IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL A 017 OF 2002

BETWEEN	LEEMAN ANDERSON	CLAIMANT
AND	THE ATTORNEY GENERAL	FIRST DEFENDANT
AND	CHRISTOPHER BURTON	SECOND DEFENDANT

Miss Thalia Maragh instructed by Jacqueline Samuels-Brown for the claimant

Mr. Michael Deans instructed by the Director of State Proceedings for both defendants

July 7, 8, 9 and 16, 2004

Sykes J (Ag)

ASSAULT AND BATTERY

The outcome of this case depends on whether Leeman Anderson correctly identified Constable Christopher Burton as the person who committed the tort of assault and battery. Mr. Anderson claims that Christopher Burton, the second defendant, who is a member of the Jamaica Constabulary Force, inflicted unlawful physical injury on him on December 14, 2000 at 44 West Bay Farm Road in the parish of St. Andrew. He seeks compensation for his injuries in the form of general damages, special damages, aggravated damages and exemplary damages. Constable Burton on the other hand says he was not the person who injured the claimant. I propose to deal first with the issue of identification.

THE IDENTIFICATION EVIDENCE

I will divide the examination of the evidence into two parts. I will look at the evidence of prior knowledge, that is, whether the claimant knew Burton before the incident. Next I will focus on the quality of the identification evidence at the time of the incident.

(a) Evidence of prior knowledge

Mr. Anderson alleges that he knew the constable before the day of the incident. He stated that he saw the constable frequently in the Bay Farm Road area. The constable agreed under cross examination that he knew Mr. Anderson. Therefore this is a case of recognition rather than the claimant trying to identify a constable whom he did not know before or did not know very well.

(b) Evidence at the time of the incident

Mr. Anderson gives a narrative in his witness statement from which I am asked to infer that he could see well enough to make a positive identification even though it makes no mention of lighting, distances and what parts of the constable he was able to see so as to be sure that he was identifying the correct person.

His testimony is that on December 14, 2000 after 7 o'clock in the evening he was in his shop when he saw three police officers walking along West Bay Farm Road. He heard them telling persons to close their shops. Three officers entered his shop. Of the three he only knew Constable Burton. He describes the uniforms they were wearing and adds that the two whom he did not know had guns in their waists. According to him Constable Burton had on the regular police uniform while the other two were in "blue police uniform".

The three officers entered his shop and gave him the same instructions that they had given the other shop operators along West Bay Farm Road. He declined

to follow them. He said Constable Burton cursed him. A war of words ensued which culminated in Constable Burton using a crutch to beat the claimant over his head, arm and the rest of his body. This act of beating, if true, may have placed Constable Burton in close proximity to the claimant thereby providing an opportunity to see his face. In addition the exchange of words in the shop before the beating began would have also provided further opportunity to see and recognise the police officer.

When the issue of time was tentatively explored in cross examination the claimant said that at that time in the evening it was not that dark and the sun was still shining. He later said in re-examination that he was not checking the time and so could not be sure about the time he gave in the witness statement. What do I make of this inconsistency? It is well known that barring divine intervention, the sun does not shine in Jamaica in December after 7 o'clock in the evening. Could he be deliberately adjusting the time in an attempt to convince the court that he could recognise the police officer? I do not think that that is the case. On his narrative given in the witness statement the inference is that he was in his shop ready to do business. This suggests sufficient light either in the shop or nearby to enable him to operate his business. His ability to describe the police uniforms and to make the distinction between Constable Burton's uniform and the other two suggests that there was sufficient lighting. He could see that the other two police officers were carrying guns in their waists. Thus even though there was no specific evidence concerning light, I conclude that he was able to see well enough to identify Constable Burton and he was not mistaken. This conclusion is based upon the strong evidence of prior knowledge (which reduces considerably but does not eliminate the risk of mistaken identification), his ability to describe the officers and how they were dressed, the duration of the incident which could not have been very brief and the close proximity of the Constable to the claimant.

