

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE**

Claim No. BVIHCV 2019/0332

BETWEEN:

DAMION A. MORGAN

Claimant

AND

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant

Appearances: Mr. Jamal Smith & Ms. Crystal Mckenzie, Counsel for the Claimant
Ms. Nicosie R. Dummett, Principal Crown Counsel, Counsel for the Defendant

2022: December 5th – 7th
2023: February 7th

JUDGMENT

- [1] **FELIX-EVANS J (Ag.):** By this claim, filed on 13th December 2019, the Claimant seeks general, special and vindictory damages against the Defendant for unlawful search, wrongful arrest, false imprisonment and malicious prosecution. He also seeks pre-judgment interest from 6th August 2018 to the date of judgment at the rate of 3% per annum and/or such rate and for such periods as the Court deems just. The Defendant is sued as the representative of the Crown pursuant to the **Crown Proceedings Act**, Cap 21 of the Laws of the Virgin Islands, Revised Edition 1991.
- [2] By Amended Defence filed on 1st February 2022, the Defendant disputes the claim in its entirety, relying on the following defences:
- i. the claims in respect of unlawful search, wrongful arrest and false imprisonment are statute barred, having commenced outside the 6 months' limitation period for bringing an action under section 2(a) of the **Public Authorities Protection Act**, Cap. 62 (the "**PAPA**");

- ii. the search, arrest and imprisonment of the Claimant were in the bona fide exercise of their duties under the **Domestic Violence Act, 2011** (the “DVA”); and
- iii. the charge against the Claimant for common assault was laid on probable cause and was not malicious.

(the “pleaded defences”)

[3] Both parties filed Closing Submissions following the conclusion of the trial in compliance with the Court's Order of 7th December 2022. In Closing Submissions, the Defendant relied on *res judicata* as another defence to the claim (the “**res judicata defence**”).¹ According to the Defendant, this claim should be dismissed as it is a “complete duplication” of claim BVIHCV2018/0201 and a “deliberate collateral attack” on the judgment of Ellis J. who, having heard the merits of that claim, dismissed it. If the Claimant was dissatisfied with the judgment of Ellis J., he ought to have appealed it instead of bringing this claim.

[4] In support of her *res judicata* defence, the Defendant referred the Court to pleadings, affidavits and submissions filed in BVIHCV 2018/0201 and the final the judgment of Ellis J in that claim. All of these documents were produced for the first time in the Defendant's Closing Submissions bundle for the Court's consideration. The Defendant also referred to these documents in support of her pleaded defences.

THE ISSUES

- [5] The issues which arise on the pleadings for determination are:
- (a) Whether the claims for unlawful search, wrongful arrest and false imprisonment are statute barred by virtue of the 6 months' limitation period under the PAPA;
 - (b) If the PAPA does not apply, whether the Claimant has made out his claims for unlawful search, wrongful arrest and false imprisonment;
 - (c) Whether the Claimant has made out his claim for malicious prosecution;
 - (d) What damages, if any, is the Claimant entitled to, and the quantum.

¹ This defence was first mentioned in the penultimate paragraph of the Defendant's Submissions filed on 2 December 2022 (3 days prior to commencement of the trial), where it was very briefly stated that this claim should be dismissed as an abuse of process, “[the Claimant] having already lost this matter on identical facts in Claim No. BVIHCV2018/0201 In the matter of an Application for Leave for Judicial Review Damion Morgan and the Commissioner of Police.”

- [6] Other issues for determination are whether it is proper for the Defendant to raise the *res judicata* defence at the trial stage and, if so, whether the claim is *res judicata*?

THE EVIDENCE

(a) Common

- [7] The Claimant and Chrystal Mitchell, ("**Ms. Mitchell**") are the biological and lawful parents of a boy child who, on 5th August 2018, was 7 months old (the "**baby**"). On that night, sometime after 11:30pm, while the baby was in the care of Ms. Mitchell's friend at the Emancipation Festival Grounds (or the Festival Village) in Road Town, Tortola, the Claimant, without the permission or prior knowledge of Ms. Mitchell, took him and carried him to his (the Claimant's) home in Harrigan's Estate. When Ms. Mitchell went to the Claimant's home to collect the baby, the Claimant refused to hand him over to her. Ms. Mitchell reported the matter to the police of the Royal Virgin Islands Police Force (the "**RVIPF**") at the Road Town Police Station ("**RTPS**").

- [8] As a result of Ms. Mitchell's report, in the early hours of 6th August 2018 officers of the RVIPF went to the Claimant's home with Ms. Mitchell. The officers banged on the Claimant's door but the Claimant did not respond. The officers forcibly entered the Claimant's home without a warrant and placed the Claimant in handcuffs. The officers took the sleeping baby from the Claimant's bed and delivered him to Ms. Mitchell. The Claimant was taken to the RTPS where he was questioned, charged for common assault against Ms. Mitchell and released later that day. The Claimant was prosecuted for common assault against Ms. Mitchell at the Magistrate's Court but the prosecution was discontinued 14 months later by the Office of the Director of Public Prosecutions.

(b) For the Claimant

- [9] Three witnesses gave evidence on behalf of the Claimant: the Claimant, Lamoy Minott and Tricia Rossear.
- [10] The Claimant's evidence was that on 5th August 2018 after he had finished working at a party at about 11:30pm, he went to the Festival Village. While there, he came across friends of Ms. Mitchell who had the baby in their care. Ms. Mitchell was not present. It was late and raining and the baby was sleeping

so he decided to take the baby home with him as he was concerned about the baby being out in these conditions. He did not communicate with Ms. Mitchell that he was taking the baby to his home.

[11] While he was at his apartment, Ms. Mitchell contacted him using her friend's telephone. About midnight, Ms. Mitchell came to his apartment to collect the baby and he refused to hand him over, informing Ms. Mitchell that the baby was asleep and he would bring him to her in the morning. He stood in the doorway of his apartment to prevent Ms. Mitchell from entering his home. He did not want Ms. Mitchell to enter his apartment to disturb the sleeping baby and his brother and his brother's girlfriend who at the time were sleeping in the living room. Ms. Mitchell left and he thought that was the end of the matter. There had been no physical altercation between him and Ms. Mitchell. About 1:00am on 6th August 2018, a police officer contacted him by telephone informing him that she had received a report from Ms. Mitchell that he had the baby at his home. He informed the police officer that he was the father of the baby and would return the baby to Ms. Mitchell in the morning because the baby was asleep. He explained to the police officer that as the baby's father he had a right to remove him from the Festival Village considering the conditions existing at the time.

[12] At about 2:00am on 6th August 2018, a team of officers of the RVIPF arrived at his apartment and banged his door. Before he could get to the door, the officers broke into his apartment and eventually removed the sleeping baby from his home. When he asked the police whether they had a warrant for their entry, he was told that they did not need a warrant and they would show him how the law works. The officers of the RVIPF did not have any court order to remove the baby from his lawful care. The Claimant testified that he had not heard sirens of the police vehicle or call outs by the police officers for him to open his door. The Claimant says that he was pulled outside of his apartment, slammed against his car, handcuffed and eventually transported to the RTPS.

[13] At the time of his arrest nothing was said to him about the reason for same. In the course of being transported to the RTPS, he asked the reason for his arrest and was informed by one of the officers that since they had broken into his home, they had to arrest him. No other or further explanation was given to him for his arrest. While at the police station, Sgt. Stany Francis said to him that he did not "push out any child" so what made him think he had a right to decide to take the child home with him that night. Another officer who was present responded to Sgt. Francis' statement by asking what

would happen if the Claimant stopped caring for the baby and Sgt. Francis responded that Ms. Mitchell could take the Claimant to court if he did.

