COMMONWEALTH OF THE BAHAMAS

2019/CLE/gen/FP/00213

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

BETWEEN

AARON WHYLEY

Plaintiff

AND

THE COMMISSIONER OF POLICE

1st Defendant

THE ATTORNEY GENERAL

2nd Defendant

Before: Mr. R. Dawson Malone
Assistant Registrar (Acting)

Appearances: Mr. Simeon Brown of Counsel for the Plaintiff

Mrs. Eurika Wilkinson-Coccia, Mrs. Anishka Missick, and Mr. John Trevor Kemp of Counsel for the Defendants

Hearing Date(s): 6th January, 2021 and 15th January, 2021

Assessment of Damages – Assault and Battery by Police – Injuries to Chest – Pneumothorax – No Defence filed - Judgment on Liability by Consent- Special Damages - General Damages– Exemplary and Vindicatory Damages

JUDGMENT
Assessment of Damges

Malone, Assistant Registrar (Acting):-

Background

1. The Plaintiff commenced this action by way of specially indorsed Writ of Summons filed on 1st November, 2019 against the Defendants seeking damages for various injuries as a result of an assault and battery sustained while in custody of police officers in Freeport, Grand Bahama on 15th January, 2019.

2. In respect of the injuries, the Plaintiff pleaded as follows:

> "PARTICULARS OF INJURY
>
> The Plaintiff was born on the 11th day of January, 1989 and 30 years old at the time of his assault. The Plaintiff was released from Police custody on the 21st January, 2019 and after making a formal complaint to the Complaints and Corruption Department of the aforesaid Police Force, took a Police Hospital Form to the Sunrise Medical Centre where he was seen and examined by Dr. Leviticus Rolle. Dr. Rolle found that there [SIC] was tenderness to touch over the anterior Chest wall (right sided). He diagnosed the Plaintiff's injury as "Costochondritis" and attributed it to trauma. He commenced the Plaintiff on analgesics with anti-inflammatory medications. The Plaintiff in the weeks that followed continued to feel occasional pain in the Chest area and on the 2nd March, 2019, the pain was so intense that the Plaintiff went to the Rand Memorial Hospital where he was seen and examined by Dr. Mcfall. Upon examining the Plaintiff, Dr. Mcfall diagnosed him as having suffered, "Right Pneumothorax" (Collapsed Lung) and he was detained and hospitalised for approximately seven (7) days. This resulted in expansion of the Lungs and necessitated the insertion of a tube into the right side of the Chest. He was discharged from the RMH on the 9th March,

2019 with prescriptions for the drug Voltaren 75mg."

3. As a consequence of the injuries, the Plaintiff pleaded that his loss and damage included pain suffering and loss of amenity; medical expenses; and loss of earnings. No further particulars were pleaded.

4. The Plaintiff also alleged violation of his Constitutional rights as follows:

> "The Plaintiff further claims compensation, punitive, exemplary and vindicatory [SIC] damages for the violation of his Constitutional [SIC] rights as aforesaid.
>
> PARTICULARS
>
> The actions of Police Officer Russell were unconstitutional, oppressive, arbitrary, abusive and degrading in assaulting and battering the Plaintiff, so as to coerce the Plaintiff to give a statement to the Police. Equally, it is particularly distressing and disgraceful that this occurred in the presence of a senior Police Officer in the person of ASP Weir. It further contravenes the right to remain silent which is fundamental to the "Caution" that the Police is required in law to give a suspect in any interview. It is arbitrary in that this interview was not held in the Police Interview Room where there are recording facilities, but instead in the Office of Inspector Weir and unrecorded. It is further oppressive that the Plaintiff was kept in custody by servants and agents of the Defendants for a further period of five (5) days after the assault and battery of the Plaintiff and without taking him to be examined and treated by a Doctor."

5. The Plaintiff concluded his statement of claim praying as follows:

> "i. General and Special Damages;
> ii. Punitive, Compensatory, Exemplary and Vindictory Damages;

iii. Interest thereon in such amount and at such rate as the Court deems just;
iv. Costs;

6. The Defendant did not enter an appearance or file a Defence and thereafter on 1st July, 2020 the Plaintiff filed a Summons seeking leave to enter judgment. On 2nd October, 2020 the Defendants filed a Summons for an extension of time to file a Defence herein.

7. Both applications (i.e. the Plaintiff's application to enter default judgment and the Defendant's extension of time application), were listed before me on 16th October, 2020 and the parties obtained an adjournment to 22nd October, 2020.

8. On the adjourned date, Counsel presented a Consent Order in the following material terms:

> "UPON THE PARTIES CONSENTING to the issues herein IT IS HEREBY ORDERED by consent as follows:-
>
> i. THAT the Defendant is liable herein as claimed in the Statement of Claim of the Plaintiff and that this action be referred to a hearing for the Assessment of Damages herein and the Plaintiff be at liberty to enter judgment herein accordingly;
>
> ii. THAT the parties file and serve Affidavits of Evidence for the hearing of the Assessment of Damages on or before the 20th day of November, A.D., 2020;"

9. The judgment was filed on 28th October, 2020 and the Plaintiff filed his affidavit on 19th November, 2020.

Proceedings in the Assessment

10. A directions hearing was held for the assessment of damages on 23rd November, 2020 whereby directions were given for inter alia the further filing and service of affidavits, notices to cross examine and attendances of witnesses.

11. The Defendants did not file any affidavits however, on 27th November, 2020 the Defendants filed a Notice to cross examine the Plaintiff in respect of his affidavit and also applied for and obtained a Subpoena Duces Tecum for Dr. Leviticus Rolle ("*Dr. Rolle*").

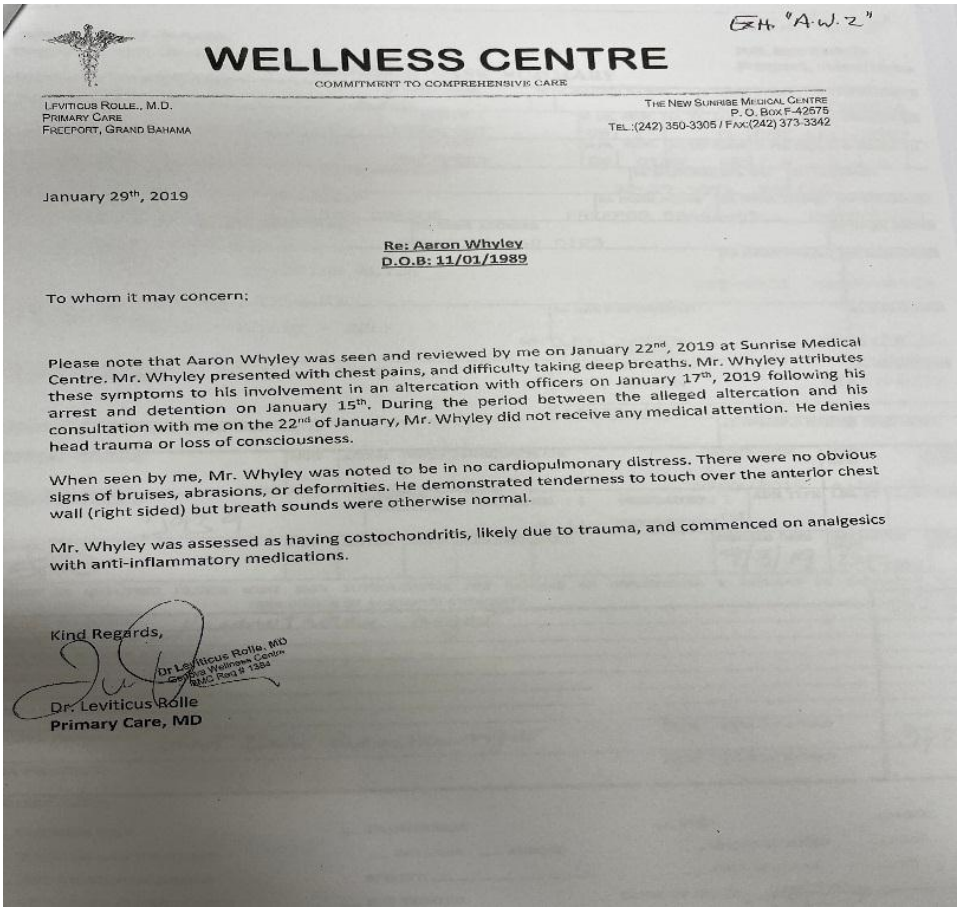
12. The assessment of damages took place via Zoom on 6th January, 2021 during which the Plaintiff and Dr. Rolle gave evidence.

The Evidence

13. Counsel agreed for Dr. Leviticus Rolle to give his evidence first and Counsel for the Defendants advised that they did not object to Dr. Rolle giving his evidence in the presence of the Plaintiff accordingly Dr. Rolle gave evidence on that basis.

14. Having been duly sworn, Dr. Rolle, confirmed that he was a registered medical practitioner licensed under The Bahamas Medical Council and for the purposes of his appearance pursuant to the Subpoena, Counsel for both parties and the Court accepted that Dr. Rolle is and was at the material time a qualified medical physician whose practice is preventive medicine. He was also deemed as an expert medical practitioner who would be qualified to give evidence in his professional opinion.

15. Dr. Rolle gave evidence that he saw the Plaintiff at Sunrise Medical Centre on 22nd January, 2019 and examined him. He further gave evidence that his medical report was prepared on 29th January, 2019 and the same was identified and duly marked Exhibit "**LR-1**" (also later referred to as "**AW-2**"). The report provided as follows:



Ex. "A.W.2"

WELLNESS CENTRE

COMMITMENT TO COMPREHENSIVE CARE

LEVITICUS ROLLE., M.D.
PRIMARY CARE
FREEPORT, GRAND BAHAMA

THE NEW SUNRISE MEDICAL CENTRE
P. O. BOX F-42575
TEL.:(242) 350-3305 / FAX:(242) 373-3342

January 29th, 2019

Re: Aaron Whyley
D.O.B: 11/01/1989

To whom it may concern:

Please note that Aaron Whyley was seen and reviewed by me on January 22nd, 2019 at Sunrise Medical Centre. Mr. Whyley presented with chest pains, and difficulty taking deep breaths. Mr. Whyley attributes these symptoms to his involvement in an altercation with officers on January 17th, 2019 following his arrest and detention on January 15th. During the period between the alleged altercation and his consultation with me on the 22nd of January, Mr. Whyley did not receive any medical attention. He denies head trauma or loss of consciousness.

