THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO.: SLUHCV2013/0634

BETWEEN:

DANNY ALLISON GEORGE

Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA
POLICE CONSTABLE 638 STEPHEN NELSON

Defendants

Appearances:

Cara Shillingford for the Claimant
Karen Bernard and George K. Charlemagne for the Defendant

2019: January 22;
April 3.

JUDGMENT

[1] SMITH J: The claimant, Danny George ("Danny"), seeks special, general, aggravated and exemplary damages against the Defendants for wrongful arrest, assault and battery, false imprisonment, and malicious prosecution. The Defendants deny the claim and raise a number of procedural and substantive defences to the claim.

Background

[2] On 10th August 2012, the second defendant, police constable Stephen Nelson ("PC Nelson") and police constable Cleus Avril ("PC Avril") went to Danny's home where he had a small fire burning in his yard. The officers ordered Danny to put the fire out and he complied. It is not in dispute that, thereafter, PC Nelson asked Danny for his identification card, which Danny indicated he was unable to find. Danny and PC Nelson, however, offer totally divergent versions of what occurred afterwards.

[3] Danny's version is that there was a verbal exchange between himself and PC Nelson who accused him of being a criminal and told him he would deal with him; he told PC Nelson not to take sides, that the fire was out and so the job he came to do was done; PC Nelson requested his name and National Insurance Corporation number, which he gave; as he was walking away, PC Nelson grabbed him by his pants, a scuffle ensued and PC Nelson dragged him to the police vehicle, all the while punching him; he fell; PC Nelson pinned him to the ground by his neck and continued to punch him. He says his sister intervened by trying to pull PC Nelson off him; PC Nelson instructed PC Avril to shoot him but PC Avril fired warning shots instead; PC Nelson then grabbed the gun from PC Avril and whilst he still had him pinned to the ground, fired two shots, one hitting him in his knee. Danny says that he was never informed of the reason for his arrest, that he was arrested without cause and shooting him was unnecessary, as he posed no threat.

[4] PC Nelson says that Danny refused to give his name when requested, engaged in disorderly conduct, and used obscene language and insulting words; he informed Danny he was arresting him for the offences of using obscene language to and insulting a police officer and refusing to give his name when asked; Danny resisted arrest by attempting to run; he pursued him, held him by the belt and attempted to convey him to the police vehicle; Danny began to assault him. He says Danny threw him to the ground, held him by his throat and tried to grab his groin; he released Danny in order to defend himself against Danny's sister who had

attacked him. Danny then got up and punched him twice in the temple causing him to be dazed. He says when he recovered he saw Danny armed with two huge stones "the size of cantaloupes", aiming to throw at him. Fearing danger to his life, he took PC Avril's firearm and fired one shot at Danny's leg in self-defence. He says he informed Danny of further offences committed and that charges would be laid against him. He denied instructing PC Avril to shoot Danny.

Issues

[5] The issues that arise for determination are as follows:

(1) Is the claim prescribed?

(2) Is the failure to serve notice under Article 28 of the Code of Civil Procedure fatal to the claim?

(3) Was the arrest unlawful?

(4) Was the claimant falsely imprisoned?

(5) Was the claimant maliciously prosecuted?

(6) Was the claimant assaulted?

(7) Was the second defendant's use of force excessive?

(8) Does the maxim *ex turpi causa* apply?

(9) What is the measure of damages, if any, to which the claimant is entitled?

(10) Should exemplary damages be awarded?

(11) Should aggravated damages be awarded?

Is the claim prescribed?

[6] The defendants submit that the claim is prescribed. It is not disputed that the incident giving rise to the claim occurred on 10th August 2012 and that the claim was filed on 27th February 2014.

[7] Article 2124 of the Civil Code of St. Lucia[1] **("Civil Code")** provides that:

[1] Cap 4.01 of the Revised Laws of Saint Lucia

> "Actions against public officers in respect of acts done by them in good faith and in respect of their public duties are prescribed by 6 months."

[8] Article 2066 of the Civil Code provides that good faith is always presumed and that he or she who alleges bad faith must prove it.

[9] The claims, having been filed beyond six months from the date of the incident, are prescribed unless Danny can prove that PC Nelson acted in bad faith. Danny says there was bad faith because PC Nelson used excessive force by shooting him in the knee whilst he was subdued and had no prospect of fleeing.

[10] The case of Finney v Barreau du Quebec[2] establishes that bad faith includes intentional fault and recklessness where the act, in terms of how it is performed, is inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power. The case of Michael Christopher v PC 240 John Flavien et al; Tamara Barrow v PC 240 John Flavien[3] explained that a finding of bad faith serves to extend the prescription period beyond the six months stipulated in Article 2124 of the Civil Code to three years as stipulated by Article 2122.2.

[11] For the reasons stated below, I find that PC Nelson used excessive force and acted in bad faith, with the result that the claim is not prescribed.

Is failure to serve notice under Article 28 of the Code of Civil Procedure fatal to the claim?

[12] Article 28 of the Code of Civil Procedure[4] **("CCP")** provides:

> "No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him or her in the exercise of his or her functions, nor can any judgment be rendered against him or her, unless notice of such suit has been given him or her at least one month before the issuing of the writ of summons.