Mr. Deans reminded me of Lord Widgery's now famous judgment of *R v Turnbull* [1977] QB 224. I have taken it into account. The danger of mistaken identification is no less in civil cases than in criminal cases. One of the possible consequences of an incorrect identification in a civil case such as this is an award of damages against the wrongfully identified defendant. However the standard in the civil case is on a balance of probabilities and applying that standard I accept that Mr. Anderson had sufficient light and opportunity to make a correct identification of someone who was known to him before.

Mr. Deans next submitted that the claimant had a motive to lie because he accused Constable Burton of killing his nephew. Mr. Anderson rebuffed that suggestion and stated that he could not have accused the constable of this because he was not the person who had shot his nephew. Mr. Anderson's witness statement did show that he accused Mr. Burton of killing his nephew. It seems to me that that had to be looked at in the context of the angry exchanges that had taken place before this was said. Mr. Anderson said when he told the police he would not close his shop the police responded by saying, "*You nuh hear mi say you fi lock up the bumbo cloth shop.*" Clearly if this was true then tempers were rising and from the evidence, it appears, that Mr. Anderson's nephew was indeed killed that day. It is alleged that he was killed by the police. In this context to say, "*You murder mi nephew you want fi come murder mi now*", is quite understandable. On this point I do not accept that Mr. Anderson has been proven to have any special reason to lie on Mr. Burton in particular.

It necessarily means that on a balance of probabilities I do not accept that Constable Burton was at the intersection of Pennwood Road and Bay Farm Road between the hours of 4:15 pm and 11:00 pm on December 14, 2000. He said he was there to prevent persons erecting road blocks in response to an alleged unlawful shooting by the police.

I must add as well that the apparent confidence of the police officer took a turn for the worse when Miss Maragh tried to get him to alter his position by confronting him with the station diary. The request for the station diary came very late in the day – during the trial of this matter. I observed that once the diary was in court and before it was handed to him the officer began shuffling and moving around in the witness box. His countenance and complexion changed. He is of fair complexion. He maintained his denial of the incident. Further proof of the entries could not be pursued. This suggests that in future counsel appearing in these matters may wish to consider asking at case management conferences for specific disclosure of the appropriate documents to track the movement of police officers if their whereabouts are important. The answer that is usually proffered by the Attorney General, as was put forward in this case, is that either the diary cannot be found or it would take too long to find it is not good enough. A modern police force must have proper records to account for its officers.

Facts proven

On a balance of probabilities I accept that

a. Mr. Anderson is neither mistaken nor untruthful when he identified Constable Burton as the police officer who beat him up;
b. Mr. Anderson is both honest and reliable in his identification;
c. both Mr. Anderson and Constable Burton knew each other before the incident and that this case is one of recognition;
d. the circumstances were sufficient to enable Mr. Anderson to identify Constable Burton as the person who entered his shop along with two other police officers and beat him with the crutch;
e. Constable Burton was not at the intersection of Pennwood Road and Bay Farm Road at the material time;

THE INJURIES

(a) The nature of the injuries

The claimant said that he put up his right hand to ward of the blows rained on him by Constable Burton. He was struck in the head and over his body.

The medical certificate in support of the claimant's case showed that he received an undisplaced fracture of the right ulna. The report also showed swelling, deformity and tenderness over the right forearm. He was placed in an above elbow plaster of paris which was removed on February 27, 2001. There is no permanent partial disability of the right hand and neither is there any whole person disability.

(b) Pain and suffering

The claimant says that he felt a lot of pain in his head and his body where he was struck. After the beating he noticed that his right hand had begun to swell. He took some pain killers and went to the hospital on Monday December 18, 2000 where he was examined and x-rayed.