- [14] A recorded interview was conducted with him during his custody and he was asked to sign at least two copies of the compact disc on which that interview was recorded. He was not given a copy of the compact disc. He was then charged with common assault against Ms. Mitchell. This was the first time he became aware that he was being arrested for common assault or was even suspected of the offence of common assault. He was released on bail at approximately 4:00pm on the same day.
- [15] The Claimant testified that at no time was he told about a cooling off period under the DVA. He denied drinking alcohol on that day. According to him, the baby was healthy and had no physical disabilities or medical issues. He was the main financial provider for the baby and every weekend he would keep the baby with him at his apartment. He kept his own set of things for the baby at his apartment, including nipple bottles, wipes, pampers and clothes. He loved the baby and would never do anything to hurt or cause him pain.
- [16] The Claimant described his home as a one-bedroom apartment in Harrigan's Estate. His bedroom was at the back of the apartment and the living room was at the front. His brother, Lamoy Minott, lived with him and occupied the living room as his bedroom. The Claimant's evidence was that his apartment was bigger than the courtroom in length but not in width.
- [17] Lamoy Minott is the Claimant's brother. His evidence was that at the time in question, he was staying at the Claimant's apartment using the living room as his bedroom. On the night of 5 August 2018, he was in the living room with a female companion, Mirna Turnbull. They were both present when the Claimant came into the apartment with the baby. The Claimant went into his bedroom with the baby. They were also present when Ms. Mitchell and later, the police, came to the Claimant's apartment.
- [18] According to Lamoy, Ms. Mitchell pounded on the door when she came to the Claimant's apartment and he went to call the Claimant who was in his bedroom. He could not hear the conversation between the Claimant and Ms. Mitchell but he realized they were arguing about the baby. Ms. Mitchell tried to come into the Claimant's apartment but the Claimant stood in the doorway thereby blocking her entry

and then closed his door. Later, he was awakened by Mirna Turnbull who told him that someone was knocking at the door. He then heard the pounding. He went to the Claimant's bedroom to inform him that someone was at the door. By the time he returned to the living room with the Claimant, the police had forcibly entered the apartment. The Claimant informed the police officers that they needed a search warrant to enter his home and one of them responded that they did not as the Claimant was inside and had heard them calling but did not answer. The police officers then took the Claimant outside, slammed him against his car and handcuffed him. Following this, the police officers went into the Claimant's bedroom, took the sleeping baby and carried him to the police vehicle.

- [19] Tricia Rossear was the occasional employer of the Claimant. Her evidence was that she is in the business of providing catering services for various events and parties on Tortola and over the past several years she has engaged the Claimant from time to time to operate the BBQ grill at these events. Throughout the years of engaging him, she has never known the Claimant to be intoxicated on the job. On 5th August 2018, she was engaged to provide her services at a birthday party which lasted for several hours. The Claimant worked for her at the BBQ grill from the afternoon until about 11:30 that night. During that time, she and the Claimant were about 5 feet or so away from each other. The Claimant only took bathroom breaks. She did not see the Claimant consume any alcohol on that day. At some point in time, she saw Ms. Mitchell come to talk with the Claimant at the grill area but she could not hear their conversation.

(c) For the Defendant

- [20] Six witnesses gave evidence on behalf of the Defendant: the officers who received Ms. Mitchell's report i.e., Sgt. Stany Francis and WPC Shenelca Francis-Richards of the Beat & Patrol Unit (the **"BPU Officers"**), the officers of the ARV Unit who responded to the call for assistance from Sgt. Stany Francis, i.e., Acting Sgt. Bruce Huggins, Constable Kerry Ottley and Constable Vic-Kaycee Winter (the **"ARV Unit Officers"**) and Mirna Turnbull, the young lady who was at the Claimant's apartment with his brother, Lamoy Minott, on the night/morning of 5th/6th August 2018.
- [21] WPC Francis-Richards' evidence was that Ms. Mitchell came to the RTPS to report that the Claimant, the father of the baby, had taken him from Festival Village without her permission or knowledge. After unsuccessfully searching the Festival Village for the Claimant, she called his cellphone number

several times but he did not answer. She finally reached him using a friend's phone. The Claimant informed Ms. Mitchell that he was at his home with the baby. Ms. Mitchell went to the Claimant's apartment to collect the baby but the Claimant refused to hand him over to her. He pushed her out of his apartment. Ms. Mitchell appeared very worried about the baby as the Claimant had no food, clothes or pampers at his home to care for the baby overnight. WPC Francis-Richards stated that she passed on Ms. Mitchell's report to Sgt. Francis, the officer in charge of the shift on that night, who at the time was out of the station.

[22] According to Sgt Francis upon his return to the station, he took Ms. Mitchell's report by means of an audio-visual interview with her which was recorded on 3 DVDs, one copy of which was placed in a sealed envelope as an exhibit. Ms. Mitchell reported that on the night of 5th August 2018 she was at the Festival Grounds with her two children, including the baby, and some friends. She left the baby with her friend who usually cared for him in order to take her older child for a ride. When she returned to her friend, she was informed that the Claimant, the father of the baby, had taken him. She searched the grounds for the Claimant and the baby with no success. She then made several calls from her phone to the Claimant's phone but he did not answer. She eventually reached him using a stranger's phone to call him. On speaking with him, the Claimant informed Ms. Mitchell that he was at his home with the baby. She got a ride with a stranger to go to the Claimant's home for the baby but the Claimant refused to hand over the baby and an argument ensued. She then attempted to enter the Claimant's apartment to get the baby but he used his hands and pushed her and closed his door. Ms. Mitchell attributed the Claimant's behaviour possibly to the fact that he had been drinking earlier and he therefore might be intoxicated. Ms. Mitchell expressed deep concern over the baby remaining in the Claimant's care as he did not have any food to feed the baby or any supplies to care for him overnight.

[23] The further evidence of the BPU officers was that at about 1:40am on 6th August 2018, they went to the Claimant's apartment at Harrigan's Estate in a police vehicle with Ms. Mitchell. On arrival there, they knocked on the Claimant's front door and the window of his bedroom several times, identifying themselves and calling out to him. WPC Francis-Richards also called his cellphone several times. The Claimant never answered to the knocks, call outs or telephone calls, although they heard the voice of a male having a conversation inside the Claimant's apartment. The Claimant's failure to open

his door or respond caused them to become highly concerned about the safety and wellbeing of the baby. They announced loudly that if the door to the Claimant's home was not opened, they would forcibly enter to retrieve the baby. Still, no one opened the door. After about 10 minutes, they called the ARV Unit officers to assist them to gain entry into the Claimant's apartment.

[24] The three ARV Unit officers arrived at the Claimant's apartment shortly thereafter. Despite the continued call outs and knocking to get the Claimant to open his door, he did not respond. With the assistance of the ARV Unit officers, the Claimant's front door was forced open and the BPU officers entered his apartment. The Claimant was very hostile and aggressive toward the officers: he was speaking loudly, "making big waving hand gestures" and both he and his brother attempted to block the officers' entry into his home. He looked like he wanted to fight. Under protest, the Claimant eventually led them to his bedroom where the baby was asleep on his bed. WPC Francis-Richards checked the baby who appeared physically well to her. She took the baby to Ms. Mitchell who was sitting in the police vehicle.

[25] Sgt. Francis then informed the Claimant that he is being arrested for a cooling off period under the DVA and cautioned him. The Claimant was transported to the RTPS where, during an audio interview conducted by Sgt. Francis in the presence of WPC Sharpe, he admitted that after he had refused to hand over the baby to Ms. Mitchell, he pushed her out of his door to close his door. As a result of this admission, Sgt. Francis charged the Claimant with common assault while he was still at the station for the cooling off period. The Claimant was released on bail on 6th August 2018 at 5:55pm.

[26] The BPU Officers testified that they were familiar with the procedure for dealing with domestic violence complaints which are matters of top priority in the Force. They referred to the Domestic Violence Policy which they state is available to all officers, including the officers of the BPU. They stated that they entered the Claimant's apartment without a warrant because the situation was urgent as they were concerned about the safety and well-being of the baby.

[27] WPC Francis-Richards admitted under cross-examination that she was not involved in or present at the interview of the Claimant by Sgt. Francis and that any information that she had about what was said at that interview was relayed to her. She testified that she did not complete the Domestic Violence

Report form as Sgt. Francis was the officer who had dealt with Ms. Mitchell's report. According to her, after receiving the initial report from Ms. Mitchell, she did nothing in relation thereto other than accompany Sgt Francis to the Claimant's apartment and assist there. Her evidence was also that it was after the Claimant was placed in handcuffs that he was questioned about the whereabouts of the baby. WPC Francis-Richards at first testified that she thought that the Claimant was transported to the RTPS in the ARV Unit vehicle. Subsequently, she stated that she could not remember in which vehicle the Claimant was taken to the RTPS, but she would say the ARV Unit vehicle.