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[2] [2004] 2 SCR 17

[3] SLUHCV2004/0502 and SLUHCV2006/0182, delivered 25th July 2007, (unreported) at paragraph [39]

[4] Cap 4.01A of the Revised Laws of Saint Lucia

> Such notice must be in writing, it must specify the grounds of the action, must be served upon him or her personally, or at his or her domicile, and must state the name and residence of the plaintiff."

[13] No notice of suit was served on PC Nelson as required by article 28. However, notice of the intended suit was served upon the Attorney General on 7th January 2013. That notice identified PC Nelson as the public officer against whom Danny complained and the intended causes of action.

[14] The seminal authority on the interpretation of article 28 of the CCP is the Eastern Caribbean Court of Appeal consolidated cases of Bryan James v The Attorney General; James Enterprise Limited v The Attorney General; and Fast Kaz Auto Supplies and Curtis Hudson v The Attorney General.[5] In each of these cases, the claimants had given to the Comptroller of Customs notice of suit in compliance with article 28. The Attorney General, however, argued that failure to serve the Attorney General notice of suit in accordance with article 28 was fatal to the claims.

[15] The question with which the Court of Appeal was therefore concerned was whether article 28 was applicable to the Attorney General, based on the provisions of the **Crown Proceedings Act ("CPA")**[6], such that it was mandatory to serve notice of suit on the Attorney General. The Chief Justice held that article 28 of the CCP is clear. In order to bring a suit against a public officer for damages a claimant must serve notice of the intended suit on the public officer personally or at his domicile. Article 28 does not speak to service upon the Attorney General and it was unnecessary to resort to any rules of interpretation outside the natural and ordinary meaning of the words used. In rejecting the contention that article 28 was applicable to the Attorney General in light of the CPA, the Chief Justice found that it had not been shown that the compliance with the plain terms of article 28 created an absurdity or led to an unworkable consequence or placed it at odds

[5] SLUHCVAP2013/0023; SLUHCVAP2013/0024; SLUHCVAP2014/0021 (consolidated)
[6] Cap 2.05 of the Revised Laws of Saint Lucia

with any provision in the CPA. She found that the provisions are not in conflict and are quite capable of operating harmoniously.

[16] The Chief Justice further held that article 28 contained an expressed and drastic sanction built in against a prospective claimant who failed to comply, which was that the claimant lost his right to sue the public officer for damages. The Chief Justice concluded that article 28 did not impose a requirement to serve notice of suit on the Attorney General and that the claimant could not be deprived of his right to sue for failure to do something other than what the article required. She stated, however: "Indeed I would consider it prudent for the claimant to also serve the article 28 notice on the Attorney General based on my later reasoning in respect of the requirement to make the Attorney General the defendant in such proceedings."

[17] It is instructive to note, however, that the Chief Justice expressly reserved her judgment as to whether the result would be the same in circumstances where the Attorney General is served with notice, but not the public officer. This is what the Chief Justice said:

> "It may be arguable that where a claimant serves only the Attorney General with an article 28 notice that the claim does not fail but I need not decide this point on this appeal, and I refrain from so doing." (underlining supplied)

This is precisely the issue that arises in the instant case. The Attorney General was served with the notice, but not PC Nelson. The fact that this issue was left open in Fast Kaz permits this Court to make a determination on that point.

[18] It is not in dispute that Danny failed to serve notice of suit on PC Nelson either personally or at his domicile. I am of the view, however, that, having served the Attorney General with notice of intended suit, the claim does not fail. I say so for the following reasons.

[19] Firstly, to interpret Article 28 to mean that a claim fails in circumstances where the notice is served on the Attorney General, but not on the public officer, would lead to an absurdity, place it at odds with the CPA and lead to injustice that could not have been intended by the Legislature. A useful starting point is to ask what is the purpose of article 28?

[20] In Bihari Chowdhary & Anr vs State of Bihar & Ors[7], the Supreme Court of India examined the rationale for section 80 of their Civil Procedure Code (the equivalent of article 28 of the CCP). Eradi, V. Balakrishna J. provided the following helpful statement:

> "When we examine the scheme of the Section it becomes obvious that the Section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinize the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the Section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the Section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. <u>The object of the Section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation</u>." (underlining supplied)

[21] Similarly, the object of article 28 is the advancement of justice and the securing of public good by avoiding unnecessary, costly litigation. The CCP came into force on 15th April 1882. Given the state of transport and technology at that time, it would have taken time for public officers, served with lawsuits in the remoter parts

[7] 1984 AIR 1043

of the jurisdiction, to expeditiously communicate or forward these to the relevant authorities, resulting in the government sometimes finding itself in avoidable litigation. Article 28 evolved to achieve the public purpose so clearly expressed in Chowdhary. That purpose was not, however, to place obstacles in a claimant's path to justice.

[22] The CPA was later enacted. Section 4(1)(a) makes the Crown liable for the delicts or quasi delicts committed by its servants or agents; and section 13 provides that civil proceedings against the Crown shall be instituted against the Attorney General. The CPA therefore cures the mischief that article 28 was designed to mitigate by providing that the Crown assumes liability for the wrongful actions of its public officers and that any proceedings in respect of such liability must be brought against the Attorney General on behalf of the Crown.