When seen by me, Mr. Whyley was noted to be in no cardiopulmonary distress. There were no obvious signs of bruises, abrasions, or deformities. He demonstrated tenderness to touch over the anterior chest wall (right sided) but breath sounds were otherwise normal.

Mr. Whyley was assessed as having costochondritis, likely due to trauma, and commenced on analgesics with anti-inflammatory medications.

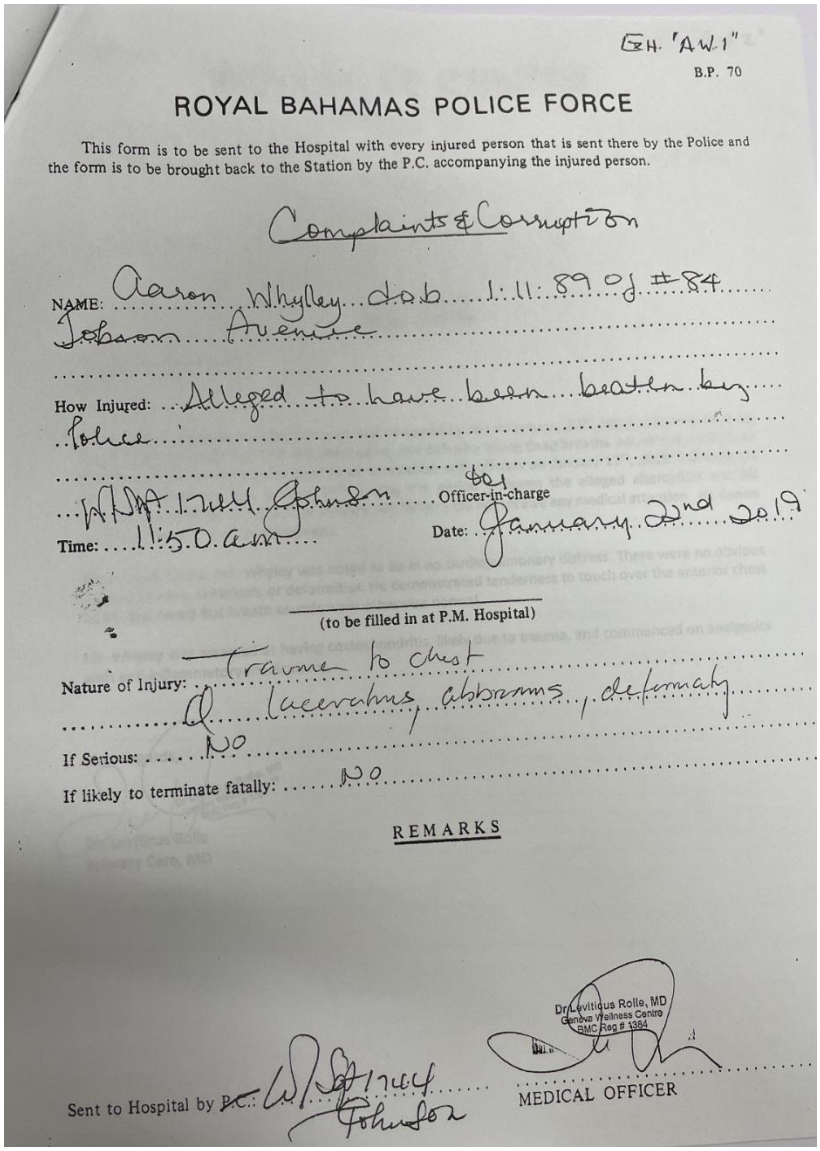
Kind Regards,

Dr Leviticus Rolle, MD
Sunrise Wellness Centre
MDC Reg # 1384

Dr. Leviticus Rolle
Primary Care, MD

16. Dr. Rolle also confirmed that he signed a document in relation to the Plaintiff's visit on the 22nd January, 2019 titled "Royal Bahamas Police Force" "Complaint and Corruption", form for completion by the "Hospital" the same being identified

and duly marked Exhibit "**LR-2**" (also later referred to as "**AW-1**"). The said form provided as follows:



EH. 'AW.1"

B.P. 70

ROYAL BAHAMAS POLICE FORCE

This form is to be sent to the Hospital with every injured person that is sent there by the Police and the form is to be brought back to the Station by the P.C. accompanying the injured person.

Complaints & Corruption

NAME: Aaron Whylley dob 1:11:89 of #84 Johnson Avenue

How Injured: Alleged to have been beaten by Police

WPC 1744 Johnson Officer-in-charge

Time: 11:50 a.m. Date: January 22nd 2019

(to be filled in at P.M. Hospital)

Nature of Injury: Trauma to chest & lacerations, abbrasions, deformaty

If Serious: NO

If likely to terminate fatally: NO

REMARKS

Dr. Leviticus Rolle, MD
Genoa Wellness Centre
BMC Reg # 1384

Sent to Hospital by P.C. WPC 1744 Johnson

MEDICAL OFFICER

17. After entering the aforesaid documents, Dr. Rolle testified that when the Plaintiff presented himself on the 22nd January, 2019 he complained of chest pains, particularly when taking a deep breath but no other injuries. He further stated that he could not confirm if the symptoms were in fact a result of an altercation with the police and he could only state that is what was told to him by the Plaintiff.

18. Dr. Rolle thereafter gave evidence that the Plaintiff during the examination denied having any head trauma or loss of consciousness. Further as to his finding of "*no cardio pulmonary distress*" Dr. Rolle explained that this means when someone is having difficulty breathing or when the pulse is too rapid, this would indicate pain and at the time of the examination the Plaintiff was not having difficulty breathing nor was his pulse rate rapid hence he was assessed as not being in cardio pulmonary distress.

19. Dr. Rolle reported that while there were no obvious signs of bruises, abrasions, and deformities, the Plaintiff demonstrated tenderness to touch and such findings can only be subjectively assessed. As to the location, the reference to anterior chest meant the front chest. In terms of the finding of costochondritis, Dr. Rolle explained that in medical terms it is a finding of damage or injury to the chest wall as opposed to internal organs; and where the bone meets the cartilage is inflamed and that causes pain.

20. Dr. Rolle was then asked to confirm the findings contained on the Police form which he did as trauma to the chest with no lacerations, abrasions or deformities.

21. Dr. Rolle was then asked:-

> **". . . could you say whether your findings is at all possible to be commensurate with any beating, any stomping in the chest or beating in the chest?"**

22. To which he responded:-

"The kind of injury presented with and the kind of symptoms he complained of, yes, ma'am, that can be consistent with blood trauma to the chest, yes."

23. Thereafter in response to questions regarding the length of time that costochondritis would present and length of time it would last, Dr. Rolle advised that it could present a day or two after the injury and also last for about two weeks if not treated but it could last up to six weeks depending on the nature of the injury.

24. When asked of a number of matters in his professional opinion Dr. Rolle responded as follows:

a. Costochondritis would not cause a collapsed lung but something else may if it occurs six weeks later;

b. Smoking tobacco would not cause collapsed lungs, it does damage to the lung itself but would not typically cause a collapsed lung;

c. In terms of the assessment of damage to the chest wall of the Plaintiff, smoking would not cause a collapsed lung;

d. For the injuries assessed, the treatment plan of analgesics over a course of two weeks (twice a day, does not lead to collapsed lungs; and

e. The intention of such treatment plan would be to clear up however every patient is different.

25. In cross examination by Counsel for the PlaintiffDr. Rolle testified that he did not order an X-ray of the chest because he did a physical exam and a manual examination and was able to

come up with the assessment based on that. From the exam, he would not have been able to assess if there were any internal injuries. Upon review of his notes, he confirmed that the tenderness was to the anterior chest wall on the Plaintiff's right side and he stood by his notes.

26. Dr. Rolle further testified that an injury that the Plaintiff sustained to the chest wall would be consistent with a collapsed lung or pneumothorax six weeks later. He further testified that in his experience, that trauma to the body may result in chest wounds.

27. In response to whether a wound to the chest of the Plaintiff could result in a pneumothorax, Dr. Rolle stated as follows:

> "I do agree with that, but it is sort of in an indirect way, but, yes. If in fact the injuries occurred, as you said they did, then, yes, that could have lead to pneumothorax later on. Could I explain to the Court why?
>
> . . .
>
> The reason why I mentioned about clear lung sounds is, whenever somebody presents with chest trauma, you want to make sure there is no fractured ribs which can then puncture a lung, and we can determine that by listening to the chest from the back. Now, he did not have any reduced breath sounds on his lungs so I determined then that he did not have a punctured lung which is why I didn't push for an x-ray. However, if there was sufficient trauma, especially a fracture, I would admit, that could puncture a lung at anytime in the coming days or weeks. And so, in my opinion, he did not have a pneumothorax or a punctured lung at the time I saw him on the 22nd. However, the nature of the injury could have precipitated a separate injury within days or even weeks later."

28. In terms of clarification of what Dr. Rolle meant by nature of the injury and whether the pneumothorax six weeks later was possible, Dr. Rolle testified as follows:

> **"I mean, if in fact he suffered from blunt force trauma to his chest, then that could have perhaps fractured a lung -- sorry, that could have fractured a rib and a fractured rib could then lead to a punctured lung. It doesn't have to occur at the time of the injury. It could have occurred at anytime, days later.**
>
> **. . . [T]he trauma that he sustained on the 22nd, which I saw him for on the 22nd is consistent with a possible pneumothorax weeks later."**

29. In closing the cross examination, Dr. Rolle testified that as far as he was aware the Plaintiff came to be examined of his own volition and that he was not brought or sent by the police but he did however read and sign the form at Exhibit LR-2 (also AW-1).

30. In re-examination Dr. Rolle testified that at the time of the assessment of the Plaintiff he did not order an X-ray because it was his assessment that the lung was not punctured but could have happened later, and he could only give evidence that the same was possible. In that regard he said,

> **"I am saying if in fact he was assaulted in the way he claimed he was assaulted, then that kind of blunt force trauma to his chest could have caused a fracture which could have punctured the lung either at the time of the injury or days or weeks later, that is consistent."**

31. When further pressed by Counsel for the Defendants as to whether the injuries must have been as a result of another accident/event, Dr. Rolle testified:-

> "It is possible. Now, obviously, I cannot speak to whether the gentleman was assaulted again; I don't know that. But I am saying that the injury that he sustained on the 22nd could have led to pneumothorax 11 days or weeks later."