[28] Sgt. Francis testified that he was the investigating officer for Ms. Mitchell's report and that it was the responsibility of the investigating officer to complete the Domestic Violence Report form. According to him, he did not recall (i) if he completed the Domestic Violence Report Form in respect of Ms. Mitchell's complaint, (ii) asking Ms. Mitchell whether the Claimant was a caring father, (iii) asking Ms. Mitchell whether there was an existing Court Order about the custody of the baby, (iv) an officer asking what would happen to the baby if the Claimant stopped caring for him, (v) responding to the officer's question that the mother of the child could take the Claimant to court; and (vi) getting a statement from Lamoy Minott. He conceded that it would have been prudent on his part to have gotten a statement from Lamoy Minott. He stated that for the purpose of preparing for this case, he did not check to ascertain whether he had completed a Domestic Violence Report form and that he had no reason to check. He also testified that he did not know that a female was at the Claimant's apartment on the night in question. He denied that he said to the Claimant that he did not push out any child so he had no right to decide to take his child home. He testified that after his encounter with the Claimant, he was not convinced that the Claimant was intoxicated.

[29] Sgt Francis also testified that what made him very concerned for the safety of the baby was the fact that Ms. Mitchell had said that the Claimant was drinking earlier that day and he might be intoxicated which might be the reason for his behavior. Ms. Mitchell said that she was not comfortable with the child remaining with the Claimant because he had nothing to give the baby and he appears to be drunk.

- [30] The evidence of the ARV Unit officers was that while they were on mobile patrol in the early morning hours of 6th August 2018, they were called by Sgt Francis who informed them that a 7 month old baby had been “abducted” and was being held “hostage”/ “captive” at a residence in Harrigan’s Estate. Sgt Francis requested their help to get into the house where the baby was held hostage. None of the ARV Unit officers could recall where exactly they were when the call for help came in from Sgt. Francis but all stated that it took them about 5 – 7 minutes to get from where they were to the Claimant’s apartment. They reported to the scene with the mindset that the baby “was in immediate danger and was being held captive”.
- [31] Upon arrival on the scene, they made call outs to the persons inside the Claimant’s apartment to open the door. They could hear voices inside the apartment but no one responded to them. They turned the door knob of the external door but it was locked. After about 10 minutes of knocking and call outs, using a method of entry equipment (a “MOE”) and a Halligan bar, they forcibly opened the front door of the Claimant’s apartment. After the door was opened, the Claimant was “aggressive”, “erratic”, “hostile” and rushed at them, demanding that they fix his door and “leave his yard”. His body language suggested that he wanted to fight. The Claimant refused to answer questions about the wellbeing of the baby and tell them the whereabouts of the baby, and instead expressed disbelief that Ms. Mitchell would send the police for him. The Claimant was brought out of the apartment and placed in handcuffs; he was neither dragged out of his apartment nor thrown against his car. The ARV Unit Officers remained outside with the Claimant as security while the two BPU officers went inside to get the baby. The baby was taken from the apartment while the Claimant was outside in handcuffs. After the baby was brought out by WPC Francis-Richards, the Claimant was informed by Sgt. Francis that he was under arrest under the DVA for a cooling off period based on his aggressive behaviour and attitude and failure to cooperate with the police.
- [32] The ARV Unit officers did not take the Claimant to the RTPS but escorted the BPU vehicle to said police station. Officer Vic-Kaycee stated definitively that the Claimant was not transported to the RTPS in the ARV Unit’s vehicle. His team only accompanied Sgt Francis’ team to the police station.

- [33] Mirna Turnbull 's evidence was that on the night of 5th August 2018 at about 11:00 she was headed for Jourvert in Road Town but then decided to visit Lamoy Minott, her boyfriend, where he lived with the Claimant. She and Lamoy were talking on his bed in the living room of the Claimant's apartment at about 12:30am when the Claimant came in with the baby covered in a blanket. The Claimant took the baby to his bedroom. About 1:30am, she heard repeated knocking on the door and knew it was Ms. Mitchell because Lamoy said so. Lamoy did not open the door for Ms. Mitchell. Sometime later, Ms. Mitchell returned to the Claimant's home with the police. She knew Ms. Mitchell was with the police because she could hear someone saying words to the effect that she wanted her child, open the door. The police knocked on the door and despite her requests to Lamoy to open the door, he did not do so. Lamoy went to the Claimant's bedroom to inform him that the police were calling him by name. The Claimant came into the living room but did not open the door. After the police continued knocking for about 10 to 15 minutes, they announced that if the door was not opened, they would be forced to burst it open. The Claimant then left the living room to return to his bedroom after which the police burst open the door. She ran into the bathroom and while there, she could hear Lamoy and the Claimant arguing loudly with the police. While the commotion was on-going, she attempted to leave the apartment but an officer informed her that she could not leave. That officer was Sgt. Francis. She and Sgt Francis knew each other very well. She had encountered him at her workplace several years before and since then, upon encounter, they would greet each other. She saw the police remove the Claimant from his apartment and place him in the police's van.

The documentary evidence

- [34] The Defendant's defences relied greatly on what was allegedly reported to the BPU officers by Ms. Mitchell and allegedly said to Sgt. Francis by the Claimant, each in a separate recorded interview. The evidence is that at least one copy of the DVDs on which each of these interviews was recorded was kept in the police's custody as evidence.
- [35] CPR 28.4 stipulates that if a party is ordered to give standard disclosure, "that party must disclose all documents which are directly relevant to the matters in question in the proceedings."

- [36] By order of 18th May 2021, the parties were ordered to, among other things, make standard disclosure by 25th June 2021 and bring the originals of the documents contained in their list of documents to the trial.
- [37] Each of the parties disclosed documents pursuant to the order for standard disclosure. On 4th April 2022, the Defendant filed an Amended List of Documents.
- [38] In the Defendant's List of Documents and Amended List of Documents, the Defendant did not disclose the recorded interview with Ms. Mitchell or the Claimant and neither of these recordings formed part of the evidence in this case. The Defendant provided no reason or good reason for the non-disclosure or absence of these documents. Ms. Mitchell was not a witness in this case. The Defendant did not give a notice or make an application under the **Evidence Act 2006** to seek to adduce the hearsay evidence of Ms. Mitchell.
- [39] Neither of the parties brought to the trial the originals of the documents contained in their respective list of documents as directed in the Order of 18th May 2021, despite the Court advertizing, on more than one occasion at the trial, to this direction in the Order of 18th May 2021.

The Preliminary Issues

- [40] The issues at [5](a) and [6] above are preliminary. How they are disposed of will determine what, if any, of the other issues remain for determination.

1 - Res Judicata

- [41] In claim BVIHCV2018/0201, the Claimant sought judicial review of the Commissioner of Police's failure to discipline the BPU officers pursuant to section 20 of the DVA. The Defendant urged the Court to examine the pleadings in BVIHCV2018/0201 and compare them with the pleadings here. That exercise would result in "the inescapable conclusion that the claims are, materially, identical" and lead this Court "to dismiss this claim as being already traversed and already decided". The Defendant cautioned that determining the merits of this case "would encourage never ending litigation,

where dissatisfied litigants, engage in hair splitting, and proliferate litigation in an abusive and vexatious manner.”²

[42] The doctrine or principle of *res judicata* is well-established. According to that doctrine an issue or cause of action that has been decided between parties by a court of competent jurisdiction cannot be re-litigated between the same parties in the same court (i.e., a court of co-ordinate jurisdiction). The decision of the court on that issue or cause of action must therefore stand unless and until it is reversed on appeal.³ The doctrine is founded on the public policy that there should be finality to litigation.⁴

[43] In the Court’s view, a *res judicata* defence calls for it to be raised at an early stage of the proceedings in order to avoid (a) issues or claims which are *res judicata* from proceeding through the court system in breach of the public policy underpinning the doctrine, (b) the incursion of unnecessary costs to and/or (c) the harassment of parties. The Court considers it improper and unfair, if not abusive of its process, for a defendant, for the first time, to raise a *res judicata* defence at the trial or after its conclusion. Additionally, that approach is in flagrant contravention of the letter and ethos of CPR 2000 which are intended to eliminate trial by ambush⁵.