[23] Section 28 of the CCP has, however, not been repealed and the Court must therefore give effect to it. In doing so, the Court must attempt to ensure that article 28 reads harmoniously with the CPA and not lead to an absurdity or injustice not intended by the Legislature. If the purpose of the article 28 notice is to give the ultimate responsible party (the state) time to assess a claim and possibly avoid unnecessary, costly litigation for the public good, it would lead to an absurdity if a claim fails for doing precisely that, namely, directly giving the Attorney General the required notice instead of the public officer for whom the state is vicariously liable. Beyond the absurd, it would lead to grave injustice if a claim were to fail because a claimant does not serve notice upon the public officer but instead serves the Attorney General who the notice, in any event, is intended to benefit and facilitate.

[24] I therefore conclude that, for the purpose intended by article 28 of the CCP, a claim does not fail if the notice is served upon the Attorney General instead of upon the public officer who it is alleged committed the wrongful act. This interpretation, in my view, and for the reasons outlined above, avoids an absurdity

and injustice while at the same time achieving the ultimate ends for which the article was intended.

[25] It would be strange if article 28, which the Chief Justice in Fast Kaz said "may be aptly described as nothing more than a pre-action protocol with an expressed and drastic sanction built in against a prospective claimant who fails to comply",[8] is interpreted in way that leads to an absurdity and injustice, if there is an alternative way of interpreting it to give effect to its purpose while, at the same time, ensuring that it reads harmoniously with the CPA.

Was the arrest unlawful?

[26] Section 570(2) of the Criminal Code[9] provides that

> "A police officer may arrest without warrant anyone who is or whom he or she, with reasonable cause, suspects to be in the act of committing or about to commit, an offence."

[27] Having assessed the evidence of Danny, as well as that of PC Nelson, I am satisfied that Danny used obscene and insulting language to PC Nelson. Both Danny and PC Nelson gave evidence that there was an exchange of words between them. As the situation escalated, I believe PC Nelson and PC Avril that obscenities were used. This Court also finds that PC Nelson informed Danny that he was being arrested for using insulting and obscene words. The claim of unlawful arrest has therefore not been made out.

Is the second defendant liable for false imprisonment?

[28] False imprisonment is the unlawful imposition of constraint on another's freedom of movement from a particular place. The tort is established on proof of: (1) the fact of imprisonment; and (2) the absence of lawful authority to justify that

[8] At paragraph 23
[9] Cap 3.01 of the Revised Laws of Saint Lucia

imprisonment.[10] It does not matter that the period of deprivation of liberty is very short.[11]

[29] It is not disputed that, at the material time, PC Nelson was attempting to arrest and detain Danny. After being shot, Danny says he was placed in the police vehicle, handcuffed and taken to the Victoria Hospital. PC Nelson and PC Avril say that Danny was placed in the vehicle and escorted to the Hospital.

[30] Before and after being shot, Danny's freedom was being constrained and therefore the fact of imprisonment has been established. The absence of unlawful authority has not, however, been made out. As stated above, it is this Court's finding that Danny likely used obscene, insulting and threatening words to PC Nelson. This is an offence for which PC Nelson would be justified in arresting Danny. On this basis, the claim for false imprisonment has not been made out either.

Is the second defendant liable for malicious prosecution?

[31] On 6th February 2013, PC Nelson proffered five criminal charges against Danny: using threatening language, resisting lawful arrest, unlawfully assaulting him, causing damage to police uniform and using insulting words. The magistrate before whom the charges came on 11th April 2013 dismissed all five charges. PC Nelson says there was cogent basis for the charges but that they were dismissed, not on the merits but for want of prosecution whilst he was on leave. Danny says the charges were dismissed because PC Nelson was unable to substantiate them.

[32] In an action for malicious prosecution, the plaintiff must show first, that he was prosecuted by the defendant, that is to say, that the law was set in motion against him on a criminal charge; secondly, that the prosecution was determined in his

[10] Albert Augustin v WPC 152 Bertie Ferdinand and The Honourable Attorney General of Saint Lucia SLUHCV2008/0647 at paragraph [31]; Alexander Jules and Lisa Callender v The Attorney General SLUHCV2016/0595 at paragraph [10]

[11] Eric Conliffe v Sergreant Jeffrey Laborde et al High Court Civil Claim No 331 of 2009 (Saint Vincent and the Grenadines at paragraph [34]

favour; thirdly, that it was without reasonable and probable cause; and fourthly, that it was malicious. The onus of each one of these is on the claimant.[12]

[33] In the case of Margaret Joseph v The Attorney General and Raphael Hamilton,[13] the Court said the following:

> "In Glinski v McIver, the House of Lords held that in order for a plaintiff to succeed in an action for malicious prosecution he must prove one or other of the following: either that the defendant did not believe the plaintiff was probably guilty of the offence; or that a person of ordinary prudence and caution would not have concluded, in the light of the facts he honestly believed, that the plaintiff was probably guilty. Additionally, the plaintiff must prove malice on the part of the defendant that is any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice - Wershof v Metropolitan Police Commissioner."[14]

[34] This Court has indicated above that it finds on a balance of probabilities that, in the heat of the exchange, Danny likely used obscene and insulting words and threatening language to PC Nelson. Danny resisted arrest, to the extent that he admitted in his evidence that he tried "to wriggle to make him loosen my pants" and that he "defended himself and a struggle ensued." I therefore find that PC Nelson had reasonable and probable cause to believe and did believe that Danny was guilty of the offences for which he was charged. There is no indication, on the evidence, that PC Nelson acted with any motive other than to bring Danny to justice in instituting the charges. In the circumstances, this Court also finds that the cause of action of malicious prosecution has not been established.