This delay in going to the hospital led Mr. Dean to launch another attack on the credibility of the claimant. He said that if he was in as much pain as he said he was he should have gone earlier. This overlooks his evidence that he took pain killers. It may be that they assisted in his pain management. Also Mr. Dean overlooks the fact that the fracture was undisplaced. This means that there was nothing that would alarm the claimant. What may be obvious to the trained medical eye may not be so clear to the layman. Mr. Anderson said that on Monday when his hand had swollen even further he went to the hospital. I do not think that this conduct is so unreasonable that the court should treat Mr. Anderson as untruthful.

(c) Loss of amenity

The claimant was without the full use of his hand from time of the time incident to March 2001. He says he can use his right hand now but it pains him. The medical report although dated March 12, 2004 does not attempt to assist with any possible explanation for the claimant's continued discomfort.

(d) Damages

(i) Special damages-

Mr. Anderson claims:

a. loss of income of $18,000 per week for three months;
b. medical expenses of $5,350;
c. transportation expense for three round trips to the hospital of $3000;
d. cost of extra help for twelve weeks - $12,000;
e. items lost at shop - $7,190

Medical expenses and the cost of the report were agreed at $2,150. The parties also agreed $3,000 as the cost of transportation. I allow the cost of extra help at $12,000 per week. There are not many house holds that a written record of what is paid for extra help and the rate of $1,000 per week is not exhorbitant.

In relation to the loss of income and loss of goods at the shop I decline to make any award. The reason is that Mr. Anderson stated he received receipts from his trips to various wholesale establishments. He said that he did not take any of those receipts with him to court. This is not a case of being unable to produce receipts. The receipts were available and it does not matter why they were not in court to prove his loss. As is well known special damage must be specially pleaded and properly proved (see *Lawford Murphy v Luther Mills* (1976) 14 JLR 119). I am aware of the dictum of Harrison P (Ag) in *Walker v Pink* SCCA 158/01 (June 12, 2003) which indicates that oral testimony may be accepted in some cases.

However oral evidence could not properly be accepted here where the claimant says, in effect, I have the receipts but did not take them to court. There is no evidential basis for me to accede to Miss Maragh's request to make an award for loss of income at the rate of $12,000 per week.

In an attempt to secure these awards for her client Miss Maragh suggested that the court could take notice of "fact" that persons like Mr. Anderson would not necessarily keep receipts in respect of his business for any length of time. I cannot help but note that one of the receipts tendered on his behalf to support his claim for medical bills is dated July 27, 2001 – a clear period of eighteen months before any action was filed on his behalf in February 2002. This does not suggest a person who does not keep records.

(ii) General damages

Miss Maragh says that I should award both aggravated and exemplary damages in addition to damages for pain, suffering and loss of amenity. I will deal with the award for pain, suffering and loss of amenity first.

pain and suffering

Mr. Deans relied on the case of ***Sheldon Beckford (b.n.f. Cecil Banks) v Noel Willey*** [Suit No. C.L. 1990/B 184 and ***Patrick Bennett v The Attorney General***[Suit No. C.L. 1991/B 176]. Both cases are found in *Assessment of Damages for Personal Injuries*, Harrison & Harrison (rev. ed.) at page 257. These two cases do not assist greatly. They are both consent judgments and do not reflect a judicial assessment of the injuries suffered in those cases. Also the sums in those cases included costs. There is no indication what proportion of the award was for the injuries suffered. Therefore I will not use them as my guide in this case.

Miss Maragh relied on the cases of ***Leroy Robinson v James Bonfield,*** *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica*, Vol. 4, page

99, Khan, Ursula (1997) and ***Clovis Bryan v Leonard Hines***, *Assessment of Damages for Personal Injuries*, Harrison & Harrison (rev. ed.) at 204. In ***Bryan's*** case the claimant suffered a fracture of the distal end of the radius, a fracture dislocation (sic) of the right elbow and a laceration of the right forearm. The recital of the injuries makes it clear that it is not a reliable guide. The injuries were much more serious that the instant case In ***Robinson*** the claimant had multiple abrasions to the left hand, tender swelling to left elbow, abrasions to the eyebrows and a fracture of the right wrist. He was in a plaster cast for 6 weeks. His total period of recuperation was 8 weeks. No permanent disability was expected but he was left with slight deformity of the wrist and pain. The general damages awarded were $269,438. The updated value of this award is $501,252 .75 using the May 2004 Consumer Price Index of 1839.9. The CPI at the time of the assessment was 989. The assessment was completed in September 1996. While the injuries in ***Robinson*** were more serious than here it does indicate that the award for pain, suffering and loss of amenity ought not to exceed half of one million dollars. I will use the Robinson case and discount the award accordingly.