32. Thereafter, the Plaintiff was called and duly sworn and his affidavit filed on 19th November, 2020 was entered and marked as Exhibit AW-I. The Plaintiff's evidence therein is as follows:

> 1. That I am the above-named Plaintiff and make this Affidavit as my sworn evidence in the aforementioned matter;
>
> 2. That sometime on the 15th January, 2019 I was at my home situate at No.84 Jobson Avenue in the aforementioned city of Freeport when Officer McKenzie and other officers of Central Detective Unit (hereinafter referred to as "CDU") came to my home and stated that they had a warrant for my arrest for a traffic ticket involving dark tinted windows;
>
> 3. That to my knowledge I knew I paid that ticket and I let the police officers in so that I could show them the receipt which was on my bureau;
>
> 4. That once the police officers were inside my home, Officer McKenzie slammed me against a wall and said I was under arrest for murder. He then asked if I had any firearms or drugs;
>
> 5. That I asked to see the warrant and was never shown it and the other police officers began to search my home. An officer took a pair of my tennis, a jacket and a pair of pants and told me that they were taking them for evidence;

6. That Officer McKenzie found an old track starter pistol that was used to start sport track and field events. He then shouted "got ya now";

7. That Officer McKenzie then told me that he was charging me because he found a gun in my home, he then stated that he was going to arrest my mother and charge her as well;

8. That I was stunned and tried to explain to Officer McKenzie that my mother did not live with me. I further tried to tell Officer McKenzie that the gun was a track starter pistol;

9. That Officer McKenzie ignored me and said that he was charging me with possession of a firearm and proceeded to wake up my tenant who rented a room in my home, to search their bedroom;

10. That I told my tenant to call my mother so she could contact my lawyer. In my presence Officer McKenzie told my tenant that if he made any calls he would lock him up and charge him with tampering with a police investigation;

11. That when the police officers took me from my home, they took possession of my cell phone and were trying to gain access to it but were unable to unlock it;

12. That when I asked them why they needed the code for my phone, Officer McKenzie took his forearm and pressed it against my throat and threatened me by saying "we can do this the easy way of the hard way". I immediately felt in fear of my life and gave them the code to my phone;

13. That Officer McKenzie demanded that the other officers go and arrest my mother at her and my grandmother's home situate at No.38 Clarke Avenue in the aforementioned city of Freeport;

14. That once there, the police officers never showed myself, my mother or my grandmother any warrants. They searched their home and found nothing;

15. That whist there I told my mother to call my lawyer, Officer

McKenzie then said to my mother to go and pack her bags and that he was arresting her. I was frightened and began to plead with Officer McKenzie not to arrest my mother;

16. That once I was taken to Central Police Station, Officer McKenzie told me that my phone and my clothing is police property and I was still not given an opportunity to call my lawyer;

17. That I was placed in a cell for fifteen minutes and was never processed. I was then moved to Lucaya Police Station, and the police officers informed Lucaya Police Station that no one was allowed to see me and I was CDU's prisoner;

18. That on the 16th January, 2019 police officers took me to CDU and questioned me about the murder of Lester Adderley, Sr. I had an alibi and told them I was with my girlfriend and was at no time near the scene of that crime;

19. That on the 17th January, 2019 I was taken back to CDU but in Officer Weir's office and questioned about the shooting of someone named "Punch". I told all the police officers present that I had no knowledge of that shooting and that I was not there;

20. The police officers then told me that either myself of Tavares Beckford shot Lester Adderley, Sr. They told me that they would charge me with gun possession for the starter pistol;

21. That Officer Ramando Russell then slapped me in my face and stomped me in my chest. Officer Weir then threatened me and said that either I redo my interview and say that Tavares shot Punch or else. He said that once I did this, he would get rid of my old gun charge and I would not have to go to court for the joint. He also said that he could get me to sign in on a different island;

22. That I was in fear and proceeded to do the interview. Once I finished, I was finally allowed to speak to my lawyer, and I told him that I was beaten and forced to give a false statement;

23. That after I was beaten by Officer Russell I felt pain in my

chest which continued throughout my interview. That I asked to be taken for medical treatment but was refused by Officer Weir and other officers;

24. That sometime on the 18th January, 2019 police officers moved me to Eight Mile Rock police station. I informed the officers there that my 48 hours had expired and I was then served with an ex-parte extension;

25. That sometime on the 20th January, 2019 police officers from Drug Enforcement Unit (hereinafter referred to as "DEU") came to the station and charged me with possession of drugs. I then asked the officer to grant me police bail and he said only CDU can grant that as they are above DEU;

26. That officers from CDU then took me to Central Police Station, while there, Officer Weir called my mother and asked her to come in. When my mother arrived Officer Weir told me in her presence that he could charge her;

27. That I was in fear of this and told Officer Weir whatever he wanted me to do, I would do. Officer Weir then told me I had to do another interview and say that Tavares Beckford told me certain things and I needed to sign it;

28. That I did the interview as instructed by Officer Weir and my mother was not charged and released;

29. That I was put back in the cell and arraigned sometime on the 21st January, 2019 at the Magistrate's Court in Freeport on the drug charge alone;

30. That on the 21st January, 2019 while I was being taken to court, I continued to feel pain and discomfort in my chest resulting from my being beaten by Officer Russell. On the 22nd January, 2019, the following day, I went to the Central Police Station to the Complaints and Corruption Unit of the Police while there I made a formal complaint;

31. That after making my complaint I was given a police medical form and instructed to attend the hospital to be seen by a medical doctor. I was seen and diagnosed with trauma to the chest; I now attach hereto the Police Medical Form marked "Exhibit AW.1"

32. That after attending the Rand Memorial Hospital I saw my private physician, Dr. Leviticus Rolle at Sunrise Medical Centre where I was diagnosed at that time with having costochondritis and placed on pain killers and anti-inflammatory medications; I now attach hereto a copy of a Medical Report from Dr. Leviticus Rolle marked "Exhibit AW.2"

33. That I continued in the weeks following to experience pain and discomfort in my chest. On the 2nd March, 2019 the pain became so intense that I went to the Rand Memorial Hospital and was examined by Dr. McFall and was diagnose with a collapsed lung. I was admitted to the hospital and held there for seven days. I underwent surgery whereby doctors inserted a tube into the right side of my chest; I now attach a copy of my Medical Records from the Rand Memorial Hospital marked "Exhibit AW.3"

34. That I was discharged from the Rand Memorial Hospital on the 9th March, 2019 and prescribed a course of voltaren 75mg to manage my pain;

35. That since then I continue to have difficulty breathing and repeatedly experience shortness of breath when completing simple tasks such as walking short and long distances;

36. That the statements herein contained are to the best of my knowledge, information and belief, true and correct.

Sworn etc.

33. The medical reports exhibited to Plaintiff's affidavit corroborates the testimony by the Plaintiff which he repeated in further examination in chief. In addition, the Plaintiff gave evidence that he was detained for 3 days and that while in custody he was "**handcuffed in a seat and Officer Rolle, Romado Rolle, slapped [him] to the ground and repeatedly stomped [him] in [his] chest while [he] was handcuffed to the floor**" and despite complaining of chest pain the officers declined his request to see a doctor. The Plaintiff further stated that he

attended Dr. Rolle the day after he attended court because he was in pain and between the time of his visit to Dr. Rolle and 2nd March, 2020 when he went to the Rand Memorial Hospital he did not suffer any injuries to his chest, he was not struck or hit by any person in his chest area.

34. For the purposes of this assessment, it is helpful to outline the entirety of the cross examination given that there was no reexamination and introduced facts not set out in the affidavit or during examination in chief. In that regard, the transcript of the proceedings, page 27 line 4 to page 31 line 13, as follows:

> CROSS-EXAMINATION BY [COUNSEL FOR THE DEFENDANTS]:
>
> Q. Mr. Whyley, could you explain exactly why you waited till almost a month or more later to go to the Rand?
> A. Because the pain, it was just like regular. I thought it was just regular pain. The pain got so intense that day that I had to go to the Rand.
> Q. So initially you weren't having bad pains or heavy pains when the injuries occurred?
> A. I was having pain. I never had chest pain before in my life until the incident that occurred with the police and I was having pain.
> Q. I asked a specific question. I am trying to determine the nature and extent of the injury.
> A. The pain was not that severe for me to go to the hospital, that's why. The pain got so severe that I went to the hospital that day.
> Q. The pain was not so severe and that's why you didn't go then right away to the hospital?
> A. Right.
> Q. I am just trying to determine the nature and extent of the injury.
> And because the pain was not so severe, would you say that you thought it was a trivial injury and that's why you didn't go because you thought it trivial in nature?
> A. If I thought it was trivial?
> Q. Yeah. You thought it was just minor injuries:

They punched you or slapped you?
A. Yeah, I thought it was minor, yes, ma'am.
Q. And you said that you were in Weir's office when an officer would have, you said kicked? What was your terminology?
A. I was slapped. I was sitting in the chair. I was slapped out of the chair and repeatedly stomped on the ground.
Q. And who all was present when you were stomped?
A. Romado Rolle, Officer Weir and it was another officer but I don't know the name of the other officer.
Q. And do you recall the name of the officer who actually stomped you in the chest?
A. Romado Rolle.
Q. Were there any other civilians there?
A. No, ma'am.
Q. Okay. So, can you say why you dismissed your injuries as trivial and didn't go to the hospital right away?
A. Because I didn't know it was that serious. I thought it was just lil minor pain and I thought it would have gone away after I take the medication, which in it didn't. It got would have.
Q. Mister Whyley, you don't think if you were stomped in the chest several times, you don't think that stomping is serious enough that you should have presented yourself to the hospital right away?
A. I presented myself to the hospital right away when I was released because I couldn't get the service while I was in there.
Q. I thought it was you went to see Dr. Rolle at the clinic first when you were released and you went to the hospital like about six weeks later, was that not correct?
A. That's the physician -- that's the same thing as me going. I went to see somebody to check myself out. I went to see a doctor to be checked out.
Q. And do you accept that Dr. Rolle, you heard Dr. Rolle's evidence and he said that it didn't appear as serious as no collapsed lung and so that's why he didn't take and x-rays?
A. Yes.
Q. Sir, I am suggesting to you that your injuries were not as serious at the time when you got the injuries as they later developed to be.
A. Yes.
Q. Or as you alleged that they would have been developed to be. And are you certain that it was the injuries that the police

created that caused the result in collapsed lung and it wasn't anything else?
A. I am sure. One hundred percent sure because I never had any issues before in my life with chest pain or breathing until that incident happened.
Q. Are you an active young man? Do you play sports or anything of that nature?
A. Yes, I was active.
Q. So you were active between the period of being released and going back to the doctor?
A. No, I wasn't active no more after the situation. I was saying that I was active before that. That's what I thought you were asking.
Q. You said the police took your cellphone from you. What type of cellphone was this?
A. An iPhone.
Q. And what value you would have placed on that?
A. At the time it was –
Q. Was it a new phone?
A. It was, it wasn't new at the time but still was valued.
Q. Do you know how much? What value you would place on the iPhone and the other items that were taken from you?
A. About $900.
Q. That would be the total of --
A. Yes.
Q. So you would say $900 for your iPhone and your personal effects?
A. Yes, ma'am.
Q. The surgery that you had at the Rand, did you have to pay for that?
A. My insurance dealt with that.
Q. So you never came out-of-pocket of any monies towards the surgery? The insurance took care of the whole thing?
A. Yes.
Q. And the physiotherapy that you did, did the insurance take care of that as well?
A. Yes, they did.
Q. And I see in the medical records that the doctors would have noted that you smoked tobacco, is that correct?
A. Yes.
Q. Did you smoke any tobacco during that period of being released from the police and going back into the Rand?
A. No.