Was there assault and battery on the claimant?

[35] Assault is an intentional or reckless act that causes someone to be put in fear of immediate physical harm. On the other hand, battery is the intentional or reckless application of force to someone without his consent. Anything that amounts to a blow, whether inflicted by hand, weapon or missile, is a battery. The requirement

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[12] Sylvanus Leslie v Ollivierre Civil Appeal No.27 OF 2001 (Saint Vincent and the Grenadines) at paragraph [13]
[13] Civil Appeal No. 9 of 2003 (Grenada)
[14] at paragraph [12]

of intention, with respect to both torts, is a reasonable inference to be drawn from all the circumstances.

[36] The Court accepts that a struggle ensued between PC Nelson and Danny. Danny said PC Nelson dragged him towards the police vehicle, all the while punching him. He says when he fell to the ground, PC Nelson pinned him down and continued to punch him. PC Nelson denies this. This court finds on a balance of probabilities that during the struggle PC Nelson used force to subdue Danny.

[37] The question then is whether PC Nelson can avail himself of section 571 of the Criminal Code[15], which provides that:

> "A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large."

[38] Section 571 requires the degree of force used to be reasonable for the purpose of effecting the arrest. I find that Danny resisted arrest to the extent that he admitted in his evidence that he tried "to wriggle to make him loosen my pants" and that he "defended himself."

Was the second defendant**'s use of force** excessive?

[39] However, I do not believe and accept PC Nelson's evidence that, during the struggle, Danny managed to grab PC Nelson, a sturdily built officer, by the collar and throw him to the ground, while Officer Avril simply stood by armed with his pistol and watched. I also do not believe that Danny was able to punch PC Nelson twice in his temple, leaving him dazed, again while Officer Avril simply stood by. Further, PC Nelson, in his evidence in chief, said "he released Danny" in order to defend against Danny's sister. This suggests that Danny did not have PC Nelson pinned to the ground, as he would have this court believe. Rather, PC Nelson appeared to have the upper hand in the struggle. After listening to and assessing

[15] Cap 3.01 of the Revised Laws of Saint Lucia

the evidence of Danny and PC Nelson, I have no difficulty preferring the evidence of Danny on this particular aspect of events.

[40] Neither do I believe that Danny was armed with two large stones the size of cantaloupes aimed to throw at PC Nelson. No evidence of these stones has been adduced by way of photographs or otherwise. Further, based on the evidence given about the area where the incident occurred, it appears to have been graded, making the convenient presence of these two rocks, the size of cantaloupes, unlikely.

[41] I therefore conclude that it was while PC Nelson had Danny fully subdued that the shot to his knee was fired. This is supported by the evidence of Dr. Dagbue who confirmed that the exit wound was anterior, which suggests it was unlikely that the PC Nelson shot from the front. PC Nelson shot Danny when he posed no threat to anyone. I do not accept that PC Nelson was in fear of imminent danger to his life. His actions constitute excessive and unlawful use of force and amount to assault and battery.

Does the maxim *ex turpi causa* apply?

[42] The Court in The Attorney General of St. Lucia and Francis Dariah v Donavan Isidore[16] cited the English Court of Appeal in Harry Cross v William Dickinson Derby, which stated the principle thus:

> "In summary, therefore, if *ex turpi causa* is to apply in tort something more than wrongdoing, whether general or even on the occasion directly in question, is needed…
>
> > 'In my judgment where the claimant is behaving unlawfully, or criminally, on the occasion when his cause of action in tort arises, his claim is not liable to be defeated *ex turpi causa* unless it is also established that the facts which give rise to it are inextricably linked with his criminal conduct. I have deliberately expressed myself in language, which goes well beyond questions of causation in the general sense. "The principle which I have endeavored to identify was succinctly encapsulated by Rougier J in his judgment in Revill v Newbery when he concluded that the

[16] Civil Appeal No. 2003/0020 (Saint Lucia)

> *ex turpi causa* principle applied only "if the injury complained of was so closely interwoven in the illegal or criminal act as to be virtually part of it or if it was a direct uninterrupted consequence of that illegal act.'"[17]

[43] For the reasons already outlined above, I cannot hold that PC Nelson's shooting of Danny, whilst he was subdued, was so inextricably linked to any criminal conduct as to be virtually a part of it. Further, as PC Nelson's behavior was excessive and disproportionate to the unlawful acts and the circumstances prevailing at the time he shot Danny, PC Nelson cannot be exculpated from his own unlawful act by relying on this maxim.

What is the measure of damages?