[44] The Court feels compelled to highlight the statements of Ferrara JA (Ag.) at [29] in the recent appeal **Carlton Lewis v Neil Cochrane** ANUHCVP2018/0039 (delivered 27 May 2022):

“In my view, despite its obvious importance, the appellant ought not to be permitted to raise this issue for the first time in this appeal. The era of trial by ambush has long passed in the civil practice before the Eastern Caribbean Supreme Court. Such an issue, going as it does to the root of the defence and counterclaim filed by the respondent, must be specifically pleaded or raised in the appellant’s witness statements or in the appellant’s pre-trial memorandum or during the course of taking evidence at the trial, thereby affording to the respondent a fair and adequate opportunity to properly respond to it, including producing any relevant documentary evidence. This was not done, and it would do an injustice to the respondent to permit this issue to be raised for the first time by the appellant in and for the determination on appeal. The proper and just

² Paragraph 16 of Defendant’s Closing Submissions

³ **Bertha Compton v Dr. Christiana Nathaniel et al** SLUHCVP2004/0012 [5]

⁴ **Net International Property Limited v ADV. Eitan Erez** BVIHCV2020/0010 [53]

⁵ **St Kitts Development Limited v Golfview Development Limited et al**, SKBHCVC2003/0024 [15]; **Celina George v Valentine Graham et al** DOMHCV2009/0075 [14]

determination of that issue would require the respondent having a full opportunity to answer it, to produce any documentary evidence as to whether the ATC has trustees and, if so, who they are, and for the court to fully interrogate this issue at the trial. [Emphasis mine]

- [45] This is not an appeal, but the statements of the Learned Justice of Appeal apply equally, *mutatis mutandis*, to the circumstances herein where the trial has been concluded. Not only was *res judicata* not specifically pleaded, the Defendant did not make any application before the trial to strike out the claim on that basis. By not raising this defence well before trial, and properly, the Claimant has not been given “a fair and adequate opportunity to properly respond” to it, if to respond at all. In the circumstances, the Court will not entertain this defence.

2 - The Public Authorities Protection Act

- [46] The **Public Authorities Protection Act**, Cap. 62 provides:

“2. Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or any public duty or authority or of any alleged neglect or default in the execution of any such act, duty or authority, the following provisions shall have effect-

- (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage, within six months next after the ceasing thereof;”

....

- [47] In **Alves v Attorney General of the Virgin Islands** [2017] UKPC 42, the Privy Council recognized that there are “immediately apparent” grammatical errors in section 2 (a) and that it should properly read as follows⁶:

2. Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or Ordinance, or any public duty or authority or **in respect of** any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect-

⁶ Para 5

- (a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in the case of a continuance of injury or damage, within six months next after the ceasing thereof;

[48] The Privy Council stated that the principle underlying the PAPA can be found in **Bradford Corp v Myers**⁷. The court referred to several statements of their Lordships in **Bradford Corp** explaining the meaning and scope of the PAPA, including,

Lord Buckmaster LC's statement at page 247 where he stated:

"...the words of the section themselves limit the class of action, and show that it was not intended to cover every act which a local authority had power to perform. In other words, it is not because the act out of which an action arises is within their power that a public authority enjoy the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority. I regard these latter words as meaning a duty owed to all the public alike or an authority exercised impartially with regard to all the public. It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply. [Their Lordships emphasis]"

Lord Viscount Haldane at page 251, who said:

"My Lords, in the case of such a restriction of ordinary rights I think that the words used must not have more read into them than they express or of necessity imply, and I do not think that they can be properly extended so as to embrace an act which is not done in direct pursuance of the provisions of the statute or in the direct execution of the duty or authority. What causes of action fall within these categories it may be very difficult to say abstractly or exhaustively. [My emphasis]"

And Lord Shaw who stated at page 262:

"It is not enough that the neglect occurs in the doing of a thing which is authorized by statute, but the thing done is not every or anything done but must be something in the execution of a public duty or authority, and it is only neglect in the execution of any such duty or authority that is covered by the statute. This restriction appears to me to be vital. The Act seems to say: - there are many things which a public authority, clothed, say, with statutory power, may do, which the limitation will not cover; but when the act or neglect had reference to the execution of their public duty or authority – something founded truly on their statutory powers or their

⁷ [1916] AC 242

public position – to that, and that only, will the limitation apply.” [Their Lordships’ emphasis]

- [49] After reviewing and commenting on the long stream of authorities which have dealt with the construction and application of the PAPA, the Privy Council acknowledged that there were many conflicting decisions on the PAPA, which cannot all be reconciled and gave the following guidance:

“36. ...where there is a general common law or statutory duty of the kind which is the same for a public authority as it would be for a non-public person or company, there is no reason for a much- abbreviated limitation period, indeed every reason why the period should be no different for a public body defendant as for anyone else. The duties of an employer to his employees, or of a transport undertaker to his passengers, or of any contractor to his contractual counterparty, are classic examples of particular duties. They may of course arise in the course of performing public functions but they are not public duties owed generally to the world or to a section of the public.

37. Despite the potentially wide words of PAPA, it must, as has consistently been held, be construed restrictively. It only applies to public authorities, and not to all persons acting under statutory authority. It does not apply to all actions performed by public authorities, but only to those where the obligation sued upon is owed generally to the public or to a section of it. Where the obligation sued upon arises simply out of a relationship with the claimant which would be the same for any non-public person or body, and where there is no question of a public law challenge, the Act has no application.”

- [50] The Privy Council approved the Court of Appeal decisions in **Bell v Commissioner of Police** Civil Appeal No. 4 of 2001 and **AG of the Commonwealth of Dominica v Cecilia Robin** DOMHCVAP2011/0034 which held that the PAPA did not bar the respective claims.

- [51] The Court recognizes that the facts herein are “materially distinguishable” from the facts in the cases above. However, the test to determine whether or not the PAPA applies is the same i.e., whether the public authorities were at the material time acting in execution/pursuit of an Act or a public duty or authority.

- [52] The Defendant contends that the police officers were acting generally pursuant to their duty under the **Police Act**, Cap. 165 and more specifically their duties under ss.18 and 20 of the DVA. Police officers of the RVIPF have a statutory duty pursuant to s.4 of the Police Act to “maintain law and order,

preserve the peace ... protect life and property, prevent and detect crime and enforce all the laws that it is required to enforce", the DVA being a law that is required to be enforced.

[53] Sections 18 and 20 of the DVA state:

"18...

- (1) A police officer shall respond to every complaint or report alleging domestic violence whether or not the person making the complaint or the report is the victim.*
- (2) A police officer responding to a domestic violence complaint shall complete a domestic violence report which shall form part of a Domestic Violence Register to be maintained by the Commissioner of Police in the prescribed manner.*
- (3) A domestic violence report shall be in the form set out as Form VIII in Schedule 2 and shall include but not be limited to:*
 - a) the name of the parties;*
 - b) the relationship and sex of the parties;*
 - c) information relating to the history of domestic violence between the parties;*
 - d) the date and time the complaint was received;*
 - e) the type of the abuse and the weapon used, if any.*
- (4) A police officer responding to a domestic violence complaint may, in order to allow for a cooling off period, arrest a person at the scene of the domestic violence whom the police officer reasonably suspects of having committed an act of domestic violence.*
- (5) A person arrested pursuant to subsection (4) shall not be held in custody for a period exceeding twenty-four hours.*
- (6) For purposes of subsection (4), the police office shall take into account:*
 - a) the seriousness of the act which constitutes the alleged act of domestic violence;*
 - b) the time that has elapsed since the last cooling off period, if any, and the alleged act of domestic violence and whether there is any further need for another cooling off period.*

20.