> Q. Would you say that you are habitual with smoking tobacco prior to this incident happening?
> A. Pardon?
> Q. Were you a habitual smoker of tobacco prior to this incident happening?
> A. Habitual?
> Q. Yes. Meaning regular.
> A. It was occasional. It was more like, it was like events or so.
> Q. Do you know that smoking do affect your lungs as well?
> A. (No response)
> MS. COCCIA: I don't I think I have much more I can ask because Mr. Brown had cleared up some things with his examination in chief.

35. On the question of insurance coverage, in response to the Court, the Plaintiff indicated that he utilized both government and private insurance for his medical expenses.

36. While Counsel for the Plaintiff did not have any further questions, in response to Counsel for the Defendants, the Plaintiff stated that he did not claim any national insurance benefits during his illness and hospitalization.

Submissions of Counsel

37. Closing arguments were heard on 15th January, 2021.

38. Counsel for the Plaintiff relied upon the Amended Plaintiff's Closing Arguments filed on 12 January, 2021 by which it is submitted as follows:

> "This is the classic case of Police oppression and the abuse of a person's right to silence by Police Officers who then physically assaulted and battered the suspect whilst purporting to act in accordance with their duties. It further demonstrates the manner in which the Police can manipulate

the detention of a suspect so as to conceal brutality inflicted on a suspect and the attempt to fabricate evidence capable of supporting the charging of innocent persons with serious criminal offences. In their interviews of the Plaintiff, they engaged in questioning "which by its nature, duration or other circumstances (including the fact of custody) excites hopes or fears or so affects the mind of the subject that his will crumbles and he speaks when otherwise, he would have stayed silent." In this regard, the acts and omissions of the Police Officers herein were "oppressive" and unlawful in every respect.

For the purposes of these Closing Arguments, the facts as established by the evidence herein raise the following issues:

- Whether the Plaintiff herein was assaulted and battered as alleged and the extent of his injuries;

- The extent of general damages for pain, suffering and loss of amenity for the injuries suffered by the Plaintiff, Aaron Whylly [SIC].

- The extent of tortious damages for the torts of Assault and Battery inflicted upon the Plaintiff, including Exemplary/ Punitive Damages.

- Whether the Plaintiff was subjected to torture, inhumane or degrading treatment or punishment as forbidden by Article 17(1) of the Constitution of the Bahamas.

- If so, the extent of Compensatory and Vindicatory or Constitutional Damages for the same.

<u>THE EXTENT OF THE PLAINTIFF'S INJURIES:-</u>
This is a civil case and as such, the Plaintiff's bares the burden of proof of each and every allegation against the Defendant on a standard, commonly called "a balance of probabilities."

It is thus for the Plaintiff to prove on the basis thereof that the Plaintiff was assaulted and stomped by a Police Officer whilst in Police custody and that as a result thereof that he was injured and further, that the injury included the collapse of his lung as discovered at the Rand Memorial Hospital on or about the 2nd March, 2019.

The Plaintiff herein has given evidence both by way of affidavit and oral evidence. His evidence has been supported by the oral and documentary evidence of Doctor Leviticus Rolle. In particular, Dr. Rolle was of the opinion that the Police stomping the Plaintiff in his chest could account for the collapse of his lung approximately 6 weeks later.

He noted that days after the alleged beating, he found evidence of tenderness to touch and pain in the area of the Plaintiff's chest. He did not perform an internal examination of the Plaintiff either by x-ray or otherwise. He found that the Plaintiff suffered trauma to the chest which he diagnosed as costochondritis, which could have been caused by a blow to the chest. He further in cross examination stated that the collapse of the lung could have been caused by a "wound" to the chest.

It is submitted that when this evidence is taken together with the Plaintiff's evidence of not having had any physical blow to the body other than that inflicted by the Police and of having suffered pain and discomfort in his chest "on and off" after being stomped by the Police, it is clear, on a balance of probability that the collapse of his lung on the 2nd or 3rd March, 2019 was caused by the Police. This satisfies the "but-for" test for the element of causation herein. In this regard, we attach hereto a summary of the case of Barnett vs. Chelsea & Kensington Hospital Management Committee [1969] 1 QB 428, which is set out in "TORT LAW"- Text & Materials, 6th edition by Lunney, Nolan and Oliphant.

GENERAL DAMAGES (PSLA):-

The evidence herein establishes that the Plaintiff was stomped in his chest repeatedly by Police Officer Russell while being interviewed at CDU in Freeport. He was examined by Dr. Leviticus Rolle at the Sunrise Medical Centre several days later after being released from Police custody. On doing so, he was found to have suffered "trauma to the chest" which was noted on a police hospital form dated 22nd January 2019. This was further explained by Dr. Rolle in a letter of 29th January 2019. Therein, Dr. Rolle explained that the Plaintiff had demonstrated "tenderness to touch" over the anterior chest wall (right side) which he diagnosed as "costochondritis", 'likely due to trauma.' He prescribed analgesics with anti-inflammatory medications. On the 3rd

March 2019, approximately one month later, the plaintiff's right lung collapsed requiring emergency surgery at the Rand Memorial Hospital. He was hospitalized at the R.M.H for a period of seven days until discharged on the 09th March 2019. It is submitted that the collapse of the plaintiff's right lung was due to the assault and battery committed against him by Police Officer Russell at CDU. In this regard, it is noted that the Plaintiff was consistent when alleging the same to Doctors at the R.M.H which is confirmed by the hospital records exhibited herein marked Exhibit "A.W.3".

Given the above we shall be guided by the 15th edition of the Guidelines of the Judicial College of England and Wales in Personal Injury Cases which recommends on page 23 thereof a bracket of damages for up to £16,860 British pounds for lung damage without continuing disability. In the Canadian case of Araujo v. Vincent (2012), the Supreme Court of British Columbia awarded the Plaintiff therein the sum of $70,000.00 general damages for a collapsed lung, 3 fractured ribs, a fractured clavicle and assorted minor injuries.

In this case, we submit that a sum of $30,000.00 on the evidence would be reasonable for PSLA herein.

PUNITIVE/EXEMPLARY DAMAGES :-

The actions of Police Officer Russell, a servant and/or agent of the defendant was unconstitutional, oppressive, arbitrary, and abusive. They certainly fall within those classes of actions referred to in Rookes vs. Barnard which warrant the award of punitive/exemplary damages. The brutality suffered by the Plaintiff must be deterred and indeed it is aggravated by the fact that it occurred in the presence of a Police Inspector [Inspector Weir], a senior Police Officer. Further, the failure and refusal to take the plaintiff to the Doctors during his detention in Police Custody was an attempt to conceal the injury implicated upon him. Police brutality must be eradicated in any fair and democratic society. The bold and direct infliction of serious injury must be stopped. If not, it will inevitably result in the death of suspects in custody. We submit that the defendant herein must be punished not to repeat the lawless behavior shown in this case. We therefore seek the sum of $250,000.00 for punitive and exemplary damages herein. In this regard, we have noted the cases of Merson vs. Cartwright and that of

Deveaux and another vs. the Commissioner of Police with respect to the torts of assault and battery. In Merson case the sum of $90,000.00 was awarded as exemplary damages for the torts of assault and battery and false imprisonment and in the Deveaux case the sum of $50,000.00 was awarded as exemplary damages. We submit that these awards are now outdated and ought to be increased. Indeed, in Merson, the injuries were not as serious as those herein and in Deveaux the writ of summons therein was filed in 1998 (twenty-two years ago). The cost of living today is much greater than twenty years ago. Further, the value of the dollar to the private person in the Bahamas has decreased since the imposition of value added tax. These are factors to be considered by a Court in determining the award of damages under any head. The Court must ensure that damages awarded are fair and reasonable having to regard to all the circumstances of the case. It is encouraging that in Merson, the Privy Council was of the view that the totality of the damages awarded as a global sum ($280,000.00) was fair and reasonable.

CONSTITUTIONAL/COMPENSATORY/VINDICATORY DAMAGES: -

Damages are appropriate under this head because of the contravention of Article 17 of the Constitution of the Bahamas. Article 17 forbids the infliction of torture, inhumane or degrading treatment. The act of stomping the Plaintiff in his chest by Officer Russell satisfies all of these forbidden acts. It was torture, inhumane and degrading treatment, in clear contravention of article 17 of the Constitution. The fact that this is a constitutional right warrants special attention and treatment. In this regard, the Judgement of the Privy Council as delivered by Lord Nicholls of Birkenhead in case Ramanoop vs. A.G of Trinidad and Tobago paras. 17 to 19 is instructive. It is noteworthy that this passage was cited with approval by the Privy Council in Atain Takitota vs. the A.G of the Bahamas. The Plaintiff herein now seeks to invoke the constitutional jurisdiction of the Court to uphold and vindicate his constitutional right which has been contravened. The fact that this right is constitutional might add an extra dimension to the wrong. This may require an additional reward to reflect the sense of public outrage and to emphasize the importance of the constitutional right, the gravity of its breach and the need to

deter further breaches. In this case, we seek a global sum for constitutional damages in the sum of $300.000.00. We do so noting that even after Merson, Tynes vs. Barr, Takitota, Robert Kane vs. The Attorney General and an ever-increasing line of cases involving the violation of the Constitutional rights of persons in the Bahamas by servants and agents of the Bahamas Government, this despicable trend continues despite the lenience of the Courts in the award of constitutional damages. We submit that further deterrents are needed to protect the constitutional rights of our citizens and residents. We submit that the sum of $300,000.00 as constitutional damages is further fair and reasonable having regard to the magnitude of the wrong, the higher cost of living today, the adverse and the negative effects of the imposition of "Value Added Tax" in the Bahamas.