[44] Dr. Ndidi Dagbue gave expert medical evidence on behalf of Danny at trial and provided two medical reports, having examined and treated him on 28th March 2013 and 12th January 2015. His reports are consistent with the reports of Dr. Richard Felix and Dr. Richardson St. Rose of the Victoria Hospital where Danny was hospitalized from 10th August 2012 to 16th August 2012. The reports reveal that Danny suffered a bullet wound to the medial femoral condyle and a comminuted fracture of the condyle. An exploration surgery was performed on 14th August 2012 in which fragments were reduced and held together by k-wires. The joint was found to be deranged and osteoarthritis would be the inevitable outcome. Danny was, at the time, ambulant on crutches and weight bearing, suffering chronic pain, and unable to work. Osteonecrosis was confirmed in November 2012.

[45] As at 28th March 2013, Danny was suffering from ankyloses of the left knee joint, which was painful; stiffness of the ankle with decreased range of motion; and osteoporosis of the femur. At the time he was being treated with physiotherapy but was expected to have some amount of permanent ankle stiffness with decreased range of motion. He had temporary partial impairment from the date of

[17] At paragraph [9]

injury to the date of assessment. It was noted that the ankyloses of the left knee joint would remain permanent unless he had total knee replacement surgery, which would improve his range of motion; alternatively, a formal knee fusion, which would result in a permanently straight knee that could not be moved but would be pain free. It was found that he could not perform most activities of daily living without support and could not return to work, as he could not bear full weight on the left lower limb.

[46] He was again examined on 12th January 2015 and was found to be suffering posttraumatic osteoarthritis of the left hip, posttraumatic osteoarthritis of the left ankle and post traumatic ankyloses of the left knee. It was further determined that full pain free function of the left hip and ankle could only be returned by total hip and ankle replacements. He could perform most basic activities of daily living but with much difficulty as he could not sit with a bent knee, walk distances, and sit in the back seat of a car as he could not bend his left hip, knee and ankle normally. He could not perform activities that would require him to run. He has a whole person impairment of 36%.

[47] At the time of the accident, Danny was a 37-year-old, able-bodied man. He was a tiler by profession and worked for various contractors. He presented the only pay slip he was able to find dated 18th May 2012 from Ian's Tiling Service for 12 days' work at the rate of $140.00 daily. He also says he did brick laying at the rate of $1.00 per block laid, for which no pay slips are issued. He says he can no longer work. He says prior to the incident he was an avid sportsman, playing cricket occasionally and football daily. He used to run every Sunday to keep fit. He can no longer enjoy these activities. He experiences severe pain of the left knee and ankle when walking short distances. He no longer enjoys a social life as he can no longer go dancing and to parties.

Special Damages

Expenses Incurred

[48] Special damages are awarded in respect of the monetary loss that the claimant has sustained up to the date of trial, and must be specifically pleaded, particularized and proven.[18] Danny has produced receipts in relation to sums for medical charges (x-rays, medical reports, hospital fee, clinic fees, consultation fees and medication) as well as transportation to and from the Victoria Hospital where he was treated. These expenses total $4,370.50, as evidenced by the receipts. Danny is therefore entitled to recover this sum by way of special damages.

Loss of Earnings

[49] Danny provided one pay slip showing payment at the rate of $140 per day for 12 days of work from Ian's Tiling Service. He says he was employed by various contractors and appeared to work on an ad hoc basis. However, he provided no evidence of the periods over which he was accustomed to working – neither the average number of days over any particular period nor the frequency of jobs. In the absence of other pay slips, there is no documentation from any employer providing this information. There is also no evidence in relation to his periods of employment doing brickwork.

[50] This court does not accept that the claimant worked 12 days per fortnight consistently throughout the year based on the nature of his employment. In the absence of evidence to support his claim, the Court finds that it is more reasonable that he worked an average of 5 days per fortnight, given that he worked for various contractors on an ad hoc basis. Using the rate of $140.00 per day, this amounts to the sum of $16,800.00 per annum. Due to the paucity of evidence in relation to his employment in brickwork, the Court is unable to consider his loss of earnings in this regard.

[18] Ilkew v Samuels [1963] 1 WLR 991

[51] Danny said in his witness statement that, up to that date, he was unable to work. His prognosis as at December 2012, contained in the report of Dr. Richardson St. Rose, was 100% disability over a period of nine months, that is, up to September 2013. In the report of Dr. Dagbue, of April 2013, it was noted that Danny would be unable to work. As at January 2015, based on the report of Dr. Dagbue, he was assessed at 36% whole person impairment. The defendants submit that as at September 2013, Danny was under an obligation to mitigate his losses by seeking alternative employment, which he was by then in a position to do. Having failed to mitigate his losses, the defendants submit that the award should be reduced. However, Danny's condition, based on the medical evidence, suggests that he would have experienced much difficulty in finding and doing alternative work. The defendants have not shown otherwise. In the circumstances, the Court does not find it appropriate to reduce the award.

[52] Loss of earnings of $16,800.00 per annum over 6 years and seven months from the date of the incident to the date of assessment amounts to the sum of $109,584.40. As Danny has not indicated to this court whether he was liable to pay taxes and other contributions such as NIS, this sum must be taxed by the amount of 20%. Danny is therefore entitled to recover the sum of $87,667.52.

