the timeline. This all happened within a very few seconds. The situation was “fluid” and quick as all three key witnesses agreed. If Constable Poole was not already right there, she was close enough in my view to have been unable to fail to see Constable Pak punch Mr. Elmardy. Moreover, it happened or it did not. It is not the kind of thing that one forgets. I do not accept Constable Poole’s denial of memory and I infer that her unwillingness to outright deny that it happened, makes it more likely than not that Constable Pak did indeed punch Mr. Elmardy in the face.

[81] Counsel for the defendants also notes that Mr. Elmardy claims that he fell after each punch. He did not mention that to the doctor or to Inspector Crone. The defendants’ counsel argues that if I reject the plaintiff’s evidence that the blows knocked him down, the only other

way he could have been injured is by some incidental contact with Constable Poole's radio or her bullet-proof vest during the handcuffing. Constable Poole denied any such contact.

[82] Counsel is being too black-and-white in my view. The trier of fact is entitled to accept or reject, some or all of a witness's evidence. Mr. Elmardy was injured. The ER doctor confirmed that the injuries he saw were consistent with closed fist punches to the face. Mr. Elmardy may well have embellished his story. It does not appear that he received a savage beating as he described. But I am satisfied that Constable Pak punched him in the face twice as Mr. Elmardy says. The injuries are real and are substantiated by the doctor's evidence of his contemporaneous ER note and the pictures.

[83] Constable Poole also agreed, in chief, that she did not tell the plaintiff that he was under investigative detention. Once led, she conceded that he was detained once the police took control over him. She does not recall if the plaintiff was advised of his right to counsel at that time.

[84] Constable Poole recalls that she patted the plaintiff down for weapons on his left side and Constable Pak patted him down on the right side. No weapon was found. She said in a very passive voice that, "At some point, his driver's license *was located*". She was not sure how it was located though. She knew that she did not take the plaintiff's wallet out of his pocket. She had no recollection of any conversation with the plaintiff about his wallet although she was right there. In cross-examination, Constable Poole agreed that Constable Pak took the plaintiff's wallet from his pants and gave her the driver's license.

[85] Constable Poole agrees that she conducted computer searches on the plaintiff – the last one at 7:31 p.m. One of the searches showed that the plaintiff did not have a current driver's license. But she has no recollection of whether the plaintiff's expired license was returned to him. Inspector Crone acknowledged Mr. Elmardy's evidence that he called Constables Pak or Poole in order to look for the driver's license and they told him that it had been seized.

[86] Constable Poole says that while she was confirming the plaintiff's identification in the car, the plaintiff was acting belligerently. Constable Poole recalls him calling them, "assholes" and saying that the police had too much power. None of this is in her contemporaneous notes. It is hard to understand how it was that Mr. Elmardy was detained, handcuffed for a full 20 to 25 minutes before the computer searches were performed, and the only expressions of belligerence, in fact the only conversation with him at all that Constable Poole recalls four years later with no notes is the exact same two insults that Constable Pak recalls.

[87] It was Constable Poole who wrote the plaintiff's information on the 208 card that was submitted as a result of this interaction. She has no recollection of any conversation in which the plaintiff was asked where he was from. She does not know how she came to know that the plaintiff was from Sudan as she wrote on his card.

[88] Constable Poole also could not explain how she knew the colour of the plaintiff's shirt that she wrote on his 208 card. She does not recall if the plaintiff's jacket was pulled down. But, she acknowledged that *if* she saw his shirt, then the plaintiff's jacket must have been open.

[89] It is perfectly obvious that Constables Pak and Poole knew that Mr. Elmardy was from Sudan because he told them so in response to someone's question. None of the other four officers who appeared at the scene acknowledged asking the question. Similarly, they knew the colour of his shirt because, at some point, Mr. Elmardy's jacket was opened. He was in handcuffs, so he did not do it. It must have been a police officer.

[90] Constable Poole testified that once she was satisfied that the plaintiff did not have any weapons, she then became concerned that he might be violating bail conditions. This is why she wanted to run his name through the computer. She gave no reason for forming this concern. It is a good thing that Mr. Elmardy's driver's license "was located" so she could fill-in all the desired information on his 208 card and run the computer searches.