CONCLUSION :-

This case must establish a clear unequivocal message. The Draconian tactics and methods of Police brutality has no basis or home in these Islands. Further, servants and agents of the Bahamas Government, must take care to ensure that the Constitutional and human rights of persons are observed within this country. The Plaintiff herein was not only beaten but was being forced to give possibly erroneous statements to be used as evidence against persons not arrested at the direction of Police Officers. He was threatened with the arrest of his mother simply as leverage during hours of interrogation. As noted by the former Chief Justice Sawyer in the Merson case, these were "Gestapo" type tactics being routinely used. This must cease immediately.

The Plaintiff thus seeks total damages as follows :-

General Damages (PSLA) - $30,000.00
Punitive/Exemplary Damages - $250,000.00
Constitutional/Compensatory/ Vindicatory Damages - $300,000.00

Total - $580,000.00

Plus, Interest thereon at 5% per annum.
Legal Costs."

39. Counsel for the Plaintiff also submitted that the Defendants' written submissions on contributory negligence and mitigation ought to be rejected in this matter in that the case is one of police brutality on a suspect in custody and their failure to take the Plaintiff to the doctor, thereafter resulting in the Plaintiff's need for medical treatment. On the issue of causation Counsel for the Plaintiff repeated the evidence given by the Plaintiff and Dr. Rolle. Counsel for the Plaintiff called on the Court to send a message by making a substantial award of damages to send a message to the police because in a small country the police appear to have little respect for human rights.

40. In response, the Defendants relied on their Written Submissions on Assessment Hearing dated 14th January, 2021 whereby they submit:

> "INTRODUCTION
>
> The Crown reserves the right to join issue with the issues raised on this assessment hearing. The Crown also reserves the right to withdraw, amend and or supplement these written submissions with oral arguments at the continuation of this assessment during the closing arguments.
>
> It is respectfully submitted that this assessment hearing is simply an exercise to determine the appropriate quantum of damages that should be awarded under each head of damage. The case is not be considered on its merits or otherwise, save and except for the need to clarify the resulting damages, loss and or injury to Plaintiff. Hence, there is no need to get into the semantics of whether the actions of the Defendant's and or their servants or agents were wrong. There is no need to even inquire into any rationale behind the actions. Liability has been admitted in order to avoid the waste of judicial time. The evidence from appropriate parties, such as the injured

Plaintiff and or medical experts is usually presented to assist the Court in determining the appropriate quantum of damages. This has been the situation in this instant case.

What is more important is whether the Plaintiff has discharged the burden of proving the resulting damages to the requisite standard, i.e. on a balance of probabilities. There was a duty on the Plaintiff to prove his injuries from a medical perspective and not only prove them but demonstrate the nexus between the injury at the time of arrest with the injury six (6) ~~months~~ weeks [*amended by Counsel during the hearing*] later that took him to the Rand Memorial. This Court only heard from a general practitioner, and not from a specialty doctor who could speak to the real nature and intricacies of the type of injury complained of.

BACKGROUND

1. The Plaintiff pleaded in a Writ of Summons filed on the 1st November, 2019, he claimed that on or about the 15th January, 2019 he was arrested at his residence for suspicion of having committed a criminal offence. He was taken to the Lucaya Police Station and detained overnight before being taken to Central Police Station.

2. He pleaded that he was threatened with harm by Officer McKenzie and other Police Officers. Further that Officer McKenzie threatened him with harm prior to his being taken to the Central Police Station. The day following his arrest he was picked up by officers and taken for an interview at the Central Detective Unit.

3. He further pleaded that on the 16th January, 2019 while being interviewed in an Office at the Central Detective Unit by ASP Weir, an Officer named Romando Russell assaulted and battered him by slapping him in the face, thereby knocking him to the ground; and stomping him repeatedly in the chest, thereby causing him injury.

4. The Plaintiff also pleaded that he was not taken to the doctor after the assault and battery, but further detained him for five (5) days. As a result he suffered serious injury, loss and damages. After he was released on the 21st January, 2019 the Plaintiff attended Dr. Leviticus Rolle's private clinic. Dr. Rolle was a registered general medical practitioner. Doctor Rolle testified that at the time of his examination of the Plaintiff he did find tenderness to the Plaintiff's chest, but he saw no obvious signs of bruises, abrasions or deformities. Dr. Rolle testified that the Plaintiff experienced no obvious signs of cardio pulmonary distress. He diagnosed the Plaintiff with Costochondritis which he attributed to some type of trauma.

5. The Doctor also testified that in his medical opinion the Plaintiff's injury was not serious enough to warrant an X-Ray. In essence, his evidence was that based on his findings he did not deem the Plaintiff's case a serious one that warranted more than analgesics and anti-inflammatory medications. However, he did admit under cross-examination that there is a possibility there is a possibility that if the Plaintiff suffered from a collapsed lung some six weeks later it could possibly result from trauma to the chest and the type of injuries complained of. This fact it is submitted though only amounts to mere speculation as to nature of the type of injury that could possibly have caused the injury, particularly since the doctor could not specifically speak to the actual injury and what caused it.

6. The doctor could only verify that it would have to result from some form of trauma. The Plaintiff alleges that he did not suffer any other form of trauma. This evidence is a matter for the Court if it is accepted, that there was no other trauma. It is a matter whether the court is in fact persuaded on a balance of probabilities that there was no other injury.

7. The Plaintiff pleaded that he continued to feel occasional pain in his chest area. On the 2nd March, 2019, the pain got so intense that the Plaintiff went to the Rand Memorial

Hospital where he was seen and examined by Dr. McFall. Dr. McFall diagnosed the Plaintiff with Right Pneumothorax which is a collapsed right lung. As a result the Plaintiff was admitted and hospitalized for seven (7) days for a tube to be inserted into his right lung. He was discharged on the 9th March, 2019 and prescribed Voltaren 75 mg.

8. The Plaintiff prayed for General and Special Damages; Punitive, Compensatory, Exemplary and Vindicatory Damages; Interest and Costs. There was no claim for aggravated damages or further or other relief. Only Article 17 was pleaded and not Article 19 of the Constitution of The Bahamas.

9. The Plaintiff's evidence was that he had medical insurance that covered his surgery, medication, physiotherapy and that he was not out of pocket for medical expenses. He and only gave evidence of $900.00 in out of pocket for special damages relating to his cell phone and personal effects.

10. The Crown submits that, while it is accepted that the Plaintiff may have endured some form of misconduct, the doctors initial findings coupled with the delayed period the Plaintiff took to visit the Hospital and the Plaintiff's view himself that he did not take his injury serious could only suggest that he had no serious injury and that whatever he suffered later was a result of other events that not the Plaintiff has not admitted.

MATTERS FOR DETERMINATION:

a. General Damages and Special Damages
b. Compensatory damages
c. Punitive; Exemplary damages
d. Vindicatory damages
e. Interest
f. Costs

g. Causation (Is there sufficient nexus between the injury and the assault and battery complained and the alleged resulting damage).

11. An agreed Consent Order was filed on the 22nd October, 2020, and a Judgment was filed on the 28th October, 2020 and entered for the Plaintiff as follows:

> "The Defendant having admitted liability herein a Consent Order of the Court dated the 22nd day of October, A.D., 2020, it is hereby adjudged that judgment is granted to the plaintiff herein with damages to be assessed and costs".

It is noted that although the Plaintiff claimed and prayed for interest in his Writ of Summons, he did not in his filed Judgment take account of interest. In light of this fact we submit that the Plaintiff has chosen to forego any claim for interest and interest cannot be considered for an award of interest.

LEGAL FRAMEWORK:

12. These Assessment proceedings are governed by Order 37 of the Rules of The Supreme Court, Chapter 53 of the Statute Laws of The Bahamas.

Civil Standard of Proof

13. The party bearing the burden of proof must prove his case on a balance of probabilities. This means that Plaintiff has a duty to demonstrate that it is "more probable than not" that he suffered injury loss and damages and what was suffered was a result of the injuries caused.

MEASURE OF DAMAGES

14. It is submitted that there is an overriding objective of doing justice and fairness and ensuring that the Plaintiff is not only adequately compensated, but also not over compensated.

15. Generally, damages fall into Special or General Damages. General Damages may be further broken down into different categories and may even sometimes overlap. These general damages may include:

i. Compensatory
Simply is to grant reimburse, recompense or pay as a relief in favour of the individual, or to compensate for losses suffered.

It is noted that the Plaintiff suffered loss of liberty.

ii. Punitive or Exemplary
"Punitive damages" or "exemplary damages is an award of damages that grants relief as a means of punishment or retribution for a wrong to an individual that seeks to not only deter further breaches but teach the wrongdoer a lesson.

iii. Vindicatory
These type of damages are awarded where a constitutional breach has occurred and there is a means to vindicate the wronged individual in justification of their assertions.

16. To quote from para 16 of the Privy Council's decision in Shorn Scott (Case provided):

"A question of principle?

Is there a principle that guideline figures, suggested by the JSB for particular types of injury, should be routinely increased to reflect different levels of the cost of living between England and the Bahamas? The Board has concluded that there is no such principle. There are three reasons for this. The first, and most important one, is that a prescriptive approach to the assessment of damages whereby they are determined

by the rigid application of a scale which is then increased at a preordained rate is incompatible with the proper evaluation of general damages. The second reason is that, on a proper understanding of the relevant case law, it is clear that no such principle has been pronounced by the Bahamian courts. Finally, it would be wrong to apply an unchanging uplift without evidence of an actual, as opposed to a presumed, difference in the cost of living between England and the Bahamas."