General damages

[53] General damages are non-quantifiable, the direct result of the injury sustained, and require determination of an award of a sum of money which will put the injured party in the same position he would have been, had he not sustained the wrong for which he is being compensated.[19] The figure awarded must be a conventional figure derived from experience and from awards in comparable cases, the aim being that justice meted out to all litigants should be even-handed.[20] The factors to be considered are the nature and extent of the injuries sustained, the nature and

[19] Livingstone v Raywards Coal Co. (1880) 5 App. Cas. 25
[20] Wright v British Railways Board [1983] 2 All ER 698 at 699

gravity of the resulting physical disability, pain and suffering endured, loss of amenities, and the impact on the claimant's pecuniary prospects.[21]

Pain and suffering and Loss of Amenities

[54] The claimant submitted that the appropriate figure to be awarded for pain and suffering and loss of amenities is $180,000.00. The defendants submitted that the appropriate sum is $60,000.00. Both parties cited cases in support of their respective contention. I have had regard to the cases cited by both parties, as well as several other cases, in which the claimants suffered injuries similar in nature to that suffered by Danny.

[55] In Andre Halls v Attorney General,[22] the claimant was assessed as having suffered compound fractures of the proximal ends of the right tibia fibula, with much soft tissue loss and a large defect about the lateral aspect of his right knee joint. The lateral popliteal nerve was destroyed. He was admitted to the Victoria Hospital and the wound was cleaned and dressed. The wound was complicated by infection and necrotic tissue and bone and was debrided. The large wound was covered by split skin grafting. He was discharged after eight (8) weeks with follow ups at the surgical out patient clinic. Upon review, the claimant was diagnosed with (1) painful neuroma about the head of the fibula; (2) Adventitius Bursa-Cystic about the same level; (3) permanent foot drop; (4) bullet fragments about the knee joint; (5) permanent damage of the lateral collateral ligaments. The small bullet fragments and damage to the collateral ligaments in the vicinity of the claimant's knee would produce an unstable knee joint with walking difficulties and chronic pain. The claimant would have a permanent foot drop with unstable knees. He had to undergo further surgical procedures to partly stabilize the knee joint and for the excision of the neuroma about the head of the fibula. An award was made in the sum of $160,000.00, being $100,000.00 for pain and suffering and $60,000.00 for loss of amenities.

[21] Cornilliac v St. Louis (1965) 7 WIR 491
[22] SLUHCV2008/0179 decided 23rd August 2018.

[56] In Ronal Fraser v Joe Dalrample,[23] the claimant suffered comminuted fracture of left ankle and lower 1/3 of leg; fractured left medial malleolus of left tibia; severely comminuted fracture of lower end fibula; lateral dislocation of left ankle/tibio talar dislocation with lateral shift of talus with ankle diastases; severely contaminated compound wound with neuro-vascular compromise; the claimant was discharged from hospital after 28 days and taken to his home where he remained bedridden for approximately 4 months after which he began to move around his home and yard with a crutch. He underwent physiotherapy and had to return to the doctor on numerous occasions, as he was in constant pain and the fracture was not healing properly. He had full disability of the lower limb and had to have further surgery in Guyana for his ankle joint to be fused, as his ankle was not healing. He continued to experience pain and discomfort over twenty months. In 2010, he was awarded general damages in the sum of $150,000.00 with $85,000 for pain and suffering and $65,000.00 for loss of amenities.

[57] In Cleos Billingly v Kevon Jessie-Don Anderson,[24] the claimant suffered laceration to the left parastatal scalp; deformity of distal leg and left elbow; fracture to left tibia and fibula; fractures to left distal humerus and right thumb. She was hospitalized for 10 days and underwent surgery for external fixation of the distal humerus as well as closed reduction and casting of the fracture of the tibia/fibula. She underwent further surgery to remove the external fixator and was discharged with follow up treatment at the out patients clinic. The claimant healed well but continued to complain of pain and stiffness of the elbow with post trauma arthritis. In 2014, the court awarded the sum of $110,000.00 for pain and suffering and loss of amenities.

[58] In Sherma Mathurin v Rain Forest Sky Rides Ltd,[25] the claimant suffered a displaced intra-articular open fracture of the lower end of the right tibia with a

[23] ANUHVV2004/0513 delivered on 5th May 2010.
[24] SVGHCV2013/0096 delivered on 3rd December 2014.
[25] SLUHCV2008/0551 delivered on 3rd August 2010.

fracture of the fibula; multiple grazes and bruises to the forehead and right upper limb. She underwent surgery for external fixation of plates and screws along with bone grafting of the fracture. The claimant developed arthrosis of the right ankle and had to seek medical treatment in Martinique. The claimant's permanent impairment of the right hind restricted her ability to walk long distances, standing for prolonged periods, walking on inclined surfaces or even wearing shoes with heels. In 2010 the sum of $150,000.00 was awarded for general damages.

[59] In Christopher Flermius v Andre Solomon and Fimber Louis,[26] the claimant, aged 31 at the date of assessment, suffered a compound comminuted fracture of his right tibia and fibula; there was bone loss, and existing fragments were reduced and fixed with external fixators; he was assessed with disability at 60% for nine months during which there would be pain; discomfort and inability to work in the long term; permanent leg shortening; an obvious limp; extensive scarring and permanent disability of 30%; he later suffered bone infection for which he underwent a bone grafting operation and inability to work for a further nine months. The court assessed damages for pain and suffering and loss of amenities at $55,000.00.

