[2016] JMSC Civ. 166

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 03817

BETWEEN	**STEVE ODDMAN**	**1ST CLAIMANT**
AND	**ORVILLE BOWRA**	**2ND CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**SERGEANT CARWOOD**	**2ND DEFENDANT**

IN OPEN COURT

Aon Stewart, Nieoker Junor and Bianca Samuels, instructed by Knight, Junor and Samuels, for the Claimants

Gail Mitchell, instructed by the Director of State Proceedings, for the 1st Defendant

Heard: April 29 and 30, 2015, April 11, 12, 13 and 15 and June 24, 2016

NEGLIGENCE – ASSAULT – BATTERY – FALSE IMPRISONMENT – AGGRAVATED DAMAGES – GENERAL DAMAGES – SPECIAL DAMAGES – EXEMPLARY DAMAGES – VINDICATORY DAMAGES/DAMAGES FOR BREACHES OF CONSTITUTIONAL RIGHTS – PROOF OF DAMAGES CLAIMED FOR - SELF DEFENCE – BURDEN OF PROOF AS REGARDS SELF DEFENCE

ANDERSON, K. J.

The background

[1] This is a claim for damages for negligence, assault and battery and false imprisonment, which has arisen as a consequence of a series of incidents which occurred in the community known as Arnett Gardens, on August 31, 2007 and which occurred as a consequence of a police operation which was being conducted in that community, on that day.

[2] On that day, the claimants, respectively, were shot and thereby injured, allegedly as a consequence of police personnel having been wildly firing gunshots from the rifles which they then had in their possession, while they were patrolling in that community. The claimants have further alleged that after they had been so injured, they were not promptly taken by the police personnel, to a hospital, for medical treatment and also, that they were assaulted and that, as a matter of law, the tort of battery was committed upon them, by members of the police personnel. In particular, in that latter-mentioned respect, the 1st claimant has alleged that he was essentially, battered by police personnel, after he had been placed under arrest at the location where he had been shot, while he was walking along a roadway.

[3] For his part, the 2nd claimant has alleged and indeed, it has not been disputed by the 1st defendant, that he was shot and thus, injured, while he was inside of his home, in the said community.

[4] The 1st defendant has not admitted to police officers/crown servants, having shot and/or injured either claimant. Furthermore, the Crown has contended, in their defence and also, via the evidence of their only witness, that whilst police officers did fire gunshots with the use of their firearms, at about 8 p.m. on August 31, 2007, while they were on foot patrol in the Arnett Gardens community, in an area known as, 'Sudan Pathway,' they only so fired same, in defence of themselves. Accordingly, they have put forward the defence which is commonly known by the misnomer – 'Self Defence.' That is a misnomer because, it is a defence which is

not at all restricted to circumstances wherein a person is defending himself or herself, in response to an actual or perceived attack. It also applies to circumstances wherein a person is taking reasonable measures to protect any other person from harm and/or loss of property, or solely to protect his or her own property.

[5] The 1st defendant's statement of case, alleged that whilst the four (4) member team of police personnel were at the southern entrance of Sudan Pathway, the 1st claimant and about two (2) other men, were seen walking from the northern end of Sudan Pathway, at which time, the 1st claimant had a rifle in his hand and one (1) of the other men that were there with him, also had a gun in his hand.

[6] A member of the police team then shouted – 'Police, don't move.' The 1st claimant then fired gunshots using the weapon that he had and those gunshots were fired in the direction of the police team. The police team then fired gunshots using their firearms, in the direction of the 1st claimant. They did so, in self defence.

[7] After the police team members had fired gunshots in the direction of the 1st claimant, the 1st claimant and the other men, ran back to the northern end of the road while continuing to fire gunshots, at the police team. The police team continued to return the fire, but ceased firing gunshots from their weapons, when the 1st claimant and the other men, were no longer in their line of vision.

[8] After the shooting had subsided, the 1st claimant was found at an outdoor location which was towards the northern end of the road. He was then found to have been suffering from an injury to one of his feet. In the defence's statement of case, it was alleged that he was then suffering from an injury to his foot, but it should be noted that the 1st claimant's evidence given in this case, which in fact was unchallenged in that particular respect, makes it clear that the 1st claimant was in fact found by police personnel, to have been suffering from an injury to his right buttock and that said injury, was a gunshot wound.

[9] In his evidence-in-chief, as per his witness statement, the 1st claimant testified that he and the 2nd claimant were walking together, towards Mr. Bowra's house at Eight Street, which is one block away from where the 1st claimant was then living. When they reached to the 1st claimant's house, the 2nd claimant's mother and a lady were sitting on the sidewalk, a few metres from the gate. The 2nd claimant went inside of his home and the 1st claimant stayed outside the gate to the 2nd claimant's house, speaking to the ladies. Approximately ten (10) minutes later, he heard what sounded like gunshots coming from down Sudan pathway.

[10] The older of the two (2) ladies ran off towards her house and the 1st claimant followed her. While running, he turned around and ran back towards her and assisted her to get up, off the ground and then, they both continued to run towards her friend's house. While running, he could still hear explosions coming from where he observed the police officers, which were getting louder and he heard whistling sounds passing by where he was, with the 2nd claimant's mother. As they reached the steps of the house of the friend of the 2nd claimant's mother, he felt a burning sensation to his right buttock and he immediately fell down, on a picket fence. He tried to get up, but had to remain down, because more gunshots were being fired. He crawled from there, to the bottom of the steps and tried to climb those steps. He was though, unable to do so, as his legs could not carry him up the stairs, as they were weak and in excruciating pain.

[11] The police personnel that were nearby and who had been firing, approached to where he was and immediately and without any warning, savagely kicked and gun-butted and boxed him and asked him where is the gun. He told them that he did not have any gun. He then observed when the 2nd claimant staggered outside and told the officers on the outside, that he had been shot. One of the officers, while pointing a long gun in his face, said – 'Pussyhole come yah. Weh di gun deh?' The officer then ordered him to lift up his shirt, which he did. While he was being savagely beaten by police officers, he was barely able to observe when the 2nd claimant was also being beaten by police personnel and being asked –

'Where is the gun?' The account given by Mr. Oddman as to what happened after Mr. Bowra had staggered outside of his home, is in large measure, the same account which was provided to the court, by Mr. Bowra.

General burden of proof

[12] The claimants had the burden of proving their claim, on a balance of probabilities. As such, it was for them to have proven, if they could, that they were injured due to gunshots which were fired by police personnel. It would only be if that was proven by each of them, that this court would then be obliged to consider what were the circumstances surrounding the shooting of each of the claimants, for the purpose of determining whether each such shooting was negligently caused, or intentionally caused and whether same were caused, pursuant to the relevant police personnel having, at the material time, come under gunfire attack, thereby having necessitated them to have responded in like manner, that being, in essence, the gravamen of their contention that they acted in self defence and did not act negligently or carelessly, in having fired their weapons, at the material time.

[13] This court has concluded, on a balance of probabilities, that indeed, the police officers who were on patrol on the relevant occasion, in the Arnett Gardens community, were, for whatever reason, firing wildly in the midst of a residential community and that is why both of the claimants got shot.

[14] This court has entirely rejected the defence's assertion that at the material time, the police personnel who were at the centre of this case, had come under gunfire attack from the use of a rifle by the 1st claimant. The reasons for this court's rejection of that assertion, are set out, further on in these reasons.

Burden of proof as regards self defence

[15] Before addressing that in some detail though, it is necessary to first address the issue as to who had the burden of proof as regards the defendant's assertion of self defence.

[16] As a prerequisite to addressing that issue though, it must be made clear that this court has applied the provisions of **Section 33 of Jamaica's Constabulary Force Act**, (hereinafter referred to as the '**Constabulary Force Act'**) for the purpose of making its final determination of this claim. **Section 33** requires that in order for a claim in tort to be successfully proven as against a police constable, the claimant must not only successfully prove the commission of the relevant tort (wrong), but also, must prove that such tort was either committed maliciously, or without reasonable or probable cause.

[17] Turning back now, to the issue of who has the burden of proof as regards self defence, it should be noted that during the trial, in the course of presenting their respective oral closing submissions, both counsel for the respective parties, had submitted to the court, that the burden of proof rested on the defence, to prove self defence. As the Judge presiding over this case, I had, at that time, considered that both counsel had been correct in that respect. Further research done by me since then though, has satisfied this court, that both counsel were incorrect in that assertion of theirs, as regards the burden of proof *vis-a-vis* self defence.

[18] Whilst it is correct to state that, at common law, in civil cases, the burden of proof rests on the defence to prove self defence, that is not so in Jamaica. It is not so in Jamaica, because in Jamaica, the common law has been reversed in that respect, as a consequence of the statutory provisions set out in **Section 33 of the Constabulary Force Act**. For the common law position, see: **Ashley v Chief Constable of Sussex** – [2007] 1 WLR 398. For the Jamaican position, in the context of **Section 33 of the Constabulary Force Act**, see an earlier

judgment of mine: **Carl Brown and Attorney General of Jamaica and Clive Nicholson** – [2013] JMSC Civ. 151, esp. at paras. 55 and 56.

Court's conclusion as to defence's assertion of self defence

[19] This court is of the considered view, that the claimants have, on a balance of probabilities, disproved the defendant's assertion of self defence. This court has rejected that assertion because, firstly, the 1st claimant, who, according to the defendant, was the person firing at them with a rifle, was never criminally charged for even as much as ever having been in unlawful possession of a gun – that being as already stated, according to the sole defence witness' own evidence, a rifle. According to the defence witness' own evidence, the possession of a firearm and the use of that firearm to fire at police personnel, would have constituted criminal offences of a serious nature. Why then, was the 1st claimant never charged for any offence?

[20] The sole defence witness – Corporal Kevin McCalla, provided to the trial court, no explanation for this. He said that he could not provide any such explanation, because he was not the police officer who investigated the criminal allegations being made against the 2nd claimant, those being the allegations which formed the basis upon which, according to the defence witness, police personnel had detained the 2nd claimant in the vicinity of the outdoor location where he had been shot. The investigating officer was never expected to testify on the defendant's behalf and did not testify.

[21] Secondly, it was the defence witness' evidence, that searches were conducted for expended shells in the location where, as the defence has alleged, the police personnel were allegedly fired upon, with the use of a rifle, by the 1st claimant, but not one expended shell was found, this notwithstanding that, as that witness had accepted, a rifle, when fired, would have expended shells. The defence witness also had no explanation as to why it was, that no expended shell was located at the scene of the alleged firing upon them, by the 1st claimant.