17. Then in Shorn Scott the Privy Council also considered at paragraph 17:

> *"Assessment of damages for pain and suffering and loss of amenity*
>
> General damages must be compensatory. They must be fair in the sense of being fair for the claimant to receive and fair for the defendant to be required to pay - *Armsworth v South Eastern Railway Co (2)* (1847) 11 Jur at p 760. But an award of general damages should not aspire to be "perfect compensation" (however that might be conceived) - *Rowley v London and North Western Railway Co (3)* (1873) LR 8 Ex at p 231. It has been suggested that full, as opposed to perfect, compensation should be awarded - *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 per Lord Blackburn:

18. Turning now to vindicatory damages, Chapter 3 of the Constitution of The Bahamas lays out the fundamental rights and freedoms of an individual, in particular protection from inhumane and degrading treatment; under Article 17, and protection from arbitrary arrest or detention under Article 19: which Articles respectively provides, inter alia:

'17. (1) *No person shall be subjected to torture or to inhuman or degrading treatment or punishment. ...*

19. It is further submitted that when exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. Notwithstanding, a wronged individual may have suffered damage and may be awarded compensation, and although in most cases more will be required than words, a declaration by the court can suffice to articulate the fact of the violation.

20. The Plaintiff relies on the most of the usual cases in the area of damages and quantification, for example Ramanoop vs. The Attorney General of Trinidad and Tobago [2005] UKPC (23 March 2005); Atain Takitota vs. AG et al [2009] UKPC 11; Merson vs. Cartwright & Anor (Bahamas) [2005] UKPC 38; Robert Kane vs. AG; Rookes vs. Barnard (No.1)

21. It is our submission that the cases relied on by the Plaintiff are only a guide for the Court in its calculated guesswork to determine the measure of damages.

22. In Harrikissoon vs. AG of Tinidad and Tobago [1980] AC 265, (Tab 3) the Board gave guidance on how this discretion should be exercised where a parallel remedy at common law or under statute is available to an applicant. Lord Diplock warned against applications for constitutional relief being used as a general substitute for the normal procedures for invoking judicial control of administrative action.

23. Further, that permitting such use of applications for constitutional redress would diminish the value of the safeguard such applications are intended to have. Lord Diplock observed that an allegation of contravention of a human right or fundamental freedom does not of itself entitle an applicant to invoke the section 14 procedure if it is apparent this allegation is an abuse of process because it is made "solely for the purpose of avoiding the necessity of

applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right": [1981] AC 265, 268.

24. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.

25. The Court must first accept the evidence alleged, in light of the fact there has not been a full trial on the merits, before going on to consider whether the arbitrary use of power in the circumstances of this case.

26. The English courts appreciates that while there exist a need for the courts to be vigilant in preventing abuse of constitutional proceedings is not intended to deter citizens from seeking constitutional redress where, acting in good faith, but there claims must not be frivolous, vexatious or contrived be repelled, unless it is a bona fide resort which is not to be discouraged. So must our courts appreciate this need.

27. Over the years we have been admonished against the misuse of constitutional proceedings and this have have been repeated in cases such as Chokolingo vs. AG of Trinidad and Tobago, [1981] 1 WLR 111-112, and the AG of Trinidad and Tobago vs, McLeod [1984] 1 WLR 522, 530. These warnings were reiterated more recently by Lord Bingham of Cornhill in Hinds vs. AG of Barbados [2002] 1 854, 870, para 24. (Tab 4 – 6)

28. Turning to exemplary and punitive damages, it is submitted that while Exemplary damages may be available as an award in these proceedings, it is available as a

discretionary remedy and not as of right. Rookes v Barnard [1964] 1 All ER 367, is the leading authority dealing with the award of damages in connection with unlawful arrest, detention and deprivation of rights is to be considered. Exemplary damages are awarded when, inter alia, the Defendant as a servant of the government has taken oppressive, arbitrary or unconstitutional action.

29. In Cartwright & anor v Merson SCCiv App No 30 of 1994 and Merson v Cartwright & anor [2005] UKPC 28: awards for exemplary damages and aggravated damages ought to be separately identified. The Defence references herein paragraphs 13 to 15 of Lord Scott's Judgment. Takitota v The Attorney General et al SCCivApp No. 54 of 2004 and Takitota v The Attorney General et al [2009] UKPC 11: The Defence references herein paragraphs 11 to 14 of Lord Carswell's Judgment. In Merson and Takitota the court awarded the extra measure of damages.

30. The principles have been clearly outlined and Tynes v Barr (1994) 45 WIR7 at 20-23 which adopts the law as stated in Rookes v Barnard provides helpful guidance, it was held:

> *"compensation (which may of course be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their [jury's] disapproval of such conduct and to deter him from repeating it, then they can award some larger sum".*

31. We submit that Takitota is also distinguishable where the period of detention was a lengthy period for some 9 years, as opposed to this case where detention was for five (5) days.

32. The facts of Ramanoop case was highlighted in order to demonstrate the egregious acts of abuse which by comparison are from present in the matter before this Court. The Court

must consider the gravity of the facts involved in this case if and when considering an award of exemplary damages.

33. Most if not all of the authorities are factually distinguishable in my humble submission.

34. If the Court accepts the Plaintiffs evidence that he Court was in fact stomped in the chest as he alleged, the Crown humbly and apologetically accepts that such facts will no doubt amount to extreme aggravating features which may warrant an exemplary or punitive award. On the other hand, on a balance of probabilities, no such award would be justifiable, if the finding is insufficient nexus exist between the injuries and the acts complained of.

INTEREST

35. The court has a wide discretion as it relates to interest. There is no interest as of right. Interest has been pleaded but is not entered in judgment against the Defendant. Section 2 (1) of the Civil Procedure (Award of Interest) Act, Ch.80 governs interest if it is to be awarded. This section provides that every judgment debt shall carry interest at such rate as shall be prescribed by the Rules of Court (i.e. the prime rate of the Central Bank plus 2% per annum).

36. We respectfully interest ought to have been entered in Judgment against the Defendant.

COSTS:

37. This court's power to assess Costs is found under Order 59 (12) of the Rules of the Supreme Court, Chapter 53 (Tab 10) which provides as follows:

> *'The Registrar shall have the power to tax –*
> *(a) the costs of or arising out of any cause or matter in the Supreme Court;*

(b) the costs directed by an award made on a reference to arbitration or pursuant to an arbitration agreement to be paid; and
(c) any other cots the taxation of which is directed by an order of the Court.'

We submit that a fixed amount of Costs is awarded.

Mitigation and or Contributory Negligence

38. It is submitted that, if the injuries were in fact caused as the Plaintiff alleges, and had the Plaintiff gone to the hospital sooner than he did he may have prevented the extent of his injuries and would have thereby mitigated his losses. This in principle overlaps with the principle that he may have contributed to a worsening of his situation by not getting proper attention as opposed to seeking assistance at a general's practitioner's clinic as opposed to going for a chest x-ray since he claimed he was stomped in the chest.

39. We submit therefore that the Plaintiff is either at least 10% contributory negligent and or would not have mitigated his losses to that extent.

CONCLUSION:

40. We submit that while certain evidence was presented to the Court, there is still some doubt on the facts as to the nexus between the Plaintiff injuries as he alleges and the acts complained of which he alleges caused his injuries. There is gap in the factual matrix of this case. It causes for speculation as to whether there is a matrix. The correlation between the injuries and what he alleged happened.

41. In all the Circumstances of this case, the determination of this Court hinges on whether the Court finds the Plaintiff to be a credible witness and accepts his version of the events. Moreover, whether the Court finds that the evidence of Doctor Rolle is sufficient to corroborate the Plaintiff's evidence. And lastly if more is not required in the form of medical evidence as to the later injury of a collapsed lung to convince the Court,

on a balance of probabilities and to remove any doubts that may suggest and not cause for speculation that the injury could not have resulted from other means. If there is a nexus and no break in the chain of causation then the Plaintiff would have discharged his duty and satisfied the burden of proof to the requisite civil standard.

42. If the court is minded to grant an award under each head of damage claimed, the following sums are submitted (taking into consideration 10% mitigation and or contributory negligence) as reasonable in the circumstances of this particular case:

a. General Compensatory Damages - $40,000.00 (If proved) (PSLA)
b. Special Damages - $900.00
c. Punitive/Exemplary damages - $80,000.00
d. Vindicatory damages (Article 17) - $50,000.00
e. Interest 6.75% from Writ action and 4% from assessment decision should the Court not agree with the Crowns earlier position on interest opted out of judgment.
f. Costs - $,45,000.00

In my humble submission unless I can be of any further assistance to the Court, that is the submissions."

41. Counsel for the Defendants made the following additional submissions at the hearing:

a. The Defendants admitted liability so that the matter is not prolonged and opted not to call witnesses which would have led to denials and possibly a waste of judicial time.

b. The Defendants accept that the Plaintiff suffered injuries however based on the evidence before the Court, the

evidence is not sufficient to correlate what is alleged to have happened in terms of the beating.

c. There is no medical evidence of continuing or permanent disabilities or damages.

d. There is a burden on the Plaintiff to prove his injuries and much is left to speculation.

e. In terms of contributory negligence, the submission is that having alleged to have been stomped the Plaintiff ought to have immediately gone to the hospital for an X-ray.

f. The only special damages to which evidence was led was $900.

g. In terms of the JSB guidelines, the correct award would be injuries leading to a collapsed lung from which a full and uncomplicated recovery is made which has a ceiling of £6,790.75 and therefore the offer of $40,000 is generous.

42. After hearing submissions from Counsel for the Defendants, the Court asked both Counsel to provide their respective view of the effect of *Order 18 rule 13 (1) and (4) Rules of the Supreme Court ("RSC")* which deems admission of facts in pleadings if there is no defence denying the same. The preliminary view being that having pleaded the injuries and no defence denying the same and the terms of the judgment being an admission, on the assessment it would not be required to prove the injury just merely the damages.

43. Counsel for the Defendants submitted that notwithstanding the same the Plaintiff still must prove on a civil standard the

injury of the collapsed lung occurred as a result of the police brutality whereas Counsel for the Plaintiff asserted that the Court's preliminary view was correct.

Discussion and Analysis

44. This assessment is commenced after the Defendants conceded liability as "*claimed in the Statement of Claim*".

45. In its simplest form at the material terms as set out above, the Plaintiff in his Statement of Claim alleged that he was the subject of an assault and battery resulting in injuries which were diagnosed as costochondritis and a right pneumothorax.

46. The Defendants did not file a defence and consented to liability as claimed in the Statement of Claim.

47. In the circumstances, contrary to the Defendants submission that the Plaintiff must prove the injuries in applying *Order 18 Rule 13 (1)* and *(4)* of the RSC the Plaintiff is not required to prove the injuries were as a result of the assault and battery but rather the amount of damages that he is entitled to by way of evidence. In any event, I find the Plaintiff to be an honest witness and that the documentary evidence exhibited to his affidavit (which was uncontested) corroborated his oral testimony and the evidence of Dr. Rolle.