[60] In Pereira v Mills,[27] the claimant, 15 years at the date of injury, suffered multiple abrasions and a fracture of the mid shaft of the left femur with displacement. She underwent surgery and a Steinman Pin insertion of the left tibia and skeletal traction. She underwent two months in traction in the hospital and then physiotherapy for two months. The injury healed with a mal-union of the proximal left fracture with overlap at the fracture site and a rotational deformity, that is, after the accident there was a hump on her thigh where the bone was broken. Her disability at the time of the award was assessed at 30% partial disability until rectified through further surgery to correct her gait. She experienced excruciating pain and pain at the fracture on direct pressure. The Court awarded the sum of

[26] Suit No. 1041 of 2002
[27] SKBHCV2004/0038 (Mathurin, M) November 23, 2004; March 15, 2015]

$60,000 as general damages, taking into account the nature of the disability and future pain, regarding the corrective surgery, for which there is a possibility that it may be problematic.

[61] In Browne v Israel et al,[28] the ancillary claimant Maurice Richardson's legs were pinned under the dashboard resulting in injury to both knees. He suffered damage to the tendons of both knees and developed osteoarthritis which caused him constant pain. The ancillary claimant was not disabled, although he continued to experience pain and some restriction in his movements. He would have lifelong problems with both knees as his condition wiould invariably worsen with age despite palliative treatment with medication and physiotherapy. He would possibly require knee replacement surgery in the future. He was awarded $50,000 for pain and suffering; $20,000 for loss of amenities.

[62] Having regard to the foregoing cases and the seriousness of the injuries suffered by Danny, in particular whole person impairment of 36%, I find that, in 2019, the sum of $160,000.00 is an appropriate award for pain and suffering and loss of amenities. The proportions are $120,000.00 by way of pain and suffering and $40,000.00 by way of loss of amenities.

Loss of Future Earnings

[63] The Court has found that Danny's yearly income would have been about $13,440.00 less taxes and other deductions. Danny was 37 years old at the date of the incident and would likely have been able to work up to the age of 65 to 70 years, had he not been injured, some 28 to 33 additional years. Having regard to the seriousness of his injury, being whole person impairment of 36% and difficulty in performing basic activities of daily living, the Court finds that a multiplier of 12 would be appropriate. Taking the multiplicand of $13,440.00 and multiplier of 12, his future loss of earning would amount to $161,280.00.

[28] SVGHC CLAIM NO 80 OF 2006 (LANNS M) July 24 2014]

[64] However, Danny has also claimed the sum of $105,000.00, based on a further report of Dr. Dagbue dated 8th February 2018 being the cost of hip replacement, knee replacement and ankle replacement surgery. Dr. Dagbue indicates these surgeries would return Danny to full pain free function of his hip, knee and ankle respectively. As the defendants argue, Danny would be obligated to undergo such surgery within a reasonable time, after which he should be able to return to work. In the circumstances, the sum for future loss of earnings would have to be discounted, since Danny would not be deprived of loss of earnings for the remainder of his working life. The Court finds it appropriate therefore to discount this sum by one half. Danny is entitled to recover the sum of $80,640.00 for future loss of earnings.

Future Medical Expenses

[65] Based on the further report of Dr. Dagbue, dated 8th February 2018, Danny is entitled to recover the cost of the hip, knee and ankle replacement surgery in the sum of $105,000.00.

Should exemplary damages be awarded?

[66] Exemplary damages are awarded where there has been oppressive, arbitrary or unconstitutional action by servants of the government.[29] It is an exceptional remedy; it goes beyond compensation of the injured party and is considered to be a measure of punishment for the defendant's action.[30] It also serves to publicly indicate that the action is unacceptable.[31]

[67] In this case, the action of PC Nelson was plainly high handed, oppressive and arbitrary. For the reasons outlined above, PC Nelson's actions amounted to an excessive and unlawful use of force, as Danny posed no imminent threat of danger to anyone. It was an abuse of power by a police officer who, as a servant of the government, is a servant of the people and whose use of power must

[29] Rookes v Barnard [1964] AC 1129
[30] Shayne Richardson v The Attorney General of Anguilla et al. AXAHCV2008/0012 at paragraph [34]
[31] Rookes v Barnard [1964] AC 1129

always be subordinate to his duty of service.[32] A strong message must be sent to police officers that such excessive and unlawful use of force will not be tolerated.

[68] On behalf of the claimant, it was submitted that an award of $50,000 would be appropriate and, in support, the English Court of Appeal case of Thompson v Commissioner of Police of the Metropolis; Hsu v Commissioner of Police of the Metropolis[33] was relied upon. I find this sum to be high and not in line with awards emanating from this jurisdiction. In accordance with the decision of the Privy Council in Tong v. L. I. Ping Sum[34], awards of damages should be confined to the same or neighbouring jurisdictions. The defendants submit that there should be no award for exemplary damages and contend that the measure of any such damages may be affected by the conduct of the parties. They highlight that Danny was resistant, aggressive and violent. The defendants submit that if the Court feels constrained to make an award, the sum of $5,000.00 is appropriate for both exemplary and aggravated damages. In support, they rely on the case of Curvin Colaire v Attorney General of the Commonwealth of Dominica and another[35].