[91] In direct disagreement with Constable Pak, Constable Poole recalled seeing the plaintiff's chewing tobacco being held by a police officer although she could not remember which one. She agreed that she did not hold it. She agreed that none of the officers in the two other cars that arrived later held it. When confronted with the logical conclusion that it must therefore have been Constable Pak holding it (since he was the only other police officer there) Constable Poole could not remember. Also unlike Constable Pak, Constable Poole recalls there being a conversation in which someone asked Mr. Elmardy if his chewing tobacco was Somali "chat." She was not sure who asked that question. Constable Saltmarsh also remembered seeing the plaintiff's belongings lying either beside him or on the police car. That is, they had been removed from the plaintiff's pockets.

[92] Inspector Crone says that he could not see any injuries on Mr. Elmardy's face when he spoke to him at close quarters between 8:30 p.m. and 9:00 p.m. that night. This is consistent with Dr. Blundell's evidence concerning the progress of the injury. Bruising is not expected before 24 hours have passed. Swelling usually starts within an hour or so of trauma and increases for the first 24 hours or so. At the hospital at 10:45 p.m., Dr. Blundell observed "swelling" according to his note. But when shown pictures of the plaintiff taken after he got home sometime after midnight, Dr. Blundell classified the swelling as having advanced to "moderate swelling." Inspector Crone did not ask to see the inside of Mr. Elmardy's lip. Nor is it surprising that he did not see pronounced swelling so soon after the incident.

[93] Inspector Crone testified that there is a video camera pointed at the intake desk at the police station that recorded his encounter with Mr. Elmardy. He was clear that he was the senior officer in charge of the station that night and he knew the facility's capabilities. Yet in responding to an undertaking given at discovery to make best efforts to provide the video to the plaintiff, the Toronto Police Service advised that the camera did not record the images it received. Inspector Crone disagreed with that answer in court. Of course the video equipment records. That is its purpose. I infer that the video would not have supported the defendants' case in light of this inappropriate tactic by the police.

[94] Finally, I note that Mr. Elmardy's conduct seemed very goal directed from the outset. He decided to complain right away as was his right. He told Inspector Crone that he was going to the hospital. Inspector Crone denies that he told Mr. Elmardy to go to the hospital as part of the police complaints process. A mandatory hospital trip is not part of the process. Mr. Elmardy says that the ER doctor told him to get x-rays himself if he felt the need to investigate further. The ER doctor, Dr. Blundell, says that he would not tell a patient to do that. If the patient has a persistent complaint, he would investigate it himself. That is what he is there for. It appears that the plaintiff not only realized that he should document his evidence right away, he tried to make it sound like others caused him to take those steps so he would appear less goal-directed. This accords with my view that Mr. Elmardy exaggerated his injuries and padded the incidents to try to bolster his evidence.

Findings of Fact

[95] Having heard all of the witnesses and pieced together their various versions of events, I am satisfied on a balance of probability that:

- a. Constables Pak and Poole had no reasonable suspicion of criminal conduct committed by Mr. Elmardy when they decided to initiate contact with him. It started as just an interaction with a community member.
- b. Mr. Elmardy was hostile to the police officers and had his hands in his pockets as it was cold outside and he was not wearing gloves.²
- c. The police constables got out of the car and asked Mr Elmardy to take his hands out of his pockets. When he declined to do so, they subdued him.
- d. In the course of subduing Mr. Elmardy, Constable Pak punched him in the face. Twice. There was other incidental contact during the struggle but nothing of enough significance to cause injury, to cause Mr. Elmardy to mention it to the Dr. Blundell at the ER, or to include it as a ground of complaint to Inspector Crone.
- e. Constable Pak opened Mr. Elmardy's jacket, emptied Mr. Elmardy's pockets including taking out his chewing tobacco and his wallet. No part of the story of any of the witnesses including the rest of Constable Pak's evidence is consistent with Constable Pak's claim to have had some implicit consent or instruction from Mr. Elmardy to look at or take his wallet. Mr. Elmardy was hostile. He did not want to be speaking to the police. He did not give a knowing consent to a search.
- f. One of the police officers questioned Mr. Elmardy about where he was from. I cannot say on the balance of probability that they taunted him about his origins as alleged.

² See Constable Pak's evidence on discovery as read-in at trial.

- g. Constables Pak and Poole left Mr. Elmardy just lying on his handcuffed hands on the deck of the neighbouring wooden retaining wall for 20 to 25 minutes before running their computer searches. Whether there was built up ice or not, it was cold and uncomfortable. It made Mr. Elmardy's hands numb and it hurt.