48. Moreover, the Defendants also argued that any damages allowed ought to be reduced by 10% for contributory negligence. I am of the view that the Defendants submission challenging liability or seeking to establish contributory negligence was a matter to be resolved at the liability stage. Accordingly having not filed a Defence and accepted liability as claimed in the

Statement of Claim and consequently settling the issue of liability, the Defendants cannot maintain on the assessment of damages that the Plaintiff was contributorily negligent (see *Ruffin Crystal Palace Limited v Brathwaite*, SCCiv & CAIS No. 96 of 2011, Judgment dated 14th March, 2013).

49. In any event, upon review of the evidence, the Defendants failed to adduce any evidence that convinces me that the Plaintiff was contributorily negligent.

50. Counsel for the Defendants placed much weight on the Plaintiff's admission that he was a habitual user of tobacco in an attempt to ground the submission that it could have caused or contributed to the Plaintiff's collapsed right lung however, the evidence of Dr. Rolle, which I accept, is that such use would not cause the Plaintiff's injury.

51. Moreover, the evidence of the Plaintiff, and I accept this, is that he attended a doctor and the doctor did not deem it necessary at that stage to order a chest X-ray.

52. No evidence has been lead or any suggestion has been made that a person can obtain an X-ray without a doctor ordering it.

53. Further the evidence of Dr. Rolle in support was that he did not deem an X-ray necessary at that time and notwithstanding the same it would be possible for the Plaintiff to subsequently suffer from a right pneumothorax. In the circumstances, I am not satisfied that the Plaintiff was contributorily negligent for not immediately obtaining an X-ray.

54. Against this backdrop, I now proceed to assess the damages of the Plaintiff pursuant to the Judgment.

55. The Plaintiff in his Statement of Claim prayed for special damages after listing as loss and damage medical expenses and loss of earnings.

Special Damages

56. In order for a plaintiff to obtain special damages, the general rule is that special damages must be specifically pleaded and specifically proved or by agreement (see *Robert Kane v Attorney General et al*, 2011/CLE/gen/FP/00170, dated 24 July, 2019, Judgment of Grey Evans J at [16]). As to the standard of proof for special damages, the mere assertion or pleading thereof is not sufficient and there must be corroboration (see *Russell v Simms et al*, 2008/CLE/gen/00440, Judgment of Barnett CJ (as he then was) at [43] to [47]).

57. In respect of the Plaintiff's claim for special damages the only evidence in support adduced by the Plaintiff was tendered during cross examination to which the Plaintiff advised that all of his medical expenses were paid by insurances and his cell phone valued at $900 was lost as a result of the altercation.

58. In so far as the Defendants have submitted that the special damages in the sum of $900 should be allowed, the court allows the sum of the $900 as special damages by way of agreement.

General Damages

59. In terms of general damages, the Plaintiff in his Statement of Claim particularized as his loss and damage, "*pain suffering and loss of amenity.*"

60. The Privy Council in *Scott v Attorney General* [2017] UKPC 15, provided the following guidance:

> *Assessment of damages for pain and suffering and loss of amenity*
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> 17. General damages must be compensatory. They must be fair in the sense of being fair for the claimant to receive and fair for the defendant to be required to pay - *Armsworth v South Eastern Railway Co (2)* (1847) 11 Jur at p 760. But an award of general damages should not aspire to be "perfect compensation" (however that might be conceived) - *Rowley v London and North Western Railway Co (3)* (1873) LR 8 Ex at p 231. It has been suggested that full, as opposed to perfect, compensation should be awarded - *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 per Lord Blackburn:
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> > "where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong …"
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> 18. As Dickson J, in the Supreme Court of Canada, observed in *Andrews v Grand & Toy Alberta Ltd* (1977) 83 DLR (3d) 452, 475-476, applying this principle in practice may not be easy:
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> > "The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution."

19. Accepting and following this approach, the Court of Appeal in England and Wales in *Heil v Rankin* [2000] EWCA Civ 84 at para 23 said:

> "There is no simple formula for converting the pain and suffering, the loss of function, the loss of amenity and disability which an injured person has sustained, into monetary terms. Any process of conversion must be essentially artificial."

20. In reaching that conclusion, the court drew on the statement of Lord Pearce in *H West & Son Ltd v Shephard* [1964] AC 326, 364 to the effect that the court had to "perform the difficult and artificial task of converting into monetary damages the physical injury and deprivation and pain and to give judgment for what it considers to be a reasonable sum".

21. The arbitrary nature of the exercise was also recognised in *Heeralall v Hack Bros* (1977) 25 WIR 119 where Haynes CJ said at 125 that "the judicial exercise of measuring in money such things as pain and suffering or the impairment of capacity to lead life to the full really involves dealing in incommensurables".

22. Given the essentially artificial, and therefore arbitrary, nature of the exercise involved in the assessment of general damages, there is a risk of markedly different levels of compensation resulting from individual assessments of what they should be. The need for some general guidance as to the appropriate amounts in similar cases is obvious. It was that need which prompted the statement in *Heil v Rankin* in para 25 to the following effect:

> "The assessment of general damages requires the judge to make a value judgment. That value judgment has been increasingly constrained by the desire to achieve consistency between the decisions of different judges. Consistency is important,

> because it assists in achieving justice between one claimant and another and one defendant and another. It also assists to achieve justice by facilitating settlements. The courts have become increasingly aware that this is in the interests of the litigants and society as a whole, particularly in the personal injury field. Delay in resolving claims can be a source of great injustice as well as the cause of expense to the parties and the justice system. It is for this reason that the introduction of the guidelines by the Judicial Studies Board ('JSB') in 1992 was such a welcome development."

23. What is a reasonable sum must reflect local conditions and expectations. In para 38 of *Heil v Rankin* the Court of Appeal said, "... The decision [on the amount of general damages] has to be taken against the background of the society in which the Court makes the award. The position is well illustrated by the decisions of the courts of Hong Kong. As the prosperity of Hong Kong expanded, the courts by stages increased their tariff for damages so that it approached the level in England. [See *Chan Pui-ki v Leung On* [1996] 2 HKLR 401 (at pp 406-408)]".

24. The *Chan Pui-Ki* decision followed that given in the earlier Hong Kong case of *Lau Che Ping v Hoi Kong Ironwares Godown Co Ltd* [1988] 2HKLR 650 where the Court of Appeal responded positively to the argument that awards fixed in a 1980 decision in *Lee Ting Lam* should be reviewed and increased. In giving the judgment of the court in *Lau Che Ping*, Cons ACJ said at 654F:

> "Apart from ... automatic adjustment for inflation, a general adjustment of the guidelines may be necessary on account of change in social and economic conditions ... Changes inevitably take place in the everyday life of any growing society and the expectations of the average person and family tend to increase as each year goes by. Hong Kong is no exception, and those changes must be reflected in the general standards of awards, otherwise the

awards will cease to be regarded as fair and reasonable compensation."

25. The Bahamas must likewise be responsive to the enhanced expectations of its citizens as economic conditions, cultural values and societal standards in that country change. Guidelines from England may form part of the backdrop to the examination of how those changes can be accommodated but they cannot, of themselves, provide the complete answer. What those guidelines can provide, of course, is an insight into the relationship between, and the comparative levels of compensation appropriate to different types of injury. Subject to that local courts remain best placed to judge how changes in society can be properly catered for. Guidelines from different jurisdictions can provide insight but they cannot substitute for the Bahamian courts' own estimation of what levels of compensation are appropriate for their own jurisdiction. It need hardly be said, therefore, that a slavish adherence to the JSB guidelines, without regard to the requirements of Bahamian society, is not appropriate. But this does not mean that coincidence between awards made in England and Wales and those made in the Bahamas must necessarily be condemned. If the JSB guidelines are found to be consonant with the reasonable requirements and expectations of Bahamians, so be it. In such circumstances, there would be no question of the English JSB guidelines imposing an alien standard on awards in the Bahamas. On the contrary, an award of damages on that basis which happened to be in line with English guidelines would do no more than reflect the alignment of the aspirations and demands of both countries at the time that awards were made for specific types of injury.

26. Cost of living indices are not a reliable means of comparing the two jurisdictions even if one is attempting to achieve approximate parity of value in both. Cost of living varies geographically and may well do so between various sectors of the population. The incidence of tax, social benefits and health provision (among others) would be relevant to such a comparison.

> 27. It is perhaps unfortunate that the Court of Appeal did not address the argument that the proper way to determine compensation for general damages was to fix the basic rate by reference to the JSB guidelines and apply a notional uplift. The lack of reference to that argument in the judgment should not be taken as an indication that it was not considered, however. It must be assumed that the Court of Appeal decided that this was not how general damages should be assessed, since, although the English JSB guidelines were followed, no uplift was applied.
>
> 28. It is likewise not to be assumed that the Court of Appeal decided that it need only apply the JSB guidelines to arrive at the appropriate amount, without regard to local economic conditions and the expectations of citizens of the Bahamas. As has been observed at para 25 above, if JSB guidelines happen to coincide with what is regarded as appropriate for the Bahamas, there is no reason that they should not be adopted. And the Board should be properly reticent about interfering with the Court of Appeal's assessment unless satisfied that a wrong principle of law was applied or that the award was so inordinately small or exceedingly great that it was plainly wrong. As the Board said in *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601, 613:
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> > "… before the appellate court can properly intervene, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (*Flint v Lovell* [1935 1 KB 354]), approved by the House of Lords in *Davies v Powell Duffryn Associated Collieries, Ltd* [1942 AC 601]."

61. For the general damages of pain and suffering and loss of amenities, Counsel for the Plaintiff submitted that a sum of $30,000 is appropriate whereas Counsel for the Defendants

submitted that if the injuries are proven, the sum of $40,000 is an appropriate and generous award.

62. Taking into consideration that the Defendants have accepted liability, the evidence of the Plaintiff which was supported by Dr. Rolle and the medical reports, taking into account that the Plaintiff was placed on medicines for the initial pain resulting from the costochondritis and thereafter he continued to periodically suffer pain until he was later hospitalized and treated for a right pneumothorax (collapsed lung) and the evidence that there is no continuing pain or ongoing treatment, as the sum offered by the Defendants exceed the sum sought by the Plaintiff, I find that the sum of $40,000 is an appropriate award of general damages in this case and, I so order.