[69] In the Curvin Colaire, the second defendant, a police officer, cranked the M16 assault rifle which he was holding and taking aim, shot the claimant. The bullet struck the claimant in his stomach. The Court found that from all accounts the rifle used was a high calibre weapon used mostly in warlike circumstances and riots. There was no evidence of provocation or aggression on the part of the claimant, neither was there any evidence that the officers' lives were endangered to justify the use of such force. The Court made an award of $10,000.00 for aggravated and exemplary damages.

[32] Rookes v Barnard [1964] AC 1129
[33] [1997] 2 All ER 762
[34] [1985] AC 445
[35] DOMHCV2014/0079

[70] In the case of Maurius Peltier v Police Constable Jefferson Drigo et al,[36] the claimant, on 21st May 2012, was taken to CID where he was questioned and beaten. He was later charged, taken before a Magistrate and was granted bail. On 23rd May 2012, he was examined by the doctor. The Court found that the force used was not reasonable and awarded exemplary damages is the sum of $7,000.00. The Court found there was no basis for an award of aggravated damages.

[71] In Andre Halls v The Attorney General,[37] the claimant was awoken by loud banging noises on the door to his home in Ciceron. He was still in bed when he was accosted by six (6) police officers. He was ordered to raise his hands in the air and to get out of his house. Once outside, he was commanded to lie face down on the ground, while his two hands were handcuffed behind his back by two police officers. While on the ground, one of the police officers shot the Claimant in the back of his right leg blasting out the entire calf area. The claimant alleged that after being shot, he was dragged bare back up a hill causing several bruises and lacerations to his face, back and chest. In keeping with the decision of Curvin Colaire v Attorney General of Commonwealth of Dominica, the court awarded the sum of $10,000.00.

Should aggravating damages be awarded?

[72] Aggravated damages are awarded by the court by way of additional compensation for injury to a claimant's proper feelings of pride and dignity and the consequence of being humiliated. In considering an award for aggravated damages, the conduct must be examined to see if it shows that there was malevolence or spite or that the behavior was high handed, malicious, insulting or aggressive in manner.[38]

[73] Danny pleads that aggravating factors include that he was shot on his own property, in the presence of his nine-year-old son and others; he was handcuffed

[36] CLAIM NO. DOMHCV2012/0267
[37] CLAIM NO. SLUHCV2008/0179
[38] Shayne Richardson v The Attorney General of Anguilla et al. AXAHCV2008/0012 at paragraph [33]

to the van rails after being shot, thereby increasing his discomfort, though he posed no threat and there was no risk of him escaping. Ms. Shillingford, counsel for Danny, submitted that an appropriate award would be the sum of $20,000. In relation to aggravated damages, the defendants submit that there should be no award because of the aggravating conduct by Danny.

[74] In relation to aggravated damages, the sum of $20,000 seems somewhat high. Though the events took place in front of his home, in the view of his son and others, when Danny was being taken from his home to the police vehicle, he was under lawful arrest. The Court takes into account here that there were provoking factors on the part of Danny in using insulting and threatening language to the officers, resisting arrest, and engaging in a struggle. As such, matters of pride and humiliation, though they may have arisen, do not rise to a sufficient degree here to warrant a significant award of aggravated damages.

[75] Based on the foregoing, I find that the claimant is entitled to an award in the sum of $10,000.00 for both exemplary and aggravated damages in the following proportions: the sum of $8,500.00 for exemplary damages and $1,500.00 for aggravated damages.

Conclusion

[76] In light of the foregoing, I make the following orders:

(1) The first defendant is not liable for unlawful arrest of the claimant.

(2) The first defendant is not liable for false imprisonment of the claimant.

(3) The first defendant is not liable for malicious prosecution of the claimant.

(4) The first defendant is liable for assault and battery of the claimant.

(5) Special damages in the sum of $4,370.50 are awarded to the claimant to be paid by the first defendant together with interest thereon at the rate of 3% per annum from the date of the incident, 10th August 2012, to the date of judgment.

(6) An award of $87,667.52 is made for loss of earnings to be paid by the first defendant, together with interest thereon at the rate of 3% per annum from the date of the incident, 10th August 2012, to the date of judgment.

(7) General damages are awarded for pain and suffering and loss of amenities in the sum of $160,000.00 to be paid by the first defendant, together with interest thereon at the rate of 6% from the date of service of the claim to the date of judgment.

(8) An award of $80,640.00 is made for loss of future earnings to be paid by the first defendant.

(9) An award of $105,000.00 is made for future medical expenses to be paid by the first defendant.

(10) Exemplary damages and aggravated damages are awarded in the sum of $10,000.00 to be paid by the first defendant.

(11) Prescribed costs are awarded pursuant to CPR 65.5 to be paid by the first defendant.

JUSTICE GODFREY SMITH, SC
HIGH COURT JUDGE

BY THE COURT

REGISTRAR