- (1) A police officer may act in accordance with the provisions of the Criminal Code where he or she has reasonable cause to believe that a person is engaging in or attempting to engage in conduct which amounts to physical violence and failure to act immediately may result in serious physical injury or death.*
- (2) This section does not authorise the entry onto premises by a police officer, for the purpose of any search or the arrest of any person, otherwise than in connection with the conduct referred to in subsection (1).*
- (3) Where a police officer exercises a power of entry pursuant to subsection (1), he or she shall immediately submit a written report to the Commissioner of Police, through the head of his or her division where the incident occurred, and the report shall contain:*
 - a) the reasons for entering the premises without a warrant;*
 - b) the offence being committed or about to be committed, and*
 - c) the manner in which the investigation was conducted and the measures taken to ensure the protection and safety of the person at risk.*
- (4) The report referred to in subsection (3) shall be submitted to the Director of Public Prosecutions by the Commissioner of police within seven days of its receipt by the Commissioner of Police.*
- (5) Where the investigation of the Commissioner of police finds that entry made under subsection (1) was unwarranted, the report may form the basis of disciplinary actions against the police officer.*

[54] The Criminal Code referenced in s. 20 of the DVA is the **Criminal Code 1997**. S.320 of the Code empowers a police officer to arrest a person without a warrant where he, with reasonable cause, suspects that an arrestable offence has been committed or is about to be committed. The section also empowers the officer, for the purpose of that arrest, to enter, "if need be by force" and search any place where that person is or is reasonably suspected to be. An arrestable offence is defined in the Code as one which, if tried on indictment, is punishable by a term of imprisonment of 5 years or longer. An attempt to commit an arrestable offence is also an arrestable offence.

[55] Section 16 of **Status of Children Act 2014** is also relevant to this discussion. It reads:

16. Unless the Court otherwise orders, where paternity is established pursuant to the provisions of this Act, the father of the child shall be deemed to be a joint guardian of the child along with the mother of the child and shall have the power to exercise parental rights over that child jointly with the mother of the child.

[56] The Defendant says that the police officers forcibly entered the Claimant's home without a warrant because based on what Ms. Mitchell reported, the BPU officers feared for the safety of the baby and in these circumstances under section 20 of the DVA they were entitled to so enter. Also, as Sgt. Francis informed the Claimant at the time, he was arrested to allow for "a cooling off period" under the DVA.

[57] The Court accepts that Ms. Mitchell made a report to the BPU officers on the morning of 6 August 2018 that the Claimant had the baby at his apartment without prior consultation with or permission by her and had refused to return the baby to her. These facts are admitted by the Claimant. However, the rest of the alleged contents of that report are disputed by the Claimant and other than the "word" of the BPU officers, the Court has no evidence before it as to the contents of that report.

[58] What Sgt. Francis, the arresting officer, said to the Claimant at the time of his arrest is also in dispute. Sgt. Francis' evidence is that he informed the Claimant that he was being arrested for a cooling off period under the DVA. All the other officers gave similar evidence. The ARV Unit officers further stated that Sgt Francis informed the Claimant that he was being arrested based on his "aggressive" behavior and attitude and refusal to cooperate with the police. The Claimant denies that any of this was ever said to him. Mirna Turnbull, who may be regarded as the one independent witness in this case, gave no evidence on that issue. She also gave no evidence about what she might have seen or heard between the Claimant and Ms. Mitchell earlier that night.

[59] The evidence of Sgt. Francis that the Claimant admitted during an audio-recorded interview to pushing Ms. Mitchell out of his door is also disputed by the Claimant.

[60] Whether or not the police officers acted in direct pursuance of ss.18 and/or 20 of the DVA or in direct pursuance of a public duty or authority depends on which version of the events the Court believes. The facts set out in paragraphs 7 and 8 above are agreed by the parties and therefore are not in

dispute. However, there are critical facts on which the parties disagree. Having heard and observed the witnesses testify and assessed their credibility and the evidence, where the evidence of the parties diverge, the Court generally preferred and accepted the evidence on behalf of the Claimant which for the most part was consistent and more reliable, credible and logical.

[61] From the evaluation of the evidence, the Court makes the findings of fact, and draws the inferences, below:

- i. At the time the Claimant met Ms. Mitchell's friend with the baby, it was late at night, raining and the baby was sleeping;
- ii. the Claimant took the baby home because he was concerned about the baby being out in a public place at a very late hour of the night in unsatisfactory weather conditions;
- iii. when Ms. Mitchell went to the Claimant's home to get the baby, the Claimant informed her that the infant was asleep and he would bring him to her later that day;
- iv. the Claimant stood in the doorway of his apartment and eventually shut his door to prevent Ms. Mitchell from entering his apartment;
- v. Ms. Mitchell went to the police solely to get their assistance to retrieve the baby from the Claimant, not to make a report of violence against the Claimant;
- vi. Ms. Mitchell did not tell the BPU officers that she feared that the Claimant was likely to cause harm to the baby;
- vii. Ms. Mitchell did not report any history of violence against her or the baby by the Claimant;
- viii. Prior to going to the Claimant's apartment, the BPU officers were possessed of the following information: the Claimant was the father of the baby, the main financial provider for the baby and the person who usually collected the baby from the daycare; there was no court order prohibiting the Claimant from having physical custody of the baby; the baby sometimes slept over at the Claimant's home; the Claimant and Ms. Mitchell did not live in the same household; the Claimant had taken the baby from a person other than Ms. Mitchell at a very late hour of the night in a public place where festivities were ongoing;
- ix. Prior to going to the Claimant's apartment, WPC Francis-Richards called and spoke with the Claimant who informed her that he was the father of the baby, the baby was sleeping, he would take the baby to Ms. Mitchell the next morning and as the father of the baby he had the right to remove the baby from the conditions at the Festival Grounds;
- x. The BPU officers went to the Claimant's apartment solely to retrieve the baby and deliver him to Ms. Mitchell, not to "protect" the baby or to investigate a complaint of domestic violence;

- xi. When the BPU officers arrived at the Claimant's apartment, there was no sound or activity emanating therefrom which suggested that any occupant therein was awake;
- xii. The sounds the BPU officers alleged that they heard coming from inside the Claimant's apartment were heard after they had commenced knocking on the Claimant's door and/or calling out to him and these sounds were not consistent with a baby crying or being in distress;
- xiii. In requesting assistance from the ARV Unit officers, Sgt. Francis did not inform them of the relationship between the Claimant and the baby. Instead, Sgt. Francis informed the ARV Unit officers that a baby had been "abducted" from the Festival Grounds and was being held "hostage"/ "captive" at a house in Harrigan's Estate;
- xiv. Sgt. Francis was very unhappy about the Claimant's "refusal" to respond to the police officers' knocks and call outs and his challenge to the police officers' entry into his apartment without a warrant;
- xv. Sgt. Francis arrested the Claimant because of the manner of the Claimant's response to the police officers' entry into his home without a warrant;
- xvi. At the time of the Claimant's arrest, Sgt. Francis did not inform him that he was being arrested for a "cooling off period" under the DVA;
- xvii. The Claimant was placed in the BPU officers' vehicle with Ms. Mitchell and the baby after his arrest; and
- xviii. a Domestic Violence Report in respect of Ms. Mitchell's alleged complaint of an assault was not completed.

[62] Based on these findings and inferences, the Court finds that the pre-conditions for action by the police under ss. 18 and/or 20 of the DVA were not in existence on the morning of 6th August 2018 and that the police did not consider and act pursuant to the DVA. It defies credibility that Sgt. Francis would have concluded that the circumstances warranted the arrest of the Claimant for a cooling off period under the DVA or informed the Claimant that he was being arrested for a "cooling off period" under the DVA and immediately thereafter place the Claimant in the same vehicle with Ms. Mitchell (the alleged victim) when an alternative vehicle (the ARV Unit vehicle) was on the scene and could have been used to transport either Ms. Mitchell or the Claimant to their respective destination.

[63] Further, Sgt. Francis was no rookie. He testified that he was in the service for 22 years and had dealt with complaints of domestic violence "many times" and knew the procedure for dealing with same.

Yet, he failed to complete a Domestic Violence Report form which s.18 of the DVA specifies must be completed by a police officer responding to a domestic violence complaint. Whilst the Court accepts that there may be the odd occasion when a police officer responding to a domestic violence complaint may inadvertently fail to complete the form, the Court views it as highly improbable that a police officer who claims to have reasonably suspected an individual to have committed an act of domestic violence and that the circumstances were serious enough to justify his arrest for a cooling off period under the DVA, would forget or deliberately fail to complete a domestic violence report in relation to that incident. The Court concludes that the only reasonable and credible explanation for Sgt. Francis' failure to complete a Domestic Violence Report is that he was not acting under the DVA at the material time and therefore the requirements of the Act were not operating on his mind at the time. The Court has viewed the Not Agreed Defendant's document labelled "24 Hour Daily Summary" for the period August 5 to August 6, 2018 with its notation that the Claimant was arrested for a cooling off period under the DVA. No evidence was provided as to who made that notation and when it was made. In light of the failure to complete the Domestic Violence Report, the Court views it as very unlikely that this notation was made contemporaneously with the event. The Court does not regard this notation as reliable evidence and would have rejected it had it been adduced into evidence. No application was made to adduce this document into evidence.