In making this award I have taken into account the subjective and objective components that go to make this kind of award. The objective parts are the undisplaced fracture, the swelling, deformity and tenderness of the right forearm as well as the blows to the head and body. He was without the full use of his right arm for at least three months. The subjective parts are the pain experienced during the beating and the subsequent discomfort. I therefore make an award of $400,000. This sum does not include any amount for either aggravated or exemplary damages. I now consider these.

Aggravated damages/exemplary damages

Mr. Deans submitted that neither aggravated nor exemplary damages should be awarded in this case. In respect of aggravated damages he says that the

circumstances of this case are not within the class of cases that attract such an award. He added that the court should not award exemplary damages because it was not pleaded in the manner indicated by the Court of Appeal in *The Attorney General & Another v Noel Gravesandy* (1982) 19 JLR 501. White J.A. said that claimants must specifically pleaded together with the facts relied on if they are to succeed in securing an award of exemplary damages. Finally, Mr. Deans, suggested that this case is not the kind of case in which exemplary damages should be awarded. This was the alternative submission to the one made about how it was pleaded or more accurately, not pleaded. I disagree with Mr. Deans on all points and I will now say why.

I will deal with the aggravated damages point first. To resolve this question one must look at the purpose for aggravated damages are awarded and what the law states must be done procedurally to secure it. The purpose is to further compensate the claimant for hurt feelings and embarrassment. In this case it was pleaded specifically and the facts being relied were set out in paragraph seven of the statement of claim. I believe that this is the kind of case in which this kind of award would be appropriate. Here we have a situation in which three police officers enter the shop of the claimant and without any apparent legal authority or good reason tell him to close his shop. He refuses and he is set upon by Constable Burton and beaten.

I will now deal with the procedural obstacle raised, by Mr. Deans, to bar the claim for exemplary damages. Paragraph 6 of the pleadings is headed "Particulars of Exemplary Damages". It reads in part "*the aforesaid actions of the Second Defendant... were arbitrary and oppressive*". The adjective "aforesaid" could only be referring to paragraph 4 where the claimant alleged that he was beaten up without reasonable or probable cause. The standard of *Gravesandy* has been met.

I observe that *Gravesandy* was decided before Civil Procedure Rules 2002 came into effect. When *Gravesandy* was decided no one would know the

specifics of the evidence that would be led at the trial until the day of trial. This new regime has introduced a new paradigm in civil litigation. The parties are now required not only to state their claim but also to provide witness statements. Under the new regime there is no room left for surprises. So insistent are the new rules on full disclosure that if a party is unable to provide a witness statement he must provide a summary along with an explanation for the absence of the statement. There is now a system of case management that helps to define the issues. Orders for disclosure and inspection of documents are common place. This was not so at the time of *Gravesandy* in which White JA said that the object of the rule requiring specific pleading was to give the defendant fair warning of what was being claimed to prevent surprise at the trial and extend the ambit of discovery. It would seem that under the new rules a failure to state in the claim form the facts being relied on to ground the claim for exemplary damages may not necessarily be fatal provided that the claimant makes it clear in the claim form that he is claiming exemplary damages. Because of the restricted categories in which exemplary damages can be awarded and certainly in the case of servants of the Crown the witness statement should make the basis of the claim for exemplary damages obvious to all who read it. The purpose of particularizing is not an end in itself but a means to an end, namely, advanced notification of (a) the claim for exemplary damages and (b) the facts being relied on to ground the claim. This same principle can be applied to aggravated damages. Lord Woolf MR speaking on the context of a defamation case made the point about pleadings under the new rules in England in *McPhilemy v Times Newspapers Ltd* [1999] 3 All ER 775 at 792j:

> *The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged.* ***In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid***

> ***being taken by surprise. This does not mean that pleadings are now superfluous.*** *Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.* (my emphasis)

The witness statement of Mr. Anderson made it very clear what he was complaining about and I would have been prepared to hold that the defendants had notice of the claim for exemplary damages as well as the facts being relied if it had happened that the statement of claim had only the claim for exemplary damages but did not plead the facts being relied on.

I will now consider whether exemplary damages should be awarded in this case. The analysis which follows is an attempt to show that Mr. Dean's proposition is not supported by anything said in ***Rookes v Barnard*** [1964] A.C. 1129 which had been accepted by the majority of the Court of Appeal in ***Douglas v Bowen*** (1974) 12 JLR 1544 accepted ***Rookes v Barnard*** as correctly stating the law in respect of exemplary damages. The Court reaffirmed its approval of ***Rookes'*** in ***Gravesandy*** and ***The Attorney General v Maurice Francis*** SCCA No. 13/95 (March 26,1999). There is nothing in these two decisions, other than the dissenting judgment of Graham-Perkins J.A in ***Bowen***, which shows any reservation about the analysis and conclusion of Lord Devlin in ***Rookes'*** case. I should add that the other Law Lords in ***Rookes'*** case agreed unreservedly with Lord Devlin's analysis, classification and conclusion. I take it then that the Court of Appeal fully and unreservedly approved of the following passage in Lord Devlin's judgment at pages 1221 – 1223:

> *But there are also cases in the books where the awards given cannot be explained as compensatory, and I propose therefore to begin by examining the authorities in order to see how far and in what sort of cases the exemplary principle has been recognised. The history of exemplary damages is briefly and clearly stated by Professor Street in Principles of the Law of Damages (1962) at p. 28. They*

originated just 200 years ago in the cause cèlèbre of John Wilkes and the North Briton in which the legality of a general warrant was successfully challenged. Mr. Wilkes' house had been searched under a general warrant and the action of trespass which he brought as a result of it is reported in Wilkes v. Wood. Serjeant Glynn on his behalf asked for "large and exemplary damages," since trifling damages, he submitted, would put no stop at all to such proceedings. Pratt C.J., in his direction to the jury, said: "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." The jury awarded £1,000. It is worth noting that the Lord Chief Justice referred to "office precedents" which, he said, were not justification of a practice in itself illegal, though they might fairly be pleaded in mitigation of damages. This particular direction exemplifies very clearly his general direction, for a consideration of that sort could have no place in the assessment of compensation.

In Huckle v. Money the plaintiff was a journeyman printer who had been taken into custody in the course of the raid on the North Briton. The issue of liability having already been decided the only question was as to damages and the jury gave him £300. A new trial was asked for on the ground that this figure was "most outrageous." The plaintiff was employed at a weekly wage of one guinea; he had been in custody for only about six hours and had been used "very civilly by treating him with beefsteaks and beer." It seems improbable that his feelings of wounded pride and dignity would have needed much further assuagement; and indeed the Lord Chief Justice said that the personal injury done to him was very small, so that if the "jury had been confined by their oath to consider mere personal injury only, perhaps £20 damages would have been thought sufficient ..." But they had done right in giving exemplary damages. The award was upheld.

In Benson v. Frederic the plaintiff, a common soldier, obtained damages of £150 against his colonel who had ordered him to be flogged so as to vex a fellow officer. Lord Mansfield C.J. said that the damages "were very great, and beyond the proportion of what the man had suffered." But the sum awarded was upheld as damages in respect of an arbitrary and unjustifiable action and not more than the defendant was able to pay.