Analysis

[96] The police are entitled to speak to members of the public with whom they interact. Similarly, members of the public are entitled to decline to speak to the police. Had Constable Pak approached me, I might have given him the information he wanted. I might have said, "Constable, I prefer to not answer your question and I would like to be on my way now please." But, Mr. Elmardy is not me. He brings his life's experiences with him. For whatever reason, he was hostile to the police and clearly wanted nothing to do with them. When one swears at a policeman, it is probably logical to expect a punch in the face. Many would say that it is deserved. But it is not. The police deal with all manner of members of the public. Each brings his or her own life and troubles, experiences and joys with him or her to each encounter. Not all are polite. No law says they have to be.

[97] So what is a policeman or policewoman to do when he or she approaches someone who is hostile? Constable Pak says that hostility is a sign that someone is hiding something and hopes the police will go away. I do not understand why the first part of the sentence follows. Hostility certainly means that the person hopes the police go away. It is not hidden or implied. The hostility is a direct statement of a lack of desire or consent to engage further. What basis was there for Constable Pak or Poole to conclude that the hostility brought with it some suspicion of criminality? It cannot be that the mere act of refusing consent to speak to the police can form a reasonable basis of criminality. That would vitiate the right to remain silent. Nor can the fact that a person expresses his or her refusal with particular clarity and flavour itself, without anything more, be a basis to form a reasonable suspicion of criminality. It cannot be that the mere act of expressing one's self impolitely is a reasonable basis for police suspicion of criminality. There are too many innocent reasons why a person might be rude for mere rudeness, without more, to be a basis for reasonable suspicion.

[98] If the police wish to exercise their undoubted power of investigative detention, there must be a reasonable suspicion that the person is implicated in criminal activity that is under investigation. *R. v. Mann*, 2004 SCC 52 at para. 34. A hunch is not enough. *Mann* at para. 35. Assessment of the lawfulness of a detention requires a balancing of the police power to investigate and the individual's liberty interest. There must be a "clear nexus between the individual to be detained and a recent or on-going criminal offence."

[99] Investigative detention at common law is to be brief – perhaps a few seconds – to allow for a pat-down if necessary to protect officer safety. But the pat-down is not to be used to compel the person detained to comply with the requests for information being made by the police. See *Mann* at para. 45. An investigative detention that is held for longer than reasonably necessary for its limited purpose becomes a *de facto* arrest. *R. v. Byfield*, 2012 ONSC 2781 at paras. 114 and 115.

[100] In this case, there was no basis to detain Mr. Elmardy as there was no criminal investigation under way. Constable Pak's "hunch" about bail conditions was arbitrary at best and there was no nexus between Mr. Elmardy and a recent or ongoing criminal offence. Moreover, Constable Poole undermined Constable Pak's "hunch" by testifying that she and Constable Pak together discussed and agreed to stop Mr. Elmardy on a suspicion that he might have a weapon. That concern was raised due to the location of the encounter being in a high crime area and the fact that Constable Poole arrested someone with a gun 10 days earlier nearby. That too was arbitrary and does not amount to a clear, or any, nexus between Mr. Elmardy and a recent or ongoing criminal offence.

[101] The officers then say that they detained Mr. Elmardy because he had his hands in his pockets and this presented an issue for officer safety. It is perfectly understandable why officers lawfully carrying out their duties investigating a criminal offence *might* wish to see the hands of someone with whom they are speaking for reasons of safety. However, this is not universally so. If the officers were in an office speaking to a bank manager whose hands were behind her back, there would not necessarily be a safety concern. If the judge's hands are hidden behind the lip of his or her dais, an officer testifying in the course of her duties has no safety concern. Under the *Waterfield* test as adopted in *Mann* and other cases, the lawfulness of police conduct depends on the justification for the use of their powers *in the circumstances*.

[102] Context is everything.

[103] Here the police were engaged in a random stop and Mr. Elmardy did not consent to speak to them. He had his hands in his pockets. But it was cold out and he had no gloves. The police had no right to detain Mr. Elmardy for carding alone. Nor does the act of walking outside with one's hands in his pockets on a cold night in Toronto in January near Moss Park provide a reasonable basis to suspect that a person is carrying a weapon. There are no "objectively verifiable indications" supporting a subjective suspicion that this person might have been armed. *R. v. Fountain*, 2013 ONCJ 434, at para. 61. Even a pat-down, as approved in *Mann*, is not justified on the basis of a "vague or non-existent concern for safety, nor can the search be premised upon hunches or mere intuition." Nor can Mr. Elmardy's express refusal to consent, even if rudely conveyed, provide a basis to detain him as discussed above. There was no criminal act being investigated. It is not crime to be rude or to try to keep one's hands warm. In my view the detention of Mr. Elmardy in the circumstances that night in that place and time was unlawful and was a violation of his s.9 rights under the *Charter*. *Mann* at para. 37.