- [64] The accepted evidence leads the Court to the ineluctable conclusion that the BPU officers involved themselves in a disagreement of a domestic nature between the baby's parents. The Claimant was the joint guardian of the baby with Ms. Mitchell and had the power to exercise parental rights and control over the baby jointly with Ms. Mitchell. No violence, breach of court order or any act of a criminal nature precipitated or was involved in the disagreement between the Claimant and Ms. Mitchell on that night that required the intervention of the police. Domestic violence is unacceptable in all of its forms and will not be sanctioned by the Court. Complaints of domestic violence must be dealt with swiftly, decisively and appropriately by the police officers to whom such complaints are made. However, every domestic dispute or disagreement does not qualify as domestic violence. On the evidence before the Court, neither Sgt. Francis nor WPC Francis-Richards was acting under the DVA or any public duty or authority on the morning of 6th August 2018 when they went to the Claimant's apartment to retrieve the baby on behalf of Ms. Mitchell, forcibly entered the Claimant's apartment, arrested and detained the Claimant, took the baby from the Claimant's bed and delivered

him to Ms. Mitchell. In the circumstances, the PAPA does not apply and the defence thereunder therefore fails.

Whether the Claimant has made out his claims for unlawful search, wrongful arrest, false imprisonment and malicious prosecution?

- [65] The burden lies on the Claimant to prove each of these claims on a balance of probabilities. In the Defendant's submissions, the Court was invited to look at the pleadings and evidence in BVIHCV2018/0201 and the statements of Ellis J. regarding the evidence before her in determining this claim. The Court adopts the stance of Cenac-Phulgence J in **Cleveland Emmanuel v The Commissioner of Police et Anr**, SLUHCV2017/0713 at [36] and rejects this invitation. The Court directs Counsel to the very instructive and relevant statements of Baptiste JA at [102] in the recent Court of Appeal judgment in **Frederick Baron et al v Blaircourt Property Development Ltd** DOMHCVAP2015/0005 & DOMHCVAP2015/0009 (delivered on 23 November 2022):

"There is a general principle of law that factual findings by one judge cannot bind another judge in different proceedings. The rule extends to render factual findings made by judges in civil cases inadmissible in subsequent proceedings (unless the party against whom the finding is sought to be deployed is bound by it by reason of an estoppel per rem judicatum)."

- [66] The Court can only decide the issues in this claim on the evidence that was received by it and "in the light of the submissions on that evidence made to it⁸. The evidence received in BVIHCV2018/0201 is inadmissible and therefore will not be considered.

Unlawful search

- [67] Sgt. Francis stated his reason for not obtaining a search warrant as follows:

"I did not obtain a search warrant prior to entering the apartment due to the urgency of the situation. I had no information on the status of the baby or whether the baby was dead or alive and given the time of the night, I knew that it would take me at least two hours to prepare a search warrant and find an available magistrate to

⁸ [106]

execute the same. In the circumstances I felt that I had to move quickly to ensure the safety and wellbeing of the infant child.”⁹

- [68] Under s.20 of the DVA a police officer may enter a person’s home without a warrant *“in accordance with the provisions of the Criminal Code where he or she has reasonable cause to believe that [the said] person is engaging in or attempting to engage in conduct which amounts to physical violence and failure to act immediately may result in serious physical injury or death.”* By including the requirement to act in accordance with the **Criminal Code**, s.20 signals that the conduct amounting to domestic violence which would justify a police officer entering without a warrant must be serious enough to amount to an arrestable offence. This view is bolstered by the closing words of subsection (1), to wit, *“...and failure to act immediately may result in serious physical injury or death.”*
- [69] The test, “reasonable cause to believe”, is stated to be an objective one (with a subjective element) determined by the question whether a reasonable man, assumed to know the law and possessed of the information which was in fact possessed by the defendant, would believe that there was reasonable and probable cause to enter and search.¹⁰ A defendant’s honest belief is not enough.
- [70] The BPU officers are assumed to know that under the **Status of Children Act** the lawful father of a child is deemed to be a joint guardian of the child along with the mother of the child and has the power to exercise parental rights over that child jointly with the mother of the child. Sgt Francis testified that he knew this to be the law. With that knowledge/assumed knowledge and the information he possessed as found by the Court at [61] above, would a reasonable police officer, who had the same information that the BPU officers possessed, believe that that there was reasonable cause to suspect that the Claimant was engaging or attempting to engage in physical violence against the baby and that their failure to immediately enter his apartment and retrieve the baby might result in physical injury or death to him?
- [71] A reasonable police officer would not have come to that belief. First, the information the BPU officers possessed about the Claimant as a father before they set out for the Claimant’s apartment did not indicate anything other than that the Claimant was a financially supportive and fully engaged father.

⁹ Para 13 of his witness statement

¹⁰ See *Rashad Joseph et Anr v The Attorney General* SLUHCV2017/0189 [48]

Secondly, the concern allegedly expressed by Ms. Mitchell about the Claimant having the baby that night was specifically that the Claimant did not have food and other supplies at his home to provide for the baby's overnight needs. Assuming Ms. Mitchell did state that the Claimant appeared drunk (which the Court does not accept), the BPU officer's evidence strongly suggests that this information was given by Ms. Mitchell to explain the Claimant's refusal to hand over the baby to her, not as the basis for a concern that the baby's safety and well-being were at risk as a result thereof. Thirdly, while the police officers were outside of the Claimant's apartment, there was no sound or activity coming from the Claimant's apartment which suggested that the baby was in distress. The alleged belief of Sgt. Francis that the non-response of the Claimant to the police officers' call outs caused him to fear that the baby might have been harmed or suffered death is fanciful and the Court wholly rejects it. The information that the BPU officers had about the Claimant as a father should have given them good reason to believe that the alleged concerns by Ms. Mitchell about the Claimant not having food or other supplies at his home to care for the baby's overnight needs could not have been well founded. Based on the evidence before the Court, the Claimant had no obligation to respond to the knocks and/or call outs of the police officers.

[72] The alleged demeanour and emotional state of Ms. Mitchell (which could have been caused by various factors which had nothing to do with any genuine concern about the safety of the baby) could not constitute reasonable cause to believe that the Claimant was engaging in or attempting to engage in physical violence against the baby such that failure to act immediately might result in serious physical injury or death to the baby.

[73] All 3 ARV Unit officers testified that in requesting their assistance, Sgt. Francis informed them that a baby had been "abducted" and was being held "hostage" or "captive". They all testified that they went to the scene with the mindset that the baby was in immediate danger and was being held captive. The words used by Sgt Francis to describe the situation were clearly not reflective of the situation as he knew it. In the Court's view, this evidence strongly suggests that Sgt. Francis did not believe that the true situation merited the police's intervention and that conveying the facts as he knew it would have resulted in the assistance that he sought. It was his use of the words "abducted" and "hostage" that led the ARV Unit officers to believe that a serious criminal offence was underway and they needed to act quickly to protect the victim.

- [74] Even after the BPU officers had completed their “wellness check” on the baby, they did not leave him with the Claimant, his father. They took him to Ms. Mitchell in the police vehicle. This confirms to the Court that their forcible entry was not to ascertain the safety of the baby but to take the baby from the father to deliver to the mother.
- [75] The Defendant's evidence is that the Claimant led them to the baby in his bedroom only after their repeated requests about the baby and under protest.
- [76] The Claimant has made out his case of unlawful search as the Court finds that no reasonable police officer, possessed of the knowledge which the BPU officers had on the morning of 6 August 2018, would have believed that there was reasonable and probable cause to enter and search the Claimant's apartment.