These authorities clearly justify the use of the exemplary principle; and for my part I should not wish, even if I felt at liberty to do so, to diminish its use in this type of case where it serves a valuable purpose in restraining the arbitrary and outrageous use of executive power. (my emphasis)

From a purely grammatical standpoint the demonstrative pronoun "*these*" (used here to qualify authorities) could only have been referring to the cases cited in the immediately preceding paragraphs just after the reference to

Professor Streets' work. The cases cited are the antecedents that permitted Lord Devlin to use the word "*these*" rather than to list the cases by name a second time. Also the word article "*this*" when used in the phrase "*this type of case*", in the context of the highlighted sentence, must be referring to cases where there is "*the arbitrary and outrageous use of executive power*". By necessary logic it must have included the reference to the ***Wilkes v Woods*** which is cited in the above quotation. His Lordship made it very clear that he would not be prepared, even if he had the power to do so, to diminish the use of exemplary damages in "*this*" types of cases of which ***Wilkes***, ***Huckle*** and ***Benson*** are not just examples but established the existence of Lord Devlin's first category. ***Wilkes*** involved an unlawful warrant. *This* type of case, for Lord Devlin, was within the class of *these authorities*, that could be described as ones in which there were "*the arbitrary and outrageous use of executive power*". It is very clear to me that that the adjective "*this*" as used in the highlighted text could not have been possible referring to the case of ***Rookes*** itself since the House held that in ***Rookes*** type of cases exemplary damages could not be awarded. Neither was it referring to any other type of case since Lord Devlin had not yet began the analysis for his second category. I fear to think of how Lord Devlin would describe the instant case. Thus both on grammatical grounds and logical grounds Lord Devlin could only have been saying that the three cases established the proposition he expounded which eventually became his first category for the award of exemplary damages. It was after establishing that the first category existed then he went on to see how the principle was applied in "other directions". To put the matter beyond doubt I will refer to the opening words of the quoted passage. In that passage Lord Devlin clearly stated that he was now going to analyse cases where "*examining the authorities in order to see how far and in what sort of cases the exemplary principle has been recognised*". It is immediately after this he cited Professor Street and then the three cases including ***Wilkes v***

Woods and then concludes his analysis by pronouncing that *these* cases had established at least one class of case in which the exemplary principle was recognised, namely, cases of abuse of executive power. If one reads the actual reports of these cases one will see quite clearly that other than ***Benson v. Frederick***, in which a common soldier obtained exemplary damages for a flogging administered to him, the conduct that attracted exemplary damages was quite benign compared to the beating of Mr. Anderson. From these cases then it is clear that Lord Devlin saw nothing wrong with awarding exemplary damages in cases of (i) a search pursuant to an illegal warrant without any evidence of physical abuse (***Wilkes***); (ii) a man apparently taken into custody wrongfully, kept for six hours, during a raid and given meat and drink (***Huckle***) and (iii) a soldier beaten on the instruction of a superior officer (***Benson***).

This long discourse by Lord Devlin, it must be remembered, was occasioned by the submission that there should be a new trial on the issue of damages because the learned trial judge had misdirected the jury on exemplary damages (see pages 1220-1221).

There is nothing in the judgment of Lord Devlin, even when he went to warn against making an award of exemplary damages merely because the conduct was wanton or willful, to suggest that he had qualified what he had said about the cases in the passage I have extracted from his judgment.

There can be no doubt in this case that the conduct of the police officer was abusive and designed to humiliate Mr. Anderson for daring to stand his ground. It was a clear abuse of power. I am therefore of the view that the conduct of the police officer is within Lord Devlin's first category. The evidence on which this is based is as follows:

a) the police were on West Bay Farm Road in December 2000;
b) Mr. Anderson was in his shop on West Bay Farm Road;

c) three police officers entered his shop including Constable Burton;
d) Mr. Anderson declined to close his shop on the instruction of the police;
e) Constable Burton beat Mr. Anderson with the crutch;
f) Mr. Anderson at the time had only one leg. The other was amputated above the knee;
g) the other police officers blocked the door so that Mr. Anderson could not leave;
h) after he was beaten he was again ordered to close his shop and as the police officers left Constable Burton drew the door closed;
i) the police officer pointed his gun at the claimant when the claimant opened his door;
j) there was no lawful justification or excuse for the conduct of the police officer.