Other Damages

63. Having conceded liability in the terms of the Statement of Claim in which the Plaintiff sought damages for compensation, punitive, exemplary and vindicatory damages for the violation of his rights under Article 17 of The Constitution which provides "*[n]o person shall be subjected to torture or to inhuman or degrading treatment or punishment,"* I now turn to consider the aforesaid damages.

64. The difficulty I have with assessing damages for the said breach is that the Plaintiff's Statement of Claim fails to separate each head of damage with specific particularization of the same. Therefore, I will consider each head of damage taking heed to the guidance of the Privy Council in *Merson v Attorney General* [2005] UKPC 38 at [21] so as to avoid making a duplication of damages and or overlap in the award of damages.

Punitive and Exemplary Damages

65. As I understand the authorities, and the submissions of both Counsel, punitive and exemplary damages are one and the same (see *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15 at [19]) emanating from the leading case of *Rookes v Barnard* [1964] 1 ALL ER 367 at 410 in which the House of Lords advised that such damages are awarded when the government has taken oppressive, arbitrary or unconstitutional action. At 411, their Lordships stated that

> **"compensation (which may of course be a sum aggravated by way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their[jury's] disapproval of such conduct and to deter him from repeating it, then they can award some large sum."**

66. The Privy Council in *Takitota v Attorney General* [2009] UKPC 11 at [12] helpfully provided the following guidance and analysis:

> **"The award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in *Rookes v Barnard* [1964] AC 1229 at 1223, to restrain such improper use of executive power. Both Lord Devlin in *Rookes v Barnard* and Lord Hailsham of St Marylebone LC in *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1081 emphasised the need for moderation in assessing exemplary damages. That principle has been followed in The Bahamas (see *Tynes v Barr* (1994) 45 WIR at 26), but in *Merson v***

> *Cartwright and the Attorney General* [2005] UKPC 38 the Privy Council upheld an award of $100,000 exemplary damages, which they regarded as high but within the permissible bracket."

67. Accordingly, the sum of exemplary/punitive damages is calculated upon considering the gravity of the highhandedness and abuse of power with a view to punishing such behaviour.

68. Taking into account the acceptance of liability by the Defendants as to the pleadings in the Statement of Claim and although a party is bound by his or her pleadings (see *McIntosh v Family Guardian Insurance Company Limited*, SCCivApp No. 64 of 2019, Judgment dated 10th June, 2020) the evidence given by the Plaintiff in which one can reasonably discern was a variance from the particulars for these heads of damages subsequently, there being no objection permits such evidence to be considered (see *Philico Development (Bahamas) Limited v Wilchcombe*, 2001/CLE/gen/FP00325, Judgment of Longley SJ (as he then as) dated 31st October, 2013 at [25]) I accept the account of events by the Plaintiff which, in summary, I find that the assault and battery are all evidence of highhandedness and an abuse of power.

69. In assessing the sum to award, reference is best had to the case of *Merson (supra),* which involved the unlawful arrest, detention and inhuman treatment of Ms. Merson in respect of which an award of exemplary damages was made. While I do find that case to be similar in nature however, in applying the same it must be discounted because the Plaintiff in this case did not claim damages for his detention.

70. The Privy Council's decision in *Merson* (supra) is 16 years old but their Lordships restated an award made by Sawyer J (as she then was) in 1994 thereby making the award 27 years old.

71. As to the appropriate award for exemplary damages, Counsel for the Plaintiff submitted $250,000 whereas Counsel for the Defendant submitted $80,000.

72. Having regard to the procedures that would be expected by ordinary citizens that the police would follow when arresting and detaining citizens in accordance with their executive power without the use of excessive force resulting in injuries, a punitive sum to punish for such behavior as evidenced in this case is in my view $200,000.00 and I so award exemplary damages in that sum.

Compensatory and Vindicatory Damages

73. I now consider compensatory and vindicatory damages for the Defendants assault and battery by which the Defendants breached of the Plaintiff's rights under Article 17 of the Constitution.

74. The oft-cited dicta of Sawyer J (as she then was) in the case of *Merson v Cartwright* [1994] BHS J No. 54 at [254] is that damages are "*at large*" for assessment of damages for breach of constitutional rights. At [256], in defining "*at large*" the learned Judge stated that "*it means that there is in fact no actual yardstick by which they can be measured*".

75. The Privy Council, in considering whether to restore damages awarded to Merson for breaches of her Constitutional rights

(such damages having been overturned by the Court of Appeal) their Lordships at [17] and [19] provided guidance on the function of constitutional damages by reference to then recent case of *Attorney General of Trinidad and Tobago v Ramanoop* (supra). I quote as follows:

> " 17. As to the first issue, the function of constitutional damages has been reviewed recently by the Privy Council in Attorney-General of Trinidad and Tobago v Ramanoop [2005] UKPC 15; [2005] 2 WLR 1324. The case involved claims for damages for "quite appalling misbehaviour by a police officer" (para 2 of the judgment). A police officer had, quite unjustifiably, roughed up, arrested, taken to the police station and locked up for some few hours the unfortunate Mr Ramanoop. Mr Ramanoop instituted proceedings against the Attorney-General for constitutional redress, including exemplary damages. He did not claim damages for the nominate torts that had certainly been committed. Counsel for the Attorney General submitted that constitutional redress, in so far as it took the form of an award of damages, should be confined to compensatory damages. The Privy Council dealt with this submission in paragraphs 17 to 20 inclusive of the judgment delivered by Lord Nicholls of Birkenhead.
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> > "17. Their Lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of chapter I rights and freedoms. This jurisdiction is an integral part of the protection chapter I of the Constitution confers on the citizens of Trinidad and Tobago. It is an essential element in the protection intended to be afforded by the Constitution against misuse of state power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the state's violation of a constitutional right. This jurisdiction is separate from and additional to ("without prejudice to") all other remedial jurisdiction of the court.
> >
> > 18. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the

constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and moreover, the violation of the constitutional right will not always be coterminous with the cause of action at law.

19. An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award.

20. For these reasons their Lordships are unable to accept the Attorney General's basic submission that a monetary award under section 14 is confined to an award of compensatory damages in the traditional sense. Bereaux J stated his jurisdiction too narrowly. The matter should be remitted to him, or another judge, to consider whether an additional award of damages of the character described above is appropriate in this case. Their Lordships dismiss this appeal with costs."

18. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of

> the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that "constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course" (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary.

76. Accordingly in assessing whether to award compensatory and vindicatory damages, any award has to take into account the exemplary damages awarded notwithstanding that compensation under the Constitution are damages "at large", and *"should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount."*

77. Pursuant to the Privy Council's guidance aforesaid, the damages to be awarded should vindicate the Plaintiff's Article 17 right to not be subjected to inter alia *"torture or to inhuman or degrading treatment or punishment".*

78. In this regard, the sum which is appropriate to achieve this aim "*will depend upon the nature of the particular infringement and the circumstances relating to that infringement.*"

79. Moreover, the Privy Council in the case of *Innis v Attorney General of Saint Christopher and Nevis* [2008] UKPC 42 at [25] provided further guidance that the award of damages for breach of constitutional rights should encompass an award to reflect the sense of public outrage, emphasize the gravity of the breach and to deter further breaches.

80. In terms of compensatory and vindicatory damages for the breach of Article 17, the same ought not to overlap with any common law damages awarded for the same actions. However, the Plaintiff did not in this action claim damages for the common law award for assault and battery. The Statement of Claim shows a claim for general and special damages for personal injuries and thereafter damages for breach of the Plaintiff's Constitutional rights. Therefore there would be no overlap of awards.

81. Finally, by way of submissions, Counsel for the Plaintiff sought for this award to include damages for unlawful arrest under Article 19 however, as every party is bound by his or her pleadings, the Statement of Claim lacks any claim for compensation for unlawful arrest and detention contrary to Article 19 of the Constitution accordingly the judgment when entered did not include a referral of assessment of such damages. Therefore I proceed on the basis that the same should not be considered in any award of damage under this head.

82. Counsel for the Plaintiff submitted that the appropriate sum of damages under this head is $300,000 whereas Counsel for the Defendants has submitted that the sum of $50,000 should be allowed.

83. In considering both parties submissions on this head of damage, I again refer to the case of *Merson* (supra) where the Court awarded the sum of $90,000 for the assault and battery which amounted to a breach of her Constitutional Rights under Article 17 coupled with the tort of false imprisonment, an additional sum of $100,000 to vindicate the breaches of her Constitutional rights. Therefore, taking into account the foregoing guidance, and using the comparable common law measure of damages, I award the sum of $150,000.00 for the breach and an additional award of $75,000.00 (which takes into account the exemplary damages as well) to prevent further breaches resulting in compensatory and vindicatory damages being accessed and awarded in the total sum of $225,000.

Interest

84. On the issue of interest, the Plaintiff having entered Judgment without including "*interest*" and the Defendants having objected to interest, my view is that in this assessment the jurisdiction to consider interest could only have been a reference to pre-judgment interest.

85. Having omitted interest from the Judgment entered herein, I accept Counsel for the Defendants submission that the Court ought not to make any order.

86. In so far as various submissions were made on interest, for future reference, I refer Counsel to the case *R v Comptroller of H M Customs Ex Parte Kelly's Freeport Limited,* 2010/PUB/jrv/FP00006, Judgment of Gray Evans J (as she then was) dated 31st March, 2017 on the law regarding pre-judgment interest and, in relation to post-judgment interest, the same is pursuant to statute (see *Garland v Perez et al*, Supreme Court

No. FP148 of 1995 (formerly 674/1993) Ruling of Deputy Registrar Gray Evans (as she then was) dated 27th February, 1998).

Conclusion

87. The damages herein stand assessed in the global sum of $465,900.00 which is comprised of the following:

a. Special Damages (by agreement) ……	$900.00
b. General Damages ……	$40,000.00
c. Punitive and Exemplary Damages ….	$200,000.00
d. Damages for breaches of Article 17 in the form of Compensatory and Vindicatory Damages ……..	$225,000.00
e. Pre-judgment interest ……	0

88. For the costs of the assessment proceedings, the Defendants have offered the sum of $45,000.00 in their submissions to which Counsel for the Plaintiff, during closing arguments duly accepted accordingly. Therefore, it is hereby ordered that costs of the assessment are so fixed and payable by the Defendants to the Plaintiff.

Delivered this 5th day of February, 2021

[Original Signed & Sealed]

R. Dawson Malone
Assistant Registrar (Acting) of the Supreme Court