Wrongful arrest and false imprisonment

- [77] Section 18 (4) of the DVA empowers a police officer responding to a domestic violence complaint to “*arrest a person at the scene of the domestic violence whom the police officer reasonably suspects of having committed an act of domestic violence*” in order to allow for a cooling off period. A person arrested under this subsection shall not be detained for a period exceeding 24 hours.
- [78] The Defendant's case is that after the forcible entry by the police into the Claimant's apartment, he was arrested for a cooling off period under the DVA and was so informed. The Claimant has consistently disputed that he was told the reason for his arrest or the authority under which he was arrested.
- [79] The torts of wrongful arrest and false imprisonment are made out on proof of the fact of the arrest and imprisonment, respectively, and the absence of lawful authority to justify same.¹¹
- [80] It is common ground that the Claimant was arrested at his apartment and transported to the RTPS where he was detained for approximately 14 hours on 6 August 2018. What is in dispute is whether the arrest and detention were lawful. In **Shamal Charles v Attorney General Claim**

¹¹ **Danny Allison George v Attorney General of St. Lucia et Anr** SLUHCV2013/0634 at [27] and [28]

SLUHCV2009/1045 (delivered 10th December 2014) Belle J stated that once the fact of arrest and imprisonment is established, the evidential burden shifts to a defendant to show that the arrest and detention were lawful. The defendant would be required to adduce evidence which explained the circumstances of the arrest and detention¹². The evidential burden therefore lies on the Defendant herein to show that the Claimant's arrest and detention was lawful.

[81] In order to have lawfully arrested the Claimant under section 18(4) of the DVA, Sgt. Francis, the arresting officer, must have reasonably suspected the Claimant of having committed a serious act of domestic violence and reasonably concluded that the circumstances called for him to have a cooling off period in order to de-escalate the situation and keep Ms. Mitchell safe.

[82] In **Bernard Wiltshire v AG DOMHCV2011/0364**, (delivered on 10th December 2013, Re-Issued on 11th December 2013) Thomas J in deciding on a claim for wrongful arrest considered the language of s.12 (4) of the **Criminal Law and Procedure Act of Dominica**¹³ which reads, "(4) *Where a constable with reasonable cause, suspects that a felony has been committed, he may arrest without warrant anyone whom he with reasonable cause suspects to be guilty of the offence.*" The Learned Judge opined that the legislative intent of the requirement "with reasonable cause suspects" is "to curb arbitrary arrest and detention while at the same time curbing crime." This Court sees no substantive difference between the requirement of "with reasonable cause suspects", the language in the Dominica legislation, and the requirement of "reasonably suspects", the language in the DVA. The legislative intent of the requirement "reasonably suspects" under s. 18 (4) of the DVA is undoubtedly to discourage arbitrary arrest and detention and at the same time keep victims of domestic violence safe. Under s. 18 (4) neither subjective nor honest suspicion is not enough for reasonable suspicion and the suspicion must be founded on facts.

[83] In **Nathan Thomas v Jerome James GDAHCV2019/0445** (delivered on 3rd January 2022), Glasgow J at [12] recited Satrohan Singh JA's explanation of the test of reasonable suspicion in the case of **Devon Calliste v the Queen**¹⁴:

¹² [18]

¹³ Cap. 12:01 of the Revised Laws of Dominica 1990

¹⁴ Grenada Criminal Appeal No. 12 of 1993 at pages 3 to 4

"Reasonable suspicion does not require certainty. The officer does not have to be satisfied beyond a reasonable doubt. Reasonable suspicion in contrast to mere suspicion must be founded on fact. There must be some concrete basis for the officer's suspicion related to the individual person concerned, which can be considered and evaluated by an objective third person. Mere suspicion, in contrast, is a hunch or instinct which cannot be explained or justified to an objective observer. Reasonable suspicion may arise from suspicious behavior of the person concerned or those with him. Reasonable suspicion cannot be supported on the basis simply of a higher than average chance that the person has committed or is committing an offence.

- [84] In **Davis v The Attorney General of St. Kitts and Nevis** SKBHCV2013/0220 (delivered 30th June 2014) Ramdhani J (Ag.) described at [12] the substantially similar test of "reasonable and probable cause":

The law gives the police the right to detain and or arrest anyone upon reasonable and probable cause that that person has or is about to commit an offence. The test as to whether there is reasonable and probable cause is both subjective and objective. The perceived facts must be such as to allow the reasonable third person and actually cause the officer in question to suspect that the person has committed or is about to commit a crime. It does not matter if the information available to the police leads equally or more to a view that the person may be innocent of the offence, once it leads reasonably to a conclusion that he may have committed, or is about to commit the offence, that is sufficient to found the arrest. The reasonable police officer is assumed to know the law and possessed of the information in the possession of the arresting officer, and would have believed that the claimant was guilty of the offence for which he was arrested. The term 'reasonable suspicion' relates to the existence of facts at the time. It does not relate to a perception of the law.

- [85] Based on the Court's assessment of the evidence, a reasonable police officer would not have suspected the Claimant to have committed an act of domestic violence, far more an act of domestic violence that was serious enough to warrant an arrest under s.18 (4). In arresting a person for a cooling off period under s.18 of the DVA, a police officer is required to take into account the seriousness of the act which constitutes the alleged act of domestic violence and whether there is any need for a cooling off period. The Defendant's evidence is that the alleged assault occurred within the context of preventing Ms. Mitchell from entering the Claimant's apartment. Even assuming that Ms. Mitchell did report that the Claimant had pushed her out of his apartment, this without more would not have led a reasonable prudent police officer to believe that the Claimant was guilty of common assault for the following, among other reasons: (a) Ms. Mitchell and the Claimant did not share a household. The Claimant was entitled to keep any person who did not reside at his apartment and whom he did

not consent to be there, out of his apartment providing he used such force as was reasonable and proportionate in the circumstances. There was no evidence that the Claimant had acted unreasonably or disproportionately in keeping Ms. Mitchell out of his apartment; (b) There was no evidence that Ms. Mitchell had complained of sustaining any injuries from her encounter with the Claimant or that the BPU officers observed any injuries on Ms. Mitchell on that night; (c) there was also no evidence of any alleged prior complaint of domestic violence by the Claimant against Ms. Mitchell. The undisputed evidence was that at the time the BPU officers arrived at the Claimant's apartment, it was quiet in the apartment and Ms. Mitchell was in the police vehicle.

[86] The preponderance of the evidence suggests that the anger demonstrated by the Claimant on that night was directed at the police after and because they had forcibly entered his apartment without a warrant. The preponderance of the evidence also suggests the Claimant's arrest was in response to the Claimant's challenge to the police officers' forcible entry into his apartment without a warrant. There was no evidence to suggest that had the Claimant not been arrested, he would have pursued Ms. Mitchell to her home.

[87] The Court accepts the evidence of the Claimant that at the time he was arrested no reason was given for his arrest and that it was only when he asked the reason for his arrest while being transported to the RTPS that he was told by one of the officers that since they had forcibly entered his home they had to arrest him. The proposition espoused in **Christie v Leachinsky**¹⁵ that a person being arrested must be told the true reason therefor in circumstances where he is not caught red-handed remains good law. Failure to inform that person of the reason or true reason for his arrest will render the arrest unlawful.

[88] On the strength of foregoing, the Court finds that the Claimant's arrest was wrongful. *A fortiori*, the imprisonment flowing from his unlawful arrest was also unlawful.

¹⁵ [1947] UKHL 2

Malicious Prosecution

- [89] The ingredients of malicious prosecution are stated in **Clerk and Lindsell on Torts** 21st Ed, page 1182, paragraph 16-09¹⁶:

"In an action for malicious prosecution the claimant must show first that he was prosecuted by the defendant, that is to say, that the law was set in motion against him by the defendant on a criminal charge; secondly, that the prosecution was determined in his favour; thirdly, that it was without reasonable and probable cause; fourthly, that it was malicious. The onus of proving every one of these is on the claimant. Evidence of malice of whatever degree cannot be invoked to dispense with or diminish the need to establish separately each of the first three elements of the tort."

- [90] A claimant has a heavy burden to discharge in proving malicious prosecution because of the combination of the requirements to prove not only the absence of reasonable and probable cause, but also of malice. [Per Lord Toulson in **Willers v Joyce** [2016] UKSC 43 at para 56].