[104] Similarly, there was no lawful basis for Constable Pak to search Mr. Elmardy's jacket pockets and to remove his tobacco. Nor was there a lawful basis for him to search for Mr. Elmardy's wallet. The Supreme Court of Canada was clear in *Mann*, that a pat-down for weapons may be appropriate for officer safety in an investigative detention. No more is allowed without exigent circumstances or some other lawful basis. There was none here. Constable Pak violated Mr. Elmardy's s.8 rights under the *Charter*.

[105] Moreover, why was Mr. Elmardy handcuffed at all? Constable Pak said that when he took Mr. Elmardy's hand out of his pocket, he did not resist. In *Fountain*, a pat-down was

conducted without handcuffs where a suspect was blading his body and was “set for action.” *Fountain*, at para. 67. Constable Poole says that Mr. Elmardy struggled a little. But Constable Pak says that he is the one who did the handcuffing. He never said why. In some cases, it may be obvious. Perhaps it is in most regular criminal investigation cases. But this is not one of them. I find it helpful to keep reminding myself that this was an innocent man who was just walking along the street minding his own business who was approached by the police. His offence, if any, was speaking rudely to the police. That is not a basis to detain or handcuff someone.

[106] In addition, it is apparent that Mr. Elmardy was not told of why he was detained or of his right to counsel upon being detained. Constable Pak agreed that he did not tell Mr. Elmardy of his suspicion regarding bail conditions. Constable Pak's claim that he gave Mr. Elmardy a form of “*Coles' Notes* rights” cannot be accepted. Neither Mr. Elmardy nor Constable Poole heard any such thing. Constable Pak violated Mr. Elmardy's s.10(a) and (b) rights under the *Charter*.

[107] Finally, the police left Mr. Elmardy cooling his heels on the wooden deck for 20 to 25 minutes while nothing apparently was happening. The computer searches were the last thing done around 7:30 p.m. No one can explain what was done from 7:05 when Mr. Elmardy was handcuffed in the “fluid” events that occurred with the initial stop until the computer searches were performed. Mr. Elmardy is alleged to have complained about police powers and called them a name. That did not take 20 minutes. There was no evidence that he was violent and that efforts to cool him down took 20 minutes. He was simply “put on ice” as the expression goes and in this case, he says, literally. The other four officers who dropped by the scene could not assist with any independent recollection of what was going on while they were briefly there although Constable Saltmarsh claimed to recall that Mr. Elmardy was loud. In my view, even if the initial detention had been lawful, which is not the case, he should have been released and let go on his way as soon as no weapon was found and he could be released safely. In any event, while 20 minutes was passing with Mr. Elmardy in custody, did no one think to put Mr. Elmardy in the car where it was warm? Or was he kept outside with his jacket open or down at his wrists as some form of punishment? His further detention was unlawful either as an unreasonable exercise of police powers or as an unlawful arrest lacking a basis of reasonable and probable grounds. In all, this was a further breach of Mr. Elmardy's s.9 rights.

[108] The defendants rely on s.25 of the *Criminal Code of Canada*, R.S.C. 1985, c.C-46, to protect Constable Pak for his use of force. However, that section does not apply where, as here, the peace officer is found to have been acting unlawfully and outside the proper scope of executing his duties. *Parsons v. Niagara (Regional Municipality) Police Services Board*, 2009 CanLII 33053 (O.S.C.) at para 139. In addition, as noted above, I would find the force used by Constable Pak, both in handcuffing Mr. Elmardy for 30 minutes and in punching him in the face to have been excessive and outside the scope of the protection of s.25.

Result

[109] Constable Pak took the law into his own hands and administered some street justice. Whether Mr. Elmardy was a known recidivist criminal with a long history of contacts with the

criminal justice system or a completely innocent victim who was just walking down the street coming home from prayers on a cold night is irrelevant. The *Charter* protects all of us. It is most often heard about when it protects people charged with criminal offences. Is it not equally important to ensure its robust application to protect an innocent person who is just out and about minding his own business? Damages are available to remedy breaches of the *Charter* under s.24(2) of the *Charter* itself. They are designed to compensate for losses suffered; to vindicate the rights; and to deter future breaches by state actors. *Vancouver v. Ward*, 2010 SCC 27, at para. 25.