If this does not fall within what Lord Devlin would describe as "*the arbitrary and outrageous use of executive power*" then it is difficult to see what could. What could be more arbitrary that a state agent invading private property, without even the pretense of legality, and administering a beating to a citizen who refused to obey what, by all indications, was an unlawful order? In ***Gravesandy*** there was none of the conduct complained of in this case. The Court of Appeal set aside the award of exemplary damages on the basis that the police officer's conduct in that case was not "overly unreasonable" and therefore outside of Lord Devlin's first category.

Exemplary damages are necessary in this case because of the need to punish this officer for his abuse of power and to deter other like minded officers. Having said this I recognise that unless and until police officers in these kinds of cases are made to contribute to the damages assessed there is no incentive for them to change their behaviour. How can there be deterrence when the persons who need

to be deterred do not contribute to the damages? This is not a case of a police officer acting in good faith but made an error. The police must realize that they simply cannot beat citizens merely because they disagree with the police.

The final question is now the quantum of exemplary damages. Happily Mrs. Khan has continued her outstanding service to the judiciary and the legal profession by publishing volume 5 of *Recent Personal Injury Awards Made in the Supreme Court of Judicature of Jamaica* (2002). At pages 298 – 300 she has set out some recent awards in this area. The three most relevant cases are ***Bowen (b.n.f.) v The Attorney General and another*** [C.L. 1982/B338]; ***Pansy McDermott v Constable Lewis and the Attorney General*** [CL 1998/M328] and ***The Attorney General v Maurice Francis*** SCCA 13/95 (March 26, 1999). On appeal the Court of Appeal in ***Bowen*** reduced the award of exemplary damages to $250,000 from $500,000. The updated value of this award is $333,055 using the May 2004 Consumer Price Index of 1839. In that case the claimant was shot by police while the police were engaged in chase. The claimant was placed in police custody and charged with illegal possession of a firearm. He was eventually acquitted of the charges. In ***McDermott***, Jones J (Ag), (as he was at the time) awarded $750,000 for aggravated damages. The current value of this award is $931,514.53. In that case the award was made on the basis that the attack on the claimant was unprovoked and she was shot "in a sensitive area of the body". This award is too high for the instant case. In ***Francis*** the Court of Appeal reduced an exemplary award of $3.5million to $100,000 for both exemplary and aggravated damages. The reason for this dramatic reduction was that the sum awarded for the $3.5 million ordered as compensatory damages was a "penalty in itself" (see page 20 of judgment) This was a case in which the claimant was shot in the back by the police while he was walking along a short cut. The value today is $155,517.97.

Having regard to these cases I make the following award $400,000 for both aggravated and exemplary damages.

CONCLUSION

The claimant has established his case on a balance of probabilities. Constable Burton was the person who assaulted and beat the claimant. I find he was not at the intersection of Pennwood Road and Bay Farm Road. His conduct was abusive. It was not justified. It fell within the category and examples referred to by Lord Devlin in *Rookes v Barnard* in which exemplary damages are awarded. Those examples and categories to which I have referred have not been altered in any way by the Jamaican Court of Appeal in the cases in which the Rookes categories have been adopted for this jurisdiction. Constable Burton's conduct is deserving of punishment. The claimant should also be awarded aggravated damages having regard to the humiliation, distress and embarrassment inflicted upon him by the police officer. The total award is $800,000. Interest is awarded at the rate of 6% per annum from the date of service of the writ to July 16, 2004.

For special damages the sum awarded is $17,150 at 6% per annum from December 14, 2000 to July 16, 2004. Costs to the claimant to be agreed or taxed.