- [91] In the Court of Appeal case of **Sandra Juman v The Attorney General of Trinidad and Tobago**¹⁷ Rajnauth JA (as she then was) stated that test of reasonable and probable cause in malicious prosecution is whether the prosecutor believed that there was a case fit to be tried and the circumstances would have led an "ordinarily prudent and cautious" man to conclude that the person charged was probably guilty. A mere belief in the truth of the charge is not enough to protect the charging officer.¹⁸ On appeal, the Privy Council approved and summarized Rajnauth JA's statement of the test as "whether the charging officer believed that there was a case fit to be tried and whether there was objectively evidence to justify such a belief"¹⁹.

- [92] The Privy Council also reiterated the definition of malice²⁰ described in its earlier judgment in **Willers v Joyce** at para 55:

"As applied to malicious prosecution, it requires the claimant to prove that the defendant deliberately misused the process of the court. The most obvious case is where the claimant can prove that the defendant brought the proceedings in the knowledge that they were without foundation... but the authorities show that there

¹⁶ At [22] of **Erastus Laville v Avalon Anthony et al** SKBHCV2015/0001

¹⁷ Civil Appeal 22 of 2009

¹⁸ At para 9

¹⁹ [2017] UKPC 3 at paras 10 and 13

²⁰ Juman at para 18

may be other instances of abuse. A person, for example, may be indifferent whether the allegation is supportable and may bring the proceedings, not for the bona fide purpose of trying that issue, but to secure some extraneous benefit to which he has no colour of a right. The critical feature which has to be proved is that the proceedings instituted by the defendant were not a bona fide use of the court's process."

- [93] In **Glinski v McIver** [1962] 1 ALL ER 696 at 700 Viscount Simmonds stated that *"though from want of probable cause malice may be and often is inferred, even from the most express malice, want of reasonable and probable cause, of which honest belief is an ingredient, is not to be inferred."*
- [94] In **Juman**²¹, Lord Toulson noted that *"[a] failure to take steps which it would be elementary for any reasonable person to take before instituting proceedings might in some circumstances serve evidentially as a pointer towards deliberate misuse of the court's process, but sloppiness of itself is very different from malice."*
- [95] In the case at bar, the Defendant does not dispute the presence of the first two ingredients of the tort of malicious prosecution. The Defendant however disputes that there was lack of reasonable and probable cause and malice.
- [96] The Court does not accept the evidence of Sgt. Francis that the Claimant admitted to assaulting Ms. Mitchell. The Claimant disputes this. The Court found the Claimant to be a credible witness. Having considered all of the evidence, including the fact that Sgt Francis placed the Claimant and Ms. Mitchell in the same vehicle after the Claimant was arrested and also failed to complete a Domestic Violence Report in respect of the complaint of Ms. Mitchell, the Court holds that Sgt Francis, the charging officer, did not honestly believe that there was a case of assault against the Claimant fit to be tried. The Court is also of the considered view that the circumstances would not have led a reasonably prudent and cautious police officer to conclude that there was a case of common assault against Ms. Mitchell fit to be tried. The Court refers to paragraph 85 above.
- [97] The absence of reasonable and probable cause together with the undisputed evidence that Sgt. Francis did not seek to obtain a statement from either Lamoy Minot or Mira Turnbull as to what they

²¹ Para 19

witnessed, if anything, between the Claimant and Ms. Mitchell, leads the Court to the inference of malice of the part of Sgt. Francis in preferring the charge of common assault against the Claimant. Sgt. Francis was not happy about the Claimant's refusal to respond to the police officers' knocks and call outs which, according to the Defendant's case, was for more than 20 minutes, and his forceful challenge to their entry into his apartment without a warrant. In the Court's view, Sgt. Francis' motivation in prosecuting the Claimant was not a desire to bring him to justice but rather the desire to demonstrate to the Claimant who was in control and teach the Claimant a lesson.

- [98] The Claimant has established the third and fourth elements of the tort of malicious prosecution and has therefore made out his case.

DAMAGES

- [99] The Claimant seeks special, general and vindictory damages.

Vindictory damages

- [100] In the United Kingdom vindictory damages were awarded in limited cases of defamation, false imprisonment and breach of privacy. The award of such damages in the common law now stands rejected.²²
- [101] The Court agrees with the submission of the Defendant that an award for vindictory damages is usually made in public law cases where there is a breach of the Claimant's constitutional right. This was recognized in **Attorney General of Saint Christopher and Nevis v Carmel Bernadette Agnes McGill et al** SKBHCVP2020/0024 (delivered on 24 November 2021). There the Court of Appeal noted that in these public law cases such award is intended not to compensate for damages flowing from the wrong, but to mark the wrong. The Privy Council decisions where awards of vindictory damages have been made all concern the breach of a constitutional right mainly as a result of gross misconduct by a police officer.²³

²² **Mc Gregor on Damages**, Twentieth Edn. Chapters 17-002 – 17-012

²³ See **Mc Gregor on Damages**, Twentieth Edn, Chapters 17-013 – 17-016

- [102] This is a private law claim where the available remedies in private law are adequate to address the unlawful actions of the police officers. The claim for vindictory damages is therefore refused.

General damages

- [103] Rule 8.6(3) of **CPR 2000** provides that a claimant who seeks aggravated and/or exemplary damages must say so in the claim form. The Claimant did not request any of these damages in his pleadings and the Court will not entertain the request for exemplary in his submissions.²⁴
- [104] The Claimant invited the Court to make a global award of US\$200,000.00, with the following breakdown: US\$100,000.00 for unlawful search, US\$50,000.00 for wrongful arrest and false imprisonment and US\$50,000.00 for malicious prosecution. The Defendant suggested a global award between US\$10,000.00 and US\$15,000.00 for unlawful search, wrongful arrest and false imprisonment. The Defendant did not suggest any figure for malicious prosecution.
- [105] The Court is guided by the principle long applied by our courts that awards of damages must be consistent. Barrow JA, as he then, in **The Attorney General of Antigua and Barbuda v The Estate of Cyril Thomas Bufton et al** [2006] ECSC No. 12 (delivered 6 February 2006) stated as a basic principle of the law of damages that,:

“similar damage must receive a similar award of damages otherwise awards are likely to be seen as arbitrary and, therefore, unjust: this is the reason why courts strive to be consistent in the awards that they make.”

- [106] In the case of **Carmel Bernadette Agnes McGill** (supra) at [50] Michel JA stated:

“In the quest for consistency in awards of damages by the courts, it must be appreciated that consistency in awards should not necessarily result in an identical amount as that previously ordered by the same court, but rather in an equivalent amount.”

Unlawful Search

- [107] In **Cardon Johnny v The Attorney General of the British Virgin Islands** BVIHCV2020/0098 (delivered on 16 June 2021), the Claimant's body, pockets and mobile phone were unlawfully

²⁴ Skeleton Submissions filed on 1 December 2022

searched and his mobile phone was seized for an undisclosed period of time. The court awarded the sum of US\$2,500.00 for unlawful search and seizure.

[108] In **Nathan Thomas** (supra) Glasgow J awarded the global sum of EC\$7,000.00 for wrongful arrest and unlawful search in circumstances where the claimant was restrained for a few minutes whilst his backpack was being searched.

[109] In **Matthew McMillan v Alonzo Carty et al** SKBHCV2017/0282 (delivered 28th October 2019, reissued on 13th November 2019) the claimant was awarded the sum of EC\$13,000.00 for the unlawful search and seizure of his bags, his USB devices, laptop and 2 mobile phones. The claimant's bags were searched twice within his sight, but the electronic devices were taken away from him for approximately 5 ½ hours and the Court inferred that they too were also unlawfully searched.

[110] In **Shayne Richardson v The Attorney General of Anguilla et Anr** AXAHCV2008/0012 (delivered 7th July 2009), the claimant was awarded the global sum of \$6,000.00 for unlawful search and assault. The search was described as "fairly perfunctory...a single tap to the outside of each of the claimant's front trouser pockets." The evidence was that the claimant suffered some pain, "though no bruising or other physical sign of trauma to his neck and throat or any other part of his body".

[111] In the case at bar, the unlawful search was of the Claimant's home in the middle of the night. The police officers did not search every room of the Claimant's apartment or go through his belongings. They forcibly entered his apartment and ordered him to lead 2 police officers to his bedroom where the baby was sleeping. While none of the cases cited above involve similar facts, they are nonetheless helpful in demonstrating the range of damages the courts have awarded for unlawful search in recent times. Considering the particular facts of the case at bar, an award of US\