[22] Thirdly, this court obtained no evidence from the defence, as regards the 1st claimant's hands having been swabbed by anyone, for the purpose of determining whether he had recently fired a firearm. This court did though, obtain unchallenged evidence from the 1st claimant, that his hands were not swabbed. This court has accepted that evidence. Why were his hands not swabbed, if it was truly believed by police personnel, that he had used a firearm to fire upon them? Once again, there has been no answer given by the 1st defendant, to that question. Too many questions exist and certainly, not enough answers have been provided by the defendant to those questions, much less, credible answers.

[23] Whilst the claimants had the burden of disproving self defence on a balance of probabilities, the 1st defendant had an evidentiary burden. That is, the burden of leading sufficient evidence capable of enabling this court to conclude, on a balance of probabilities, that at the material time, the 1st claimant had fired at them first, whereafter, they had responded in like manner and that as a consequence, the claimants had been shot.

[24] The defence witness gave evidence to the trial court, which met that burden, on the face of it. In other words, if this court had accepted that evidence as given by the defence witness in that particular respect, then this court would have concluded that the claimants had failed to discharge their burden of disproving self defence on a balance of probabilities. This court though, has entirely rejected the 1st defendant's assertion of self defence.

Claim for damages for negligence

[25] The claimants are, in this court's considered opinion, entitled to recover damages for negligence, arising from the injuries and loss which they respectively suffered, due to the gunshot injuries which they respectively received.

[26] Whilst it has not been proven beyond a reasonable doubt, that the respective claimants were shot by police personnel, it has been so proven, on a balance of

probabilities. That is the standard of proof which is applicable to the present case. The only persons who, in this court's view, had guns which were being fired in the direction of the respective claimants at the material time, were the police.

[27] The Crown breached its duty of care to the claimants, by the police personnel having fired as they did, in that community, on the questioned occasion. They owed a duty of care to take reasonable care to ensure that innocent bystanders, passers – by and/or persons in their homes who were taking no part in attacking or threatening to attack the police, were not harmed at all and even moreso, harmed by police bullets – which is, what this court has concluded, on a balance of probabilities, is what in fact occurred.

2nd claimant – claim for damages for assault/false imprisonment/battery/breach of constitutional rights – claim for aggravated and exemplary damages

[28] The 2nd claimant has failed to prove his claim for damages for assault. He has particularized his claim for same – see para. 7 of particulars of claim. He gave no evidence of having been put in fear that he would have been beaten by the police immediately as and when, according to him, he saw the 1st claimant being beaten, assaulted, kicked and gun-butted by police personnel.

[29] As a matter of law, if he was to have been successful in proof of his claim for damages for assault, on the basis that he witnessed the 1st claimant being assaulted and, as he described it, also battered, he needed to have given evidence that he feared that he would have immediately been subject to an unlawful and non-consensual touching of his person, by police personnel. He did not give any such evidence.

[30] In any event, for reasons which will be provided further on in these reasons for judgment, this court has concluded that no such assault and/or battery, in particular, the threatening of and/or the beating, kicking and gun-butting of the 1st claimant, as he has alleged, ever in fact occurred.

[31] As such, having rejected the evidence of both claimants in that respect, that is a second reason why the 2nd claimant's claim for damages for assault, founded upon that alleged factual substratum, must be and is in fact, concluded by this court, as being an unproven claim.

[32] There are though, two (2) bases upon which the 2nd claimant has founded his claim for damages for assault. According to his statement of case, at para. 7 of his particulars of claim, '*Uniformed members of the Jamaica Constabulary Force maliciously and without reasonable and/or probable cause assaulted the 2nd claimant by intentionally putting him in immediate fear for his safety by their statements to him including that they would kill both the 2nd claimant and the 1st claimant.*' That quotation is the second respect upon which the 2nd claimant's claim for damages for assault is founded.

[33] This court has already stated its conclusion that no such threat was ever issued to the claimants by any of the police officers who were, by then, around him. This court has not accepted that evidence, because, this court does not believe that any of the police officers who were then on duty in that particular location, genuinely believed that either of the claimants had ever, at any time that night, had in their respective possession, any firearm/rifle. Accordingly, it is this court's considered view of the evidence, that the claimants would not have been questioned about the whereabouts of any gun and would not have been threatened in respect of any alleged use of a gun. This court simply does not accept either of the claimants' evidence, that that happened.

[34] In any event though, the 2nd claimant testified that he feared he would have been killed by the police, 'later that night' and not, 'there and then' whilst the alleged assault and battery of both himself and the 1st claimant was allegedly ongoing.

[35] An assault consists of placing a person in fear that an immediate, non-consensual and unlawful, touching of his person, would occur. Placing a person in fear of being killed can, in appropriate circumstances, constitute an assault,

but in that respect, the claimant must prove that he had the fear that he would have been killed, as a matter of immediacy after the threat became a reality for him – as a threat, or if a specific threat was issued, then, as a matter of immediacy after that threat was issued. See: **Tuberville v Savage** – [1669] 1 Mod. Rep. 3; and **Collins v Wilcock** – [1984] 1 WLR 1172, at 1178.

Claim by the 2nd claimant for damages for false imprisonment

[36] As regards the 2nd claimant's claim for damages for false imprisonment, it was made known to this court, by the claimants' counsel, during his oral closing submission, that although the 2nd claimant has sought damages for false imprisonment, he (the 2nd claimant) is now no longer seeking to obtain that relief. In view of that which is set out, further on in these reasons for judgment, as to what in law, constitutes false imprisonment, that concession was a very surprising one, but was one which it was entirely within the purview of the claimants' counsel to have made and thus, this court will not interfere with same.

Claim by the 2nd claimant for damages for battery

[37] The 2nd claimant has not, in the traditional and expected manner, particularized the battery upon him, for which he has also, by means of this claim, made claim for damages.

[38] The 2nd claimant ought to have particularized same in the traditional and expected manner, so as to have more easily and readily enabled the defendant to have been better prepared to respond to same. In fact, the 2nd claimant never particularized, in the particulars of claim, any battery at all.

[39] Upon the urging of the claimant's lead counsel though, this court has permitted both claimants to seek to obtain, by means of this claim, damages for battery, since the alleged battery of the 2nd claimant was in fact clearly set out in that claimant's evidence, albeit that it was not particularized in the claimants' particulars of claim, as it ought to have been, which would have been the setting

out of those particulars under the heading – 'particulars of battery of the 2nd claimant.' That was in fact what was done in respect of the 1st claimant and thus, it is quite surprising to this court, that the same approach was not taken in respect of the 2nd claimant, in the single particulars of claim document which was filed.

[40] The evidence of the claimants detailed that they were both handcuffed by police personnel and that they laid on the ground for several minutes, while respectively bleeding from their respective wounds. Thereafter, they were each dragged to awaiting marked police vehicles and they were respectively, initially, placed in separate vehicles, but a little later, while still at the location in Arnett Gardens, where they had been placed in those separate vehicles, Mr. Bowra was then placed in the police vehicle that Mr. Oddman was in and they were transported to the Kingston Public Hospital – where they received medical treatment.

[41] While at that hospital, the claimants were under police guard. There was only one available bed when they arrived there and Mr. Bowra testified that he allowed Mr. Oddman to occupy the bed, because his injury was more serious. They were placed under police guard. Mr. Bowra spent one day and one night, on a chair at the hospital, while he was undergoing treatment and under police guard. The following day, Mr. Bowra got a bed and he was immediately placed in a handcuff, which was attached to that bed.

[42] Mr. Bowra also testified that he felt ashamed and humiliated while he was handcuffed at the hospital, because he felt that he was being treated like a criminal and also, because he could observe some of the patients, nurses and visitors who came to other patients on the ward, staring and pointing at him, as though he had done something wrong.

[43] According to Mr. Bowra, in his evidence-in-chief, as set out in para. 21 of his witness statement – *'Two (2) days later a police officer came and pulled the handcuffs from my hand while I was on the ward and told me that the police no*

longer had an interest in me. I was released from custody without any charges ever being laid against me.' During cross-examination, the 2nd claimant specifically said that he was discharged from the Kingston Public Hospital on September 3. The incidents involving Mr. Bowra, Mr. Oddman and police personnel, which form the basis for this claim, occurred on August 31, 2007, at around 8 p.m.

[44] Accordingly, this court has concluded that the 2nd claimant was forcibly detained by police personnel, for nearly 72 hours (3 days at 24 hours per day) and that throughout that period of time, he was subjected to non-consensual touchings of his person, whether directly, or by means of an object such as handcuffs.

[45] What then is a 'battery?' As stated in the text- Winfield and Jolowicz on Tort, authored by Winfield and Jolowicz, 14th ed.,1994, (hereinafter referred to as the 'Winfield and Jolowicz text'), at p. 58, '*Battery is the intentional and direct application of force to another person.' For that purpose, any physical contact, whether direct or indirect, with the claimant's body, or with his clothing, is sufficient to amount to 'force.' If there is 'force' in the technical sense, no physical hurt is necessary, for all forms of trespass are actionable per se.* See: Winfield and Jolowicz text, at p. 59; and **Pursell v Horne** – [1838] 3 N and P. 564.

[46] My understanding of the law as regards the tort of battery is that a further element should be added to the definition of battery, as above – quoted. That is the element of that application of force being non-consensual, as between the person applying that force and the person upon whom that force is to be applied. See: **Chapman v Ellesmere** – [1932] 2 KB 431 and the Winfield and Jolowicz text, at p. 59. Such consent though, must be freely given, as against being given solely as a consequence of wrongful threats, sufficient to overbear the claimant's will. See: Winfield and Jolowicz text, at pp. 58 and 724.

[47] The placement of handcuffs on a person's wrists or leg cuffs on a person's legs, if not carried out pursuant to a lawful arrest and done intentionally and non-consensually, will amount to a battery. See: **Collins v Wilcock** – [1984] 1 WLR 1172. Physical harm is not required to be proven by a claimant, as having occurred to him, in order for him to prove that a battery occurred in relation to him.

[48] To strike a horse, whereby it throws its rider, can constitute battery. See: **Dodwell v Burford** – [1669] 86 ER 703. So too, it can be a battery to spit in someone else's face, or to cut someone's hair, or to pull a chair from under a person, so as to cause that person to fall to the ground. See: The Law of Torts – Fleming, 7th ed., 1987, at p. 23. All in all, once the nature of the 'force' is outside of the accepted occurrences/usages, arising from daily life, such as, for example, tapping someone on his shoulder, so as to bring something to his attention, it is capable of constituting a battery and will, as a matter of law, be battery, if carried out intentionally and non-consensually.

[49] That is why an unlawful arrest which leads to, or during which, there is the touching of the person arrested, or the handcuffing or leg-cuffing of that person, will typically constitute not only false imprisonment, but also, battery.

[50] Furthermore, it is important to note that if the claimant, though not having in fact consented to the touching of his person, conducted himself in such a manner as to have led the defendant to reasonably have believed that consent exists, then the defendant cannot properly be held liable See: **O'Brien v Cunard S.S. Co.** [1891] 28 N.E. 266.

[51] It has also been stated in the Winfield and Jolowicz text, at p. 59, that – '*Subject to lawful authority, such as a power of arrest, an adult of full understanding has an absolute right to the inviolability of his body and therefore, has an absolute right to choose whether or not to consent to medical treatment, even if the medical treatment is necessary to save his life.'* See: **Re F** – [1990] 2 AC 1.

[52] In the circumstances, this court must next consider whether the 2nd claimant – Mr. Bowra was at all times while in police custody and while being in handcuffs at the Kingston Public Hospital, then under lawful arrest and even more importantly, to begin with, whether the 1st defendant has asserted same in that office's defence which was filed, in response to this claim.

[53] The 1st defendant has not so asserted in respect of the 2nd claimant. The 1st defendant has, on the other hand, so asserted, in respect of the 1st claimant. The defence cannot rely on any assertion that they have not put forward in their defence, unless the court has expressly permitted the defendant to do so. See: **Rule 10.7 of the Civil Procedure Rules (CPR)** in that regard. In fairness to the 1st defendant's counsel, she has never asserted that the 2nd claimant was at any time, under lawful arrest. It is meet and right that she did not do so, because, the evidence given by the only defence witness – Cpl. McCalla, does not support any basis for the making of such assertion. There exists no evidence that he was detained on reasonable suspicion that he committed a criminal offence. That would have been the only lawful basis upon which either of the claimants could have been arrested, as they were, without a warrant.

[54] At common law, as stated in the Winfield and Jolowicz text, at p. 69, '*the burden of proof of justifying an arrest is upon the person effecting it and if he fails to do so he is liable for false imprisonment and, where there has been a threatened or actual use of force, no matter how minor, for assault or battery as well.'* In Jamaica, the provisions of **section 33** of the **Constabulary Force Act** would operate though, so as to cast the burden of proof on the claimant, to satisfy the trial court, that the arrest was carried out either maliciously, or without reasonable or probable cause, in which event, that would constitute false imprisonment and if any force was used to effect that arrest, then such would also constitute a battery. If there was a threat of force being used in such a circumstance and that threat was duly perceived by the claimant, then the claimant would also be able to recover damages for assault. This court has found it surprising therefore, that

the 2nd claimant's counsel chose, at a very late stage of the trial proceedings, to inform this court that the 2nd claimant was no longer claiming damages for false imprisonment, whereas he has claimed damages for battery and that battery pertains to the circumstances surrounding his detention by police personnel.

[55] There was absolutely no basis for the detention of the 2nd claimant by police personnel. It may be that, in that regard, the relevant police personnel were acting under a mistaken view of their legal power of arrest and in particular, in what circumstances that power could be exercised. A mistaken view, or understanding by them, of their legal powers of arrest though, will not exempt the Crown from liability. The provisions of **Section 33 of the Constabulary Force Act** will not avail the Crown, in such a circumstance.

[56] The 2nd claimant has proven that battery was committed upon his person, by the Crown's servants or agents and that the same was committed without reasonable or probable cause. A mistaken view of the law, taken by a constable, as to his or her power of arrest, does not fall within the ambit of the protection afforded to constables, by the provisions of **Section 33 of the Constabulary Force Act**. See: **Murphy v Richards** – [1960] 2 W.I.R 143.

[57] In the circumstances, the 2nd claimant is entitled to be awarded damages for negligence and battery. The precise sum of the damages award (s) to be made in relation to each of same, will be addressed further on, in these reasons.

The 1st claimant's claim for damages for false imprisonment

[58] The burden of proof rested on the 1st claimant to prove that he was unlawfully arrested.

[59] This court, having concluded that the 1st defendant's evidence, as given through its only witness – Cpl. McCalla, that the 1st claimant was seen firing bullets at police officers, using a firearm, is untruthful, must of necessity, go on to conclude that the 1st claimant has proven that he was unlawfully arrested by Crown

servants and/or agents. The 1st claimant was arrested without reasonable or probable cause and that is why it is also this court's conclusion that Cpl. McCalla provided untruthful evidence to this court, as to what caused police personnel to have arrested that claimant. If his evidence in that regard had been believed, then the 1st claimant would have failed to have proven his claim for damages for false imprisonment. This court though, has reached the conclusion, for reasons already given, that his evidence in that particular respect, is entirely incapable of belief. On the other hand, the 1st claimant's evidence as to the circumstances surrounding his arrest, was entirely credible and is accepted by this court as being truthful evidence. Accordingly, the 1st claimant has proven his claim for damages for false imprisonment.

The 1st claimant's claim for damages for battery

[60] With there having been no lawful arrest of the 1st claimant, by police personnel, the handcuffing of him, by police personnel, constitutes battery. He had, in his evidence-in-chief, stated that he had been handcuffed while he was in custody at the scene where he had been shot and that he had remained handcuffed while he was at the Kingston Public Hospital. He had alleged in para. 12 of his particulars of claim, that he was handcuffed at the hospital and at the Denham Town Police Station.

[61] He did not though, allege same, as being aspects of the particulars of battery, in relation to him. Instead, what he and his counsel chose to allege as particulars of the battery committed upon him, by the Crown's servants or agents, was their 'physical abuse of him' and their gun-butting and kicking of him.

[62] This court has already concluded that no gun-butting and/or kicking of the 1st claimant ever took place and therefore, will not address that issue any further, at this juncture.

[63] This court is unclear as to what is meant by the phraseology – 'physical abuse' as used in the claimant's particulars of claim, this particularly in terms of whether

that phraseology is adequate to include within its ambit, the handcuffing of him, without lawful justification.

[64] In any event though, it matters not, since the most important objective to be achieved by particularizing one's claim, is to enable the opposing party to know the case that will have to be met. Inelegant or imprecise drafting is to be distinguished, in that important respect, from wholly incomplete drafting, of a party's statement of case – of which, for the claimant, the particulars of claim forms an important part.

[65] In the case at hand, the drafting of the claimant's particulars of claim, is, as far as the particulars of battery is concerned, imprecise. The 1st defendant though, has known from ever since the Attorney General was served with the particulars of claim, that the claimant was alleging that he had been unlawfully arrested, or in the language of the law of tort – falsely imprisoned and that he had been handcuffed, pursuant to that arrest. In response to that assertion, the 1st defendant had asserted that the 1st claimant was lawfully arrested.

[66] With this court now having concluded that the 1st claimant was unlawfully arrested, it follows, a fortiori, that not only did the defendant know the case that they had to meet, in terms of the claimant's allegation that he had been handcuffed, but also, that their defence to that claim has been successfully rebuffed by the 1st claimant. The 1st claimant will therefore be awarded damages for battery, arising from his having been handcuffed. Furthermore, the 1st claimant has proven that he was handcuffed without reasonable or probable cause, since he has also proven that he was arrested without reasonable or probable cause and he was handcuffed pursuant to that arrest of him. Accordingly, the requirements of **Section 33 of the Constabulary Force Act**, have been met by him.

[67] The 1st claimant, although having provided evidence to this court, during examination-in-chief, as per para. 18 of his witness statement, that he was

handcuffed while he laid on the ground in the immediate vicinity of where he had been shot, expressly disagreed that he was then handcuffed, when he was questioned about same, during cross-examination.

[68] During cross-examination of the 1st claimant on April 11, 2016, the 1st claimant was asked the following questions:

Q. 'When you say they handcuffed us and had us there for almost half an hour,' is it that you were saying that while you were still on the scene and had been shot, you were handcuffed?'

A. 'No Ma'am.'

[69] That having been his evidence in response to a very straightforward and open question which had been placed to him, by cross-examining counsel, this court is constrained to conclude that the 1st claimant has failed to prove that he was handcuffed while under arrest in Arnett Gardens and accordingly, cannot and will not be awarded damages for battery, arising from that particular allegation.

[70] Additionally, although the 1st claimant had alleged in his particulars of claim, that he was handcuffed while at the Denham Town Police Station, he led absolutely no evidence whatsoever, in support of that allegation.

[71] Accordingly, this court has not found the allegation of battery, in that respect, proven. What this court has found proven, is that the 1st claimant was handcuffed while he was initially awaiting and undergoing treatment at the Kingston Public Hospital, over several days, prior to his having been taken from there, to the Denham Town Police Station. He initially spent seven (7) days at the hospital and this court has therefore concluded that the 1st claimant has proven, on a balance of probabilities, that he remained handcuffed for seven (7) days. He is entitled to and will be awarded both general and aggravated damages for battery, arising from same, as he was, by being handcuffed while he was at the hospital, caused understandable emotional distress and humiliation.

The 1st claimant's claim for damages for assault

[72] The only allegation of assault, in respect of the 1st claimant, that is worthy of any consideration, is the allegation made in para. 8(b) of the claimants' particulars of claim, that the 1st claimant was put in immediate fear of harm to his person, by uniformed members of the Jamaica Constabulary Force, as a consequence of their statements to him, that they would kill both him and the 2nd claimant, and by their ongoing physical abuse of him.

[73] This court has already stated in these reasons, that it does not accept that there was ever any physical abuse of the 1st claimant, by members of the Jamaica Constabulary Force. Accordingly, this court is unable to accept that the 1st claimant was assaulted as a consequence of same having allegedly occurred, whether in the form of his having been gun-butted, or kicked, or for that matter, in any other form whatsoever.

[74] This court has also concluded that the 1st claimant has failed to prove his claim for assault, which was founded upon the allegation that he was put in immediate fear of harm to his person, by uniformed members of the Jamaica Constabulary Force, as a consequence of their statements to him, that they would kill both him and the second claimant. The claimant gave no evidence whatsoever, which was even remotely capable of supporting that assertion.

The 1st claimant's claim for damages for false imprisonment

[75] The defence had, as part and parcel of their skeleton submissions, essentially conceded the claimant's claim for damages for false imprisonment. The Crown had though, only conceded same, on the basis that they could not place before the trial court, any reason for the lengthy detention of the 1st claimant.

[76] It was indeed, entirely appropriate for the 1st defendant to have so conceded, as the burden rested on the Crown to lead evidence capable of satisfying the trial

judge that there existed reasonable cause, for the lengthy detention. That is an evidentiary burden.

[77] The detention of the 1st claimant, by the Crown's servants or agents would have been unlawful, if it was carried out without reasonable or probable cause – since it was an arrest without a warrant and thus, was not an arrest carried out, pursuant to the mandate of a judicial officer.

[78] It would also have been unlawful, if the 1st claimant had remained under arrest for an unduly lengthy time period, even if the initial arrest had been lawful. In that regard, see: **Peter Flemming v Det. Cpl. Myers and the Attorney General** – [1989] 26 J.L.R. 525.

[79] As such, whilst in the present claim, the Crown has conceded that the 1st claimant should succeed in his claim for damages for false imprisonment, based on the unduly lengthy period of time that he was detained for, without having been criminally charged, arising out of the alleged basis upon which he was arrested and even more importantly, in terms of the length of time for which he was detained, without having been arraigned before a court of law or a judicial officer, the 1st claimant also has succeeded in proving his claim for damages for false imprisonment, based on this court's conclusion that police personnel had no reasonable or probable cause for his arrest.

[80] The 1st claimant was initially detained by police personnel, in Arnett Gardens, on August 31, 2007. That is undisputed. Following on his lead attorney at that time – Mr. Bert Samuels, having filed at the Magistrate's Court, a habeas corpus application on his behalf, it was ordered by the court, that he was to be released or criminally charged, by 12 noon on September 11, 2007. The 1st claimant gave that evidence, as per para. 31 of his witness statement and his evidence in that respect, was unchallenged by the Crown. This court has accepted that evidence. The 1st claimant also gave evidence, via that same para. of his witness statement, that his attorney, Mr. Samuels made a habeas corpus application on

September 10, 2007. The 1st claimant would have been present at that court hearing on September 10, 2007, as that is what is required in respect of every habeas corpus application.

[81] When he was questioned during cross-examination, as to whether he could recall how long he had been in custody, the 1st claimant's answer to that query was – 'over a week.' This court accepts that evidence, as it is consistent with the 1st claimant's evidence given, in-chief. This court accepts, that the 1st claimant was placed before a court of law, on September 10, 2007.

[82] In the circumstances, the 1st claimant was unlawfully detained from August 31 to September 10, 2007 – a period of ten (10) days.

[83] The detention of the 1st claimant for ten (10) days, as proven, was a detention for an unduly lengthy period of time, especially bearing in mind that he was never even so much as criminally charged for any offence whatsoever, either during, or at the end of those ten (10) days. Added to that ignominy, it must not be forgotten, that the 1st claimant's initial arrest was unlawful.

[84] All in all therefore, this court has concluded that the 1st claimant's initial detention, coupled with the length of that detention, was overall, carried out in a high-handed and oppressive manner by Crown servants – police officers and furthermore, that his detention, from beginning to end, presents to this court, aggravating circumstances such as humiliation of the claimant and an affront to his dignity as a human being. Overall therefore, as will later be readily recognized, when this court addresses the issue of damages, with particularity, the false imprisonment as proven by the 1st claimant, will justify an award of both aggravated and exemplary damages, separate and apart from general damages and any proven special damages.

[85] Having so concluded, this will be a convenient juncture to address the issue of damages. In that regard, this court will address same in respect of the law and

then go on to apply that law, to each claimant's case separately, in terms of what tortious conduct of the Crown's servants, has been determined by this court, as having been proven by each claimant and what were the consequences of that conduct, upon each claimant.

Aggravated Damages

[86] 'Aggravated damages' is the term used to describe an award of a sum of money to a claimant, by a court, in an effort to compensate that claimant, for the injury to that claimant's proper feelings of dignity and pride, which was caused by the manner in which the tort was committed. See: **Rookes v Barnard** – [1964] AC 1129, at 1221, per Ld. Devlin and **Broome v Cassell and Co Ltd.** – [1972] AC 1027, at 1071 and 1073, per Ld. Hailsham L.C.

Exemplary Damages

[87] Unlike aggravated damages – which is awarded solely for the purpose of compensating the claimant, 'exemplary damages,' is otherwise commonly termed as 'punitive damages.' It is this latter-mentioned phraseology which is perhaps the most apt, since exemplary damages are awarded to teach the defendant that, 'tort does not pay' and to deter him and others from similar conduct in the future. See: **Broome v Cassell and Co. Ltd.** (*op. cit.*), at 1073, per Ld. Hailsham, L.C.

[88] As stated in the text- Clerk and Lindsell on Torts, 20th ed. (2010), at para. 28 – 139 – '*It was formerly supposed that exemplary damages could be awarded in almost any case of tort if the defendant's conduct had been particularly outrageous.'* In 1964, however, the House of Lords, through the speech of Ld. Devlin in **Rookes v Barnard** (*op. cit*.), laid down that exemplary damages, as distinct from aggravated damages, should only be awarded in two (2) specific categories of case, unless of course, they were expressly authorized by statute. These categories comprise, first, cases of '*oppressive, arbitrary or unconstitutional action by the servants of government' and secondly, cases in which the defendant's conduct has been calculated by him to make a profit for*

himself which may well exceed the compensation payable to the (claimant).' In cases falling within one or the other of those categories Ld. Devlin considered that exemplary damages were justified by authority and that they served a useful purpose in vindicating the strength of the law.

[89] In the case at hand, it has been alleged by the claimants, that the Crown's servants – police officers acting in the execution of their duties as such, carried out oppressive, arbitrary and unconstitutional actions in relation to them, by having committed the torts of assault, battery and false imprisonment.

[90] In recent times, both in England and Jamaica, the most common example of exemplary damages being awarded, arising from oppressive, arbitrary, or unconstitutional action by the servants of the government, has been in claims against the police/attorney general, for torts such as assault, battery and false imprisonment. See: **Thompson v Commissioner of Police for the Metropolis** – [1998] QB 498 (CA) and **Muuse v Secretary of State for the House Department** – [2010] EWCA Civ. 453 and **Maxwell Russell and the Attorney General for Jamaica and Corporal McDonald** – Claim No. 2006 HCV 4024 and **Odane Edwards and the Attorney General** – [2013] JMSC Civ. 116.

Damage for breaches of constitutional rights/ 'vindicatory damages'

[91] As regards this particular head of damages, which is being sought by each of the claimants herein, a brief quotation from the text – Clerk and Lindsell on Torts (*op. cit.)* will suffice to set out the circumstances in which such may properly be awarded by a court in Jamaica.

[92] At para. 28-142 of that text, the following is stated: '*In a series of decisions of the Privy Council, 'vindicatory damages' awarded for infringement of constitutional rights have been awarded in circumstances where exemplary damages might otherwise have been awarded within the first of Ld. Devlin's categories. So, for example, in* ***Attorney General of Trinidad and Tobago v Ramanoop*** *– [2006] 1 AC 328, there had been an unconstitutional arrest, assault and detention by a*

police officer. It was held that there was jurisdiction under section 14 of the constitution of Trinidad and Tobago to award the victim, in addition to compensatory damages, damages for infringement of his constitutional rights. Those additional damages were to vindicate the claimant's constitutional right, to emphasize the gravity of the breach, to reflect the sense of public outrage, and to deter further infringements. Although recognized as covering the same ground as punitive or exemplary damages, the Privy Council thought that, as punishment in the sense of retribution was not the object of this additional award, the expression 'punitive damages' or 'exemplary damages' were here better avoided. In ***Takitota v Attorney General*** *– [2009] UKPC 11, the Privy Council concluded that a court should not award both vindicatory and exemplary damages because of the overlap between them. Vindicatory damages is, it seems, not yet utilized in English Law, arising from the infringement by the state, of a person's rights under the* ***Human Rights Act****, 1998.'*

[93] In the case – **Odane Edwards v The Attorney General** – [2013] JMSC Civ. 116, my brother Judge, Mr. Justice D. Fraser, adopted the approach as set out in the **Takitota case**, which is a Privy Council judgment, emanating from Bahamas, in that, in that case, he declined to award vindicatory damages, since as he stated in para. 96 of the court's judgment in that case, the award of exemplary damages made in that case, coupled with the award for basic aggravated damages, would serve to adequately compensate the claimant for the impugned conduct of the police officers around whose unlawful actions, that case surrounded.

[94] This court wholly agrees and will adopt the approach as set out in the **Takitota case**, but must, for the record state that since the purpose of exemplary and vindicatory damages is not compensation, it will not award both vindicatory and exemplary damages, not because that would overly compensate the claimant, but because, there is overlap between an award of vindicatory and exemplary damages, in circumstances wherein, exemplary damages are to be awarded to punish the defendant for outrageous behaviour and deter him and others from

repeating it, in circumstances wherein the defendant's conduct constitutes unconstitutional action of a government servant and even moreso, wherein that unconstitutional action had been carried out in an oppressive and/or arbitrary manner.

[95] Those are precisely the alleged circumstances in the present claim, which have led to the claimant seeking an award of exemplary and vindicatory damages. Each of the claimants though, for the reasons given, can only, at most, be awarded either exemplary or vindicatory damages, but not both of the same.

General and special damages

[96] General and special damages, have been collectively described in some judgments, no doubt, solely for the purpose of distinguishing between those types of damages and aggravated, exemplary and vindicatory damages, as 'basic damages.' They are properly so described, because those types of damages are typically awarded in cases involving the commission by a defendant, of a tort (wrong).

[97] The purpose of an award of general damages and/or special damages, is to compensate the claimant, for the injury and/or loss suffered, to the best extent possible, arising from a mathematical calculation by a court of law. In other words, general and special damages awards, are designed to put the claimant in the position that he would have been in, if the tort had not been committed. As such, those awards of general and special damages, are compensatory only. See: **Livingston v Rawyards Coal Co.** – [1880] 5 App. Cas. 25 at 39, per Ld. Blackburn.

[98] As stated in **Ratcliffe v Evans** – [1892] 2 QB 524, at 528, per Bowen, L.J, '*the distinction between general and special damages is important, not only for the purpose of the form of an award, but also, in relation to pleading and proof.'* The law presumes 'general damages' to flow from the wrong done and thus, it is sufficient if, in the claimant's particulars of claim, in order for the purpose of

obtaining an award of general damages, the claimant alleges the wrong and alleges that as a consequence of the commission of that wrong, he has suffered loss and/or damage. In that regard, see: **Admiralty Commissioners v SS Susquehanna** – [1926] AC 655, at 661.

[99] On the other hand, special damages are awarded, arising from proof of any 'special damage' which the claimant has alleged and proven, as having arisen from the wrong that was done. As stated at p. 528 of the **Ratcliffe v Evans** case (*op. cit.)* by Bowen. L.J, *'special damage' means, 'the particular damage beyond the general damage which results from the particular circumstances of the case, and of the claimant's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be no surprise at the trial.'*

[100] Accordingly, it has often been stated by judges, that special damages must be specially pleaded and specially proven. It has also though, always been equally emphasized by judges, that this is a general rule only. Thus, in **Ratcliffe v Evans** (*op. cit.*) at p. 524, Bowen, L.J, is recorded as having stated – *'The character of the acts themselves which produce the damage and the circumstances under which these acts are done must regulate the certainty and particularity with which the damage done ought to be proved. As much certainty and particularity must be insisted on in proof of damage as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.'* This principle has been applied in Jamaica's courts, on numerous occasions. See: **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** – Supreme Court Civil Appeal No. 109 of 2002.

Mitigation

[101] It has often been stated in court judgments, that a claimant is, 'under a duty' to mitigate the losses resulting from the defendant's tort. As pointed out by

Pearson, L.J in **Darbishire v Warran** – [1963] 1 WLR 1067, at p. 1075, this is not though, a legal duty, since it cannot be enforced as such. Failure to fulfil it, simply entails a reduction in the damages awarded. Accordingly, the claimant will not be allowed to recover for any losses which, though he did sustain, he could reasonably have avoided. In tort cases (such as in this case), a defendant is only liable for such part of the claimant's loss, as is properly to be regarded as caused by the defendant's commission of the wrong, as distinct from, that which is caused, either wholly or partially, from the claimant's failure to make reasonable efforts to limit the amount of loss suffered.

[102] It was, at one time, the considered view of the Privy Council, that the burden of proof lay on a plaintiff/claimant, to satisfy the court that in all the circumstances, he had taken reasonable steps to mitigate his loss. See: **Selvanayagam v University of the West Indies** – [1983] 34 WIR 267. That considered view though, was inconsistent with two (2) prior judgments of England's House of Lords – **Steele v Robert George and Co. Ltd.** – [1942] 1 ALL ER 447; and **Richardson v Redpath Brown & Co. Ltd.** – [1944] 1 ALL ER 110. It came as no surprise therefore, that on a later occasion, the Privy Council, in **Geest plc v Lansiquot** – [2002] 61 WIR 212, refused to follow its own earlier view in that regard, as had been expressed in the **Selvanayagam** case. As such, the burden rests on a defendant to prove that the claimant has failed to adequately, or at all, mitigate his loss. The Board stated in the **Geest case** (*op. cit.)* that such an approach is soundly based and the Board's prior decision in the **Selvanayagam** case, on that particular legal aspect, cannot be relied on as an accurate statement of the law, on that aspect.

[103] It is also very important to note that the Privy Council also held, in the **Geest case** (*op. cit.),* that not only is the burden of proof on the issue of mitigation, one for the defendant to bear, but also, that if the defendant intends to contend that a plaintiff/claimant has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff in sufficient time

before the hearing, so as to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter.

[104] Such notice, of a contention by the defendant, that the claimant/plaintiff has failed to adequately mitigate his loss is not, to my mind, given to the claimant, merely by putting forward the averment that the defendant, 'makes no admission as to any loss, injury and/or damage allegedly suffered by the claimant and puts the claimant to proof of same.' Putting the claimant to proof of the actual loss which he suffered and notifying the claimant that he is being put to that proof, ought not to be equated with notifying the claimant that the defendant intends to prove that the claimant failed to adequately mitigate his loss.

[105] Although notice of proof of actual loss suffered and notice of intention to prove failure to adequately mitigate, are undoubtedly, related legal concepts, since they both relate, ultimately, to the proof of damage/loss, they are nonetheless, also, distinctly different legal concepts. That is so because, the burden of proof of loss rests on the claimant and not all loss suffered by a claimant in a tort case, will be presumed as flowing from the proven wrong. On the other hand, whilst a person may suffer actual loss of, for example $1,000,000.00, arising from the wrong committed by the defendant in relation to him, the only actual recoverable loss may very well be $1,000.00, because the remaining $999,000.00 in loss, was suffered solely as a consequence of the claimant's failure to adequately mitigate his loss. This is no doubt why, the Privy Council held in the **Geest case** (*op. cit.)* that notice of a contention that the plaintiff/claimant failed to adequately mitigate his loss, should be clearly given to the plaintiff/claimant, in a timely way.

[106] This court will now apply all of the aforementioned legal principles, to this claim, based on that which this court has concluded as having been proven by the respective claimants, in respect of the alleged tortious and unconstitutional actions of the Crown's servants/agents. In that respect, this court will, in these reasons, firstly address what award of damages should be made to the 2nd claimant – Orville Bowra.

Orville Bowra – Damages to be awarded

[107] This court has concluded that Mr. Bowra – the 2nd claimant, was the subject of the tort of battery committed by the police officers, on the relevant occasion, this in so far as they had handcuffed him without any reasonable and/or probable cause. The 2nd claimant abandoned his initial claim for damages for false imprisonment. The 2nd claimant remained handcuffed for a considerable period of time, including but not limited to, when he was awaiting medical treatment at the Kingston Public Hospital. That situation must have been very humiliating for him. In the circumstances, this court will award to him as compensation, aggravated damages. He will also be awarded general damages for negligence and battery.

[108] As far as the 2nd claimant's alleged special damages is concerned, he has, in the particulars of claim, respectively claimed as follows:

> *'Costs of 12 doctors visits at $2500.00 each*
> *$30,000.00*
>
> *Cost of additional transportation expenses*
> *$12,000.00*
>
> *Cost of medicine and medical apparatus*
> *$20,000.00*
>
> *Loss of wages for five (5) weeks, at $7,500.00 per week*
> *$37,500.00.'*

[109] The 2nd claimant gave evidence that he was employed at the time when the incident which forms the subject of this claim occurred and that, as a result of this incident, he was unable to work at his then place of employment – Jamaica Plumbing Supplies Ltd., for a period of six (6) weeks. He also gave evidence that at that time, he was earning $7500.00 per week. The 2nd claimant though, provided no evidence to this court, whether through himself, or anyone else, as

to whether he was, at the material time, a permanent or part-time employee, of Jamaica Plumbing Supplies Ltd., at the material time.

[110] The failure to provide that evidence is significant because, in the circumstances, this court does not know whether the 2nd claimant was, or was not, at the material time, an hourly paid worker, or a worker who got paid, based on his work on a particular job or jobs, from time to time (that in other words being the role of a part-time employee), or whether instead, the 2nd claimant received a fixed salary each week, regardless of his specific work tasks carried out during any particular week (that being the role of a permanent employee).

[111] If the 2nd claimant was a permanent employee at the material time, he would have, by law, been entitled to be paid during the period of his absence from work, due to illness. See: **Sections 3 and 4 of the Holidays with Pay Act and the Holidays with Pay Order 1973, regulation Nos. 8 and 9**, in that regard. Accordingly, if he was not paid during that period of time, then he would need to make claim against his then employer, for the sum which he was not then paid, as he ought to have been.

[112] As the court is in complete doubt in that particular respect, the 2nd claimant's claim for loss of wages, in the sum of $37,500.00 has not been proven. The 2nd claimant has failed to prove that he actually suffered that financial loss or that, he suffered same, as a consequence of the unlawful actions of the Crown's servant/agents.

[113] The 2nd claimant, although having claimed for doctors' visits costs, provided to this court, no receipts in proof of same and his only explanation as to why he provided to this court, none of same, was that the taxi drivers who carried him, did not provide him with any receipts. According to his evidence at trial, he had to visit the Alma Jones Medical Center, every other day, to dress his wound and get medical attention and the sum of $2500.00 which he is claiming for each of

his twelve (12) visits there, pertain to the cost solely associated with his having used a taxi to get to and from those doctors visits.

[114] This court will award to the 2nd claimant, as special damages, the cost of taxi fare for twelve (12) visits to and from the Alma Jones Medical Center, but will not award same at $2500.00 per visit. That sum appears exorbitant and undoubtedly, cannot be a truthfully and accurately provided, sum. According to the evidence of Steve Oddman at trial, the Alma Jones Medical Center is located approximately one (1) to two (2) miles away from where the claimants lived at the material time. It could not therefore have cost more than $300.00 for each trip and return trip (included) to and from that medical center. As such, this court has found as proven by the 2nd claimant in respect of same, the sum of $3600.00 ($300.00X12).

[115] The 2nd claimant has also claimed $12,000.00 for 'additional transportation expenses,' but provided to this court, no evidence whatsoever, as regards same. As such, this court cannot and will not make any award for same.

[116] As far as the 2nd claimant's efforts to prove his actual medical expenses are concerned, he was only able to prove medical expenses of $5050.00, as set out in the Kingston Public Hospital document which was admitted and marked as Exhibit 1A. This court will therefore only award to the 2nd claimant as costs of medicine and medical apparatus, the sum of $5,050.00.

[117] In total therefore, as special damages, the 2nd claimant will be awarded the sum of $8650.00 ($5050.00+$3600.00).

[118] With respect to the tort of battery, the 2nd claimant will be awarded the sum of $1,400,000.00 as general and aggravated damages (combined): **Desmond Prescott v Attorney General of Jamaica** 2006 HCV 00008 – Judgment delivered on April 18, 2008.

[119] This court is of the considered opinion that an award of aggravated damages ought to be made in favour of both of the claimants in the case at hand, arising from the injury to their feelings, which they gave evidence of having undergone, as a consequence of the wrongful/unlawful actions of police personnel, in relation to them. The sum to be awarded to each of the claimants as aggravated damages though, will not and cannot be the same, as the overall injury to the 1st claimant's feelings would, undoubtedly, in the case at hand, have been worse in nature for the 1st claimant, than it would have been for the 2nd claimant, since the 2nd claimant was not treated as deplorably by police personnel, as was the 1st claimant. The aggravating features proven by the 1st claimant are more serious in nature, than those proven by the 2nd claimant.

[120] In the **Prescott** case (*op. cit.),* the claimant was, while then being a former police officer, detained at the Norman Manley International Airport, while waiting to board a flight. He was then allegedly detained, based on the suspicion that he was a drug trafficker. After he was searched and questioned in a guard room, he was handcuffed, led through a public area, locked in a cage at the airport and then taken to the hospital to be x-rayed. He was later returned to the airport and released. He was deprived of his liberty for approximately five (5) hours and was awarded $100,000.00 for injury to his feelings and $250,000.00 arising from the placement of handcuffs on him.

[121] The Consumer Price Index (CPI) in April 2008, was: 124.807. The current CPI, which is the one set as of May 2016, is 229.0. Basic general damages and aggravated damages, can properly be collectively aggregated and awarded as a composite whole, described as general damages. In that regard, see: **Richardson v Howie** – [2004] ALL ER (D) 74, per Thomas, L.J. It is important though, for damages assessment purposes, to treat with basic general damages and aggravated damages, separately, since somewhat different legal principles apply to same, although undoubtedly, basic general damages and aggravated

damages, unlike exemplary or vindicatory damages, are intended to be compensatory only.

[122] When the Prescott award for general damages, is updated therefore, using the current CPI, and is further adjusted upwards, due to the length of time that the 2nd claimant had remained handcuffed, the award to be made as general damages, inclusive of aggravated damages, arising from the tort of battery committed by the Crown's servants or agents, upon the 2nd claimant, is $1,400,000.00. This composite figure has been calculated based on a sum of $1,300,000.00 as relates to the placement of handcuffs on the 2nd claimant, for a much longer period of time than five (5) hours, which is the period of time that the claimant in the **Prescott** case (*op. cit.),* had remained handcuffed for. In the case at hand, it is to be recalled that the relevant incident occurred in Arnett Gardens during the evening hours and not long thereafter, the 2nd claimant was handcuffed and later taken to the Kingston Public Hospital, where he remained handcuffed, until three days later. This court will utilize the same sum, as was used by the trial judge in the **Prescott** case (*op. cit.),* with respect to aggravated damages, that being - $100,000.00. That award of general and aggravated damages though, only pertains to the battery. The negligence award, must of necessity, also now be addressed herein.

[123] The 2nd claimant suffered a gunshot wound to the left side of the lower part of his neck, as a consequence of the negligence of police personnel/crown servants or agents. The diagnosis provided by Dr. R. Aitken in respect of the injury which he received, was that he had suffered a soft tissue injury to his lower neck region. There was no medical evidence given that would serve to even remotely suggest that the 2nd claimant either has or would suffer from any form of disability, arising from that injury. The 2nd claimant went to the hospital, arising from that injury, on August 31, 2007 and was discharged from that hospital on September 3, 2007 – three (3) days later.

[124] According to the 2nd claimant's evidence-in-chief, as per para. 24 of his witness statement, when he was discharged from the Kingston Public Hospital, he had to attend the Alma Jones Medical Center every other day, to get medical attention and to dress the wound. He gave evidence that he had done that for about two (2) months. He gave that evidence while he was being cross-examined. He also gave evidence, while being cross-examined, that he in fact went to the Alma Jones Medical Center, twice a week, 'for dressings.' That is therefore, not quite, the same as 'every other day,' since if the latter were correct, he would in fact have attended the Alma Jones Medical Center, three (3) times a week and not two (2) times per week, as he testified, while he was being cross-examined.

[125] The claimant testified in his evidence-in-chief, as per para. 28 of his witness statement, that he continues to experience pain in his left shoulder since the incident and that he is unable to put any significant weight on his shoulder. According to him, he is currently unable to exercise as much as he used to do, because he can neither do push-ups or lift weights, because of the pain which he constantly feels.

[126] It must be recalled at this juncture though, that the medical evidence provided to the trial court, in respect of the 2nd claimant's injury, did not disclose that Mr. Bowra suffered or was expected to suffer from any form of disability whatsoever, as a consequence of the injury which he suffered. Accordingly, it is this court's considered conclusion, that the 2nd claimant has failed to prove, on a balance of probabilities, his contention that as a consequence of the injury, he has suffered a partial disability which prevents him from doing certain things, in particular, exercise-related activities, which he once used to do. Accordingly, this court will make no portion of its award for general damages, either pertain to pain and suffering arising from any partial disability – whether temporary or permanent, or pertain to loss of amenities. The 2nd claimant has failed to prove either of same.

[127] This court though, has accepted as proven, the 2nd claimant's evidence that he feels ashamed when he goes to the beach or takes off his shirt, because he has

an unsightly wound. That is undoubtedly part of the suffering which he would have and will continue to experience as a consequence of the injury. The 2nd claimant is entitled to recover, as general damages, not only for his physical suffering, as in pain, caused due to the injury, but also, for any emotional suffering which he has experienced or will experience, as a consequence of that injury.

[128] There is a large divergence between the sums submitted by the respective parties' counsel, as to what should be awarded as general damages, in respect of both claimants. Such a large divergence should not exist on a matter of law, between officers of the court – as attorneys are, on a matter of law which is neither novel, nor unduly difficult for experienced counsel – as are the parties' attorneys in this case, to appreciate and properly assist this court, with. It is hoped by me, that this is not a trend and that it will not continue.

[129] This court had received, belatedly filed supplemental submissions from the 1st defendant as to general damages arising from the injuries suffered by the claimants. In that document, which was filed on April 19, 2016, the defence counsel submitted that a sum of $900,000.00 – $1,000,000.00, would be a reasonable sum to be awarded to the 2nd claimant as general damages for negligence, arising from the gunshot injury to his left lower neck. In support of that contention, she has relied on the award made by this court in Claim No. 2002 C.L. W 064 – **Ain Maire Witter v Beresford Robinson and Bernabeth Codner-Robinson**. The injuries to the claimant in that case though, need not to be set out here, as they bear very little, if any, similarity to either the extent or type of injury suffered by the 2nd claimant, which forms a significant part of the basis for his claim.

[130] For his part, the claimants' lead counsel, submitted in writing, in skeleton arguments which were filed prior to trial, that the sum of $2,500,000.00 should be awarded to the 2nd claimant as general damages for negligence, but during his oral closing submissions which were made after all of the evidence had ended,

he instead submitted that the sum of $1,840,000.00 should be awarded as general damages. He relied on the case – **St. Helen Gordon and ors. v Royland McKenzie** – cited in Khan's assessment of damages for personal injuries and death, Volume 5**,** at p. 152. In that case, the pertinent injuries to the claimant were soft tissue injuries around the neck and pain and stiffness around the neck and shoulder. The award of general damages made in that case, in July of 1998, was: $400,000.00. That award, updated using the applicable CPI (229) as at now, would be $1,893,774.93. The CPI in July, 1998 was: 48.369.

[131] In that case though, the claimant had suffered more than one injury, whereas in the present case, the 2nd claimant had suffered a single injury. In that case also, the injuries were caused as a consequence of a motor vehicle accident, whereas in the present case, the injury was caused as a consequence of a gunshot which entered and exited the 2nd claimant's neck. Also, in the case, the claimant was medically diagnosed, as having suffered a whole person disability of 3%, arising from the injuries which she suffered. Accordingly, in that case, the claimant was more severely injured, than in the case at hand.

[132] Accordingly, the award made in the **St. Helen Gordon case** (*op. cit.),* would have to be reduced fairly significantly, to meet the particular circumstances of the case at hand. A reduction of 40% in that regard, would be appropriate, this particularly, though not solely because, in the case at hand, the claimant has suffered no disability whatsoever.

[133] When reduced by 40%, the award for general damages in the **St. Helen Gordon** case (*op. cit.),* would be $1,136,264.96. ($1,893,774.93 - $757,509.97)

[134] Accordingly, the 2nd claimant will be awarded as general damages for negligence, the sum of $1,136,264.96 and as general and aggravated damages for battery, the sum of $1,400,000.00. As special damages, he will be awarded $8650.00. The awards of general and special damages will be made with interest up until date of judgment, at the rate of 3%.

Steve Oddman – damages to be awarded

[135] This court has concluded that Mr. Oddman – the 1st claimant, was the subject of the torts of battery and false imprisonment, arising from his having been handcuffed and detained without reasonable and/or probable cause and also, solely in terms of false imprisonment, arising from his having been detained for a longer period of time than was reasonably necessary, before he was brought before a court of law, to face any criminal charge, in addition to his having been detained without reasonable and/or probable cause.

[136] Earlier in these reasons, it was expressed that the 1st claimant was unlawfully, initially arrested/detained and thus, he was falsely imprisoned from as of the date/time of his initial detention. He was unlawfully detained for ten (10) days. He will therefore be entitled to recover damages for the entire period of his unlawful detention. On the other hand, if his initial detention had been lawful, but had, after a period of time thereafter, become unlawful, because of the length of time of that detention before the 1st claimant was brought before a court of law or a judicial officer for the purpose of arraignment, it would only have been for the period of time which constituted his unlawful detention, that the 1st claimant would have been able to have recovered damages for false imprisonment, for. In such a circumstance, it follows, that the period of time constituting the unlawful detention, must be of a shorter duration, than the entire period of time, of the detention. If it were not so, then a claimant could recover damages even for a period of time when he was and remained, lawfully detained. The law does not so permit.

[137] The 1st claimant will be awarded aggravated damages for the torts of battery and false imprisonment which were committed in relation to him, as he was initially detained and remained handcuffed for no valid reason, after he had been unlawfully shot by police personnel and overall, he was treated in a humiliating and degrading manner by police personnel, such that, for the purposes of

compensation for injury to his feelings, an award of aggravated damages, arising from the commission of those torts in relation to him, ought to be made.

[138] The 1st claimant will also be awarded general damages for negligence, arising from the gunshot injuries which he received, when he was shot without any lawful justification, by police personnel, in circumstances wherein the police were firing their weapons wildly, while they were in the Arnett Gardens community, on August 31, 2007. As a consequence of that, the 1st claimant suffered a gunshot wound to his right buttock and the diagnosis by Dr. Felix, who did not provide any oral testimony to the trial court, was that the 1st claimant suffered a, 'fracture left acctabulum, left femoral head;' and 'ceptie dislocation of the left hip.' That diagnosis was disclosed in a medical report under the hand of Dr. Felix. This court though, was provided with no explanation whatsoever, of the medical terminology quoted above.

[139] The 1st claimant though, during his evidence-in-chief, as per his witness statement, gave detailed and understandable evidence as to the injuries suffered by him and the extent of his discomfort, as well as his treatment subsequent to his discharge from the Kingston Public Hospital. He has also provided evidence of loss of amenities and that his left leg is now shorter than the right one and that he walks with a limp.

[140] What was not provided by him, as evidence to the trial court though, is any medical evidence properly capable of enabling this court to conclude that the loss of amenities which he has given evidence of, are properly attributable to the gunshot wound to the right buttock, which this court accepts, on a balance of probabilities, as having been proven by him, that he suffered from, as a consequence of the negligent actions of the Crown's servants/agents.

[141] Also, what he failed to provide as evidence to the trial court, is any medical evidence capable of certifying that all of the injuries which he has alleged that he suffered as a consequence of the gunshot wound to the right buttock, are injuries

which were caused as a consequence of same. This is an issue of proof and in that regard, it must be recalled that the 1st claimant bore the burden of proof in that regard and that the requisite standard of proof, is proof on a balance of probabilities.

[142] He has though, in this court's view, in that regard, met that burden, to the requisite standard of proof.

[143] The 1st claimant gave evidence, as part of his examination-in-chief, as per para. 47 of his witness statement, that he is not able to function in the way that he is accustomed to and that he moves around very slowly, as his left leg is now shorter than his right one and he walks with a limp. He also has stated in that said para. of his witness statement, that: *'The gunshot that was fired by the defendant's agents/or servant is still lodge in my left pelvic region and I was informed by my doctors that it can be removed because I may be paralyzed and I would not have any use for the left foot.'*

[144] This court recalls that while he was being cross-examined, the 1st claimant was asked by crown counsel, to demonstrate where the bullet had lodged and he demonstrated same, without there having been any suggestion thereafter, that what he had shown, was not the left pelvic region of this body. Accordingly, this court is of the considered opinion, that the 1st claimant showed that, as he stated, the bullet had lodged in his left pelvic region.

[145] This court is also of the view that the 1st claimant made a mis-statement in his witness statement, in the portion thereof, as quoted above, in that it seems to this court, that the 1st claimant was in fact told by doctors that the bullet *cannot* be removed because to remove same, may lead to paralysis.

[146] This court is of the view that within para. 47 of his witness statement, the 1st claimant provided to the court, at trial, unchallenged hearsay evidence, which was also, not objected to, by defence counsel, in terms of admissibility. That

would be as regards the 1st claimant's evidence that he was informed by his doctors that, 'it *can* be removed because I may be paralyzed and I would not have any use for the left foot.'

[147] Hearsay evidence is admissible in civil cases, if there is no objection to same, provided that notice of intention to rely on same, has been given. See: **Section 31 E (1) and (2) of the Evidence Act** in that regard. This court is of the view also, that sufficient notice of intention to rely, would have been provided by the claimant's counsel, to defence counsel, by means of the service on defence counsel, of the 1st claimant's witness statement. On that witness statement, this court has seen that there exists a date stamp from the office of the Director of State Proceedings, evidencing that the 1st claimant's witness statement was served on that office, on March 9, 2015. Trial began on April 28, 2015.

[148] In the circumstances, that evidence was not only admitted, as it was not objected to, by defence counsel, but has been accepted as truthful and accurate evidence, by this court. In addition, that evidence has served to explain why the 1st claimant has experienced problems with his groin area and his left leg, consequent upon his having been shot by police officers/crown servant/agents, on the relevant occasion. Accordingly, as stated above, the 1st claimant has met the burden of proof cast upon him, in that regard.

Special damages claimed by 1st claimant

[149] The 1st claimant has made claims for special damages. In that regard, he had initially claimed for legal expenses, in the sum of $150,000.00, but at the close of trial, during closing submissions, his lead attorney – Mr. Stewart, abandoned that claim, as no receipt evidencing payment of same, had been provided to this court.

[150] The 1st claimant gave evidence, at para. 52 of his witness statement, that he had incurred expenses, as follows:

i)	Colostomy bag	-	$ 41,500.00
ii)	Crutches	-	$ 3,750.00
iii)	Travelling expenses	-	$ 38,400.00
iv)	Loss of earnings	-	$614,800.00
v)	Medical expenses	-	$130,115.00
vi)	Clinic visits	-	$ 57,600.00
	Total	-	$886,165.00

[151] In addition, the 1st claimant provided to the trial court, documentary evidence, in further proof of some of the expenses which he claimed for, as set out above. In that regard, there was admitted into evidence, a receipt for a pair of crutches, in the sum of $3,750.00. There was also admitted into evidence, a single receipt, for two (2) colostomy bags, the total cost for which, was $359.14 (inclusive of tax). He also provided to the trial court and got admitted into evidence, documentary proof of medical expenses incurred for the purpose of the treatment of his injuries, in the total sum of: $134,015.00.

[152] The 1st claimant has not duly proven that he is entitled to recover for any medical expenses and/or 'clinic visits,' save and except for the cost of colostomy bags, other than as was so proven by means of oral evidence of the 1st claimant, along with documentary proof, which, it should be noted, consisted of documents which were admitted into evidence by consent of the parties.

[153] The 1st claimant gave evidence that since it was difficult for him to move around with the crutches, he had to take a taxi to go to his appointments, or to get to and from various destinations. He alleged that he had to take taxi, to and from the hospital, at a cost of $800.00 per trip and that he made approximately 48 trips, to and from the hospital. Accordingly, it is his allegation that he incurred $38,400.00 as transportation expenses ($800.00 x 48). He has also alleged that he was not provided with any receipts from the taxi drivers who carried him, on those occasions. (see: para. 38 of the 1st claimant's witness statement)

[154] As regards the total sum of $41,500.00 which he has claimed for, as the cost of colostomy bags which he had allegedly purchased, the 1st claimant has alleged that he had to use approximately three (3) colostomy bags per day, for about three (3) months, which in total, was approximately 270 colostomy bags. The 1st claimant has relied on the receipt for the purchase of two (2) colostomy bags, in the sum of $359.14. Accordingly, by calculation, the cost of 270 colostomy bags would have been $359.14 x 135 = $48,483.90. The 1st claimant also gave evidence that he had been, 'unable to locate all the cash register for the colostomy bags purchased as they have become lost or mislaid.' (see: para. 36 of the 1st claimant's witness statement).

[155] This court accepts the evidence of the 1st claimant as regards what he spent for the purchase of colostomy bags and as to what he spent as transportation expenses, to and from the Kingston Public Hospital. Accordingly, the 1st claimant is entitled to and will recover for each of those special damages claims, the respective sums of: $48,483.90 and $38,400.00.

[156] The 1st claimant has also claimed for loss of earnings, in the sum of $614,800.00, as special damages. According to him, he was not able to work for approximately four (4) years and five (5) months, since he was injured by the, 'defendant agents and or servants,' with the result that he could not earn his average fortnightly pay of $5,800.00. He therefore lost earnings for that period, in the sum of $614,800.00. He also testified that in or about August of 2007, he had been employed as a hospital attendant at the Kingston Public Hospital. (see: paras.1 and 44 of the 1st claimant's witness statement)

[157] The 1st claimant though, although having given detailed evidence to this court, especially via his witness statement, as to why, for instance, he was unable to provide to this court, documentary proof of expenses incurred in respect of the purchase of colostomy bags and his payments for transportation expenses, did not, in his witness statement, provide any evidence to this court, as to why it was that he had not provided to this court, any documentary evidence whatsoever,

even so much as to confirm that at the material time, he was in fact employed as a hospital attendant at the Kingston Public Hospital, much less, how much he was then earning, for the purposes of that employment.

[158] The fact that the 1st claimant provided no such documentary proof at trial, was rather surprising to this court, since such information could undoubtedly have been obtained from the Kingston Public Hospital, at any time prior to the commencement of trial. Even if the Kingston Public Hospital had been, for whatever reason, unwilling to provide such documentary information/proof to him, the 1st claimant could and should have subpoenaed the same, for the purpose of assisting him in proving his claim for loss of earnings at trial. This court is, at this time, not aware that even so much as a request for that documentary information to be provided to him, was ever made by the 1st claimant, or that the 1st claimant had even so much as sought to obtain a subpoena, as regards same.

[159] While testifying during cross-examination, the 1st claimant's evidence was that in fact, he had been earning $8500.00 per fortnight and not 5,800.00 per fortnight – as had been incorrectly stated, in his witness statement. He also then told the court that he got payslips, but he did not submit them to his attorney, as, 'the place was ransacked, so couldn't find them.' The 1st claimant also gave evidence during cross-examination, that he had been living in his own apartment up until the occurrence of the relevant shooting incident as between police personnel and him, but thereafter, had been in hospital for quite some time and after that, had to stay with his mom, who then lived nearby to his apartment.

[160] Lead counsel for the claimants, has urged this court, during his oral closing submissions, to award to the 1st claimant, at least minimum wage for the pertinent period that the 1st claimant gave evidence that he had been unable to work due to the injuries received. On the evidence presented by the 1st claimant at trial though, this court will not accede to that submission.

[161] This court views the 1st claimant's evidence as to having been unable to find his payslips because, 'the place had been ransacked,' as being a recent fabrication/concoction. It is this court's view of the 1st claimant's evidence in that particular respect – concerning his alleged employment at the material time, that same was entirely untruthful. If it was not so, then why would not the 1st claimant's counsel have been able to obtain, at the very least, documentary proof of the 1st claimant's employment with the Kingston Public Hospital, at the material time? Proof of employment at the material time, was provided to this court at trial, by the same counsel, on behalf of the 2nd claimant, so therefore, that counsel must have known and understood the importance of same. In the circumstances, this court will make no award to the 1st claimant for loss of earnings.

[162] The total sum which the 1st claimant will be awarded as special damages, is therefore: $220,898.90.

General damages for negligence

[163] The 1st claimant is entitled to recover, as general damages, for his proven pain and suffering and loss of amenities. This court has accepted some of his evidence, as per paras. 46 and 47 of his witness statement, that he cannot do the things that he used to do, like walking fast, running or playing football. In addition, his left leg is now shorter than the right one and he walks with a limp. In addition, he was unable, during the period of his recovery, to have sexual intercourse with his girlfriend, because of the pain that he was experiencing and the discomfort and embarrassment of having a colostomy bag attached to his side.

[164] The 1st claimant also gave evidence, which this court has accepted, that he spent approximately two (2) months in the hospital and was discharged from the hospital, on crutches. He used the crutches for almost six (6) months. (para. 35 of the 1st claimant's witness statement) He had to use the colostomy bags, to assist him to pass his stool, for about three (3) months. He had to undergo

surgery to repair his rectum, his leg was broken and the left part of one of his hips, was dislocated. Another surgery had to be and was in fact performed on his left hip. A further surgery had to be undergone by him, where traction was placed on his foot, to put the bone back in place. In addition to all of that, when he had initially been a patient at the Kingston Public Hospital, arising from the relevant injuries, he was, after a few days, transferred to Mona Rehab, to commence physiotherapy. He spent two (2) weeks there, but his condition was not improving. It was thereafter, that he was taken back to the Kingston Public Hospital and surgery on his left hip, was performed. (See: paras. 26, 27, 28, 33, 34, 35, and 36 of the 1st claimant witness statement). This court has accepted some of that evidence, as being both truthful and accurate.

[165] The claimants' lead counsel has submitted that the 1st claimant is placing reliance on the following cases, for the purpose of the assessment of general damages for negligence, in respect of the relevant gunshot injuries: **Donald Williams v Evette Cope -** Harrison's, at p. 100; and **Eric Buchanan v Elias Burke** – Khan's, Volume 4, at p. 45. According to the claimants' lead counsel, the injuries suffered in the former case, were remarkably similar to those suffered by the 1st claimant in the instant case. In that case, the sum awarded in September, 1990, was: $130,000.00, whereas, in the latter case, the sum of $400,000.00 was awarded in October, 1994. He has also submitted that a reasonable sum to be awarded to the 1st claimant as general damages, would be: $7,000,000.00 – this even though, what has been stated by the claimants' counsel in skeleton submissions dated April 24, 2015, is that the award which was made in the 'remarkably similar' case, when updated at that time, yields the sum: $4,720,300.00.

[166] The defence counsel filed supplemental submissions as regards the respective sums to be awarded to the claimants as damages for negligence. Those submissions were filed in a single document, which was filed on April 19, 2016. Defence counsel has placed reliance on two (2) cases – **Granville Bowen v**

Attorney General, Detective Constable Brown and Corporal Sloley – Suit No. C.L 1982 B 338; and **Lloyd Robinson v Denham Dodd and Audrey Wilson** – Suit No. C.L 1987 R 133. Regrettably, there was not attached to the 1st defendant's supplemental submissions the cases referred to, in those submissions as regards the 1st claimant. This court though, has, through its own efforts, been able to obtain the cases cited in the 1st defendant's supplemental submissions. Those cases are therefore referred to, further on in these reasons.

[167] Before addressing the similarities and/or distinctions between the injuries suffered by the claimants in those cases and by the 1st claimant in this case though, it must be stated that although a medical report was entered into evidence by consent of the parties, it was only of limited helpfulness. That is so because, that report does not detail most of the injuries and/or alleged surgical procedures that were allegedly undergone by the claimant, after he had been initially examined and treated at the Kingston Public Hospital, even though, those subsequent surgical procedures were performed on the 1st claimant at that hospital. In fact, that medical report states that the treatment of the 1st claimant was as follows, after he had been examined by an orthopaedic team on October 25, 2007, following upon the 1st claimant having presented himself at the hospital, on August 31, 2007: 'skeletal traction applied in femoral Steinman pin. Intravenous antibiotics were continued and dressings to the wound.'

[168] That treatment as quoted above, did not expressly state that any surgery was in fact conducted on the 1st claimant, but that report has also disclosed that the 1st claimant was discharged from orthopaedic, with out-patient clinic review and that the 1st claimant would be subject to continued management by general surgery team for other injuries. Accordingly, whilst this court is possessed of a report from the orthopaedic team that attended to the 1st claimant, this court has not been provided with any report from the surgical team which apparently, also attended to the 1st claimant.

[169] That medical report has also disclosed that the 1st claimant's 'history' was a, '*gunshot wound to the right buttock August 31, 2007. Pelvis x-rays were done. On examination of the 1st claimant, the report findings of the orthopaedic team were: '...granulating, discharging left lower limb relative to the right with deformity to the left hip. There was a left foot drop.'* For the most part, this court has not been able to comprehend said medical findings, as were so expressed, using medical terminology. Furthermore, it has not been proven to this court's satisfaction, on a balance of probabilities, that the reason why his left leg is shorter than his right leg, is because of the gunshot wound to the 1st claimant's right buttock, which occurred on August 31, 2007.

[170] Additionally, there exists no satisfactory proof that the 1st claimant has suffered any disability whatsoever, as a consequence of that gunshot wound to his right buttock.

[171] In the final analysis though, this court has concluded that the 1st claimant did undergo the surgical procedures which he gave evidence of. He underwent same, after he had initially been attended to and treated by the Kingston Public Hospital's orthopaedic team. The 1st claimant has proven that, on a balance of probabilities.

[172] This court is of the view that only one (1) of the two (2) cases relied on by the defence counsel in her submissions, is somewhat similar, in terms of the injuries suffered by the claimant in that case and the nature of the medical treatment undergone by the claimant in that case, to the case at hand. That would be the case: **Granville Bowen v Attorney General, Detective Constable Brown and Corporal Sloley** – Suit No. C.L. 1982 B 338.

[173] In that case, the claimant was shot and injured whilst he was standing outside, talking to his father. He was shot by police personnel, while those personnel had been chasing an alleged thief. He was placed under armed police guard while in hospital and that caused him, mental anguish and distress. He suffered injury to

both lower limbs. The bullets that he was shot with, entered and exited his left leg and then lodged in his right leg. He recovered satisfactorily from his injuries.

[174] He was awarded $200,000.00 for pain and suffering and loss of amenities, arising from his gunshot injuries. In that case though, it does not seem, from the report provided to this court, that the claimant had to undergo any surgery.

[175] This court has also, to some extent, relied on one of the cases cited by the claimants' counsel. That is the case: **Donald Williams v Evette Cope-** Suit No. C.L. 1998 W 028, as referred to in the text – Assessment of Damages for Personal Injuries, at p. 100. That case came before the Court of Appeal, on the issue of assessment of damages – S.C.C.A. No. 60/91 – Judgment delivered on October 5, 1992.

[176] It is unknown to this court, what caused the claimant's injuries in the **Williams** case (*op. cit.),* but the claimant's injuries were as follows: fracture of the pelvis to the roof of the right acetabulum; separation of the public symphysis; displacement of the right sacrosiliac joint; compound comminuted fracture of the left tibia and fibula; lower back was swollen and tender over the lumbar region; scrotum was swollen and painful. The claimant was hospitalized for 35 days. The claimant was diagnosed as having suffered a permanent partial disability of 15%. The claimant was held 80% liable and on appeal, it was adjudged by the Court of Appeal that the appropriate award to be made for pain and suffering and loss of amenities, was $130,000.00, up from the $110,000.00 which had been awarded at the Supreme Court.

[177] Since the claimant in the **Williams** case (*op. cit.)* was held 80% liable for his injuries/loss, it follows that he only recovered 20% of what he would otherwise have recovered, if the defendant had been held by the trial court, as having been 100% liable. To properly compare that case with the present one therefore, what has to be done first, is the mathematical calculation of what the claimant would have recovered in that case, if the defendant had been held by the trial court, as

having been a 100% liable for the claimants injuries/loss. That sum would then have been: $650,000.00. The injuries in the **Williams** case (*op. cit.)* as disclosed above, appear to be more severe than in the case at hand. On the other hand though, in the **Williams** case (*op. cit.),* it is not reported that the claimant underwent any surgery. Also taken into account, is the fact that in the **Williams** case (*op. cit.)*, the claimant suffered a permanent partial disability of 15%, whereas, in the present case, there is no evidence of the claimant having suffered any disability as a consequence of his injuries.

[178] This court therefore thinks it best to award as general damages to the claimant in the present cases, a sum which is lower than the sum awarded in the **Williams** case (*op. cit*), as updated using the current CPI, but higher than the sum awarded in the **Bowen** case *(op. cit).* This court is of the considered opinion that a sum equivalent to 75% of the sum that would have been awarded to the claimant in the **Williams** case *(op. cit.),* as updated, if the defendant had, in that case, been held 100% liable, would be an appropriate award to be made to the claimant in the present case, arising from the 1st defendant's negligence, as related to the gunshot injuries suffered by the 1st claimant, due to the negligence of crown servant/agents.

[179] That sum of 75% of $650,000.00, is $487,500.00. In the **Williams** case (*op. cit*.), at the date of the Court of Appeal's judgment, the CPI was 17.152. At present, the CPI is: 229 (April, 2016). When updated therefore, 75% of the award in the **Williams** case, is: $6,508,716.18. That will be the sum to be awarded to the 1st claimant as general damages for negligence, arising from his claim.

[180] The 1st claimant, as aforementioned, will be awarded special damages of $220,898.90, arising from his claim for damages for negligence.

[181] The 1st claimant will be awarded as general and aggravated damages for battery, the sum of: $1,100,000.00, and as general and aggravated damages for false

imprisonment, the sum of $750,000.00 and as exemplary damages, arising from his false imprisonment, the sum of: $250,000.00.

The 2nd Defendant

[182] The claim against the 2nd defendant, expired as it was not served within the prescribed time. The court was informed that a mistake was made in the naming of the 2nd defendant, as the person who ought to have been so named, was one sergeant Garwood, whose first name is unknown to this court. He was the investigating officer into the incidents involving the 1st and 2nd claimants.

Judgment Orders

[183] (i) The 1st claimant is awarded general damages for negligence, in the sum of $6,508,716.18.

ii) The 1st claimant is awarded general and aggravated damages for battery in the sum of $1,100,000.00.

(iii) The 1st claimant is awarded general and aggravated damages for false imprisonment, in the sum of $750,000.00.

(iv) The 1st claimant is awarded exemplary damages for false imprisonment, in the sum of $250,000.00.

(v) The 1st claimant is awarded special damages of $220,898.90.

(vi) The 1st claimant is awarded interest on general and aggravated damages, at the rate of 3%, with effect from July 9, 2012.

(vii) The 1st claimant is awarded interest on special damages, at the rate of 3%, with effect from August 31, 2007.

(viii) The 2nd claimant is awarded general damages for negligence, in the sum of $1,136,264.96.

(ix) The 2nd claimant is awarded general and aggravated damages for battery, in the sum of $1,400,000.00.

(x) The 2nd claimant is awarded special damages of $8650.00.

(xi) The 2nd claimant is awarded interest on general damages for negligence and on general and aggravated damages for battery, at the rate of 3% with effect from July 9, 2012.

(xii) The 2nd claimant is awarded interest on special damages, at the rate of 3%, with effect from August 31, 2007.

(xiii) The claimants are awarded the costs of this claim and such costs shall be taxed, if not sooner agreed.

(xiv) The claimants shall file and serve this order.

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Hon. K. Anderson, J.