[110] Mr. Elmardy seeks \$75,000 in general damages in relation to the battery committed upon him by Constable Pak. The battery consisted of two punches in the face and some further minor contact that caused little or no injury. Mr. Elmardy's cheek was swollen for a few days. His lip cut healed quickly. His knees were better within a week. General damages are to compensate a plaintiff for the injuries suffered. This includes emotional losses such as the plaintiff's claim to have been humiliated and to now distrust police. Considering tort cases dealing with similar injuries, in my view, an award of \$5,000 for general damages for pain and suffering is appropriate although it may well be at the high end of the range for such injuries.

[111] As to the false arrest, this is the same underlying action as the detention in breach of s.9 of the *Charter* and includes damages for being held longer than was appropriate. The plaintiff's hands were numbed briefly and he was cold. The entire event lasted 30 minutes. In my view, general damages of \$2,000 are appropriate for this head of damages.

[112] As to the illegal searches, the plaintiff does not claim that anything of his was destroyed. His driver's licence had expired and was seized. The police obtained the plaintiff's name when he preferred to decline to provide it. Subject to punitive damages below, the plaintiff suffered only nominal damages as a result of the illegal searches and I award him \$1,000 in general damages for this head.

[113] The same is true of the breaches of s.10 of the *Charter*. No loss was suffered that can be compensated by an award of general damages. Therefore I award him a further \$1,000 for these breaches.

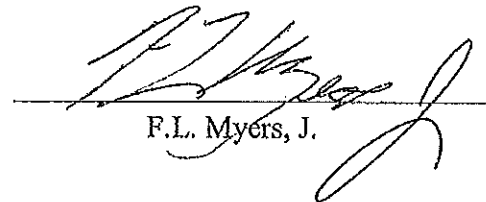
[114] In my view vindication and deterrence are best dealt with by declaratory relief and punitive damages. Mr. Elmardy should have a judgment of this court that positively declares that his s.8, s.9, and s.10 rights were violated in this case. He has petitioned Her Majesty's courts for a declaration of right and in my view he is entitled to it.

[115] While I have found that Mr. Elmardy exaggerated his evidence and his efforts to prepare his case seemed quite goal-oriented from the outset, this case is not really about money. Mr. Elmardy cannot have expected a big payday from a couple of bruises. I accept his desire to show that he is equal under the law and that the law applies to him as a refugee permanent resident just as much as to anyone. I was moved by Mr. Elmardy's expression that he came here to "feel the law." Perhaps one has to experience corrupt government and lawlessness to consciously *feel* the well-being that comes merely from being present in a country in which the rule of law matters

and all are equal before and under the law. That police officers shattered Mr. Elmardy's feeling of the law strikes at the rule of law itself and requires condemnation by the court.

[116] Therefore, I turn to deal with punitive damages. For the intentional torts of battery and false arrest, in my view, a punitive damages award is appropriate to express the disapproval of the court at the deliberate and inappropriate conduct of Constable Pak. As for the *Charter* breaches, administering street justice is the opposite of a society based on laws. One who is not being investigated for criminality is allowed to walk down the street on a cold night with his or her hands in the pockets and to tell inquisitive police officers to get lost without being detained, searched, exposed to sub-zero temperatures, or assaulted. It appears that none of Constable Pak, Constable Poole, or the other four officers who dropped by the scene knew this. It is therefore important for TPS and Constable Pak to hear it from the court and to hear it in a manner that bespeaks the court's disapproval and shock that such conduct might be considered acceptable in 2011. The manner in which the officers testified in 2015 was no less shocking. In view of the contumelious disregard shown by Constable Pak and TPS for the rights of Mr. Elmardy, in my view he is entitled to punitive damages equal to twice his aggregate award so as to triple his recovery. Therefore I award punitive damages of \$18,000.

[117] The defendants may deliver to my office up to 5 pages of submissions as to costs supported by a Costs Outline and any offers to settle by May 15, 2015. The plaintiff may then respond with no more than 5 pages of submissions, his Costs Outline and offers to settle by May 29, 2015. All submissions shall be made by searchable PDF attachments to an email to my assistant. Case books shall not be filed. Rather, cases, if any, shall be referred to in the submissions by hyperlinks to CanLII or another online source.


F.L. Myers, J.

DATE: May 7, 2015

CITATION: Elmardy v. Toronto Police Services Board, 2015 ONSC 2952
COURT FILE NO.: CV-12-445971
DATE: 20150507

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

MUTAZ ELMARDY

Plaintiff

- and -

TORONTO POLICE SERVICES BOARD and
POLICE CONSTABLE PAK

Defendants

REASONS FOR DECISION

F.L. MYERS J.

Released: May 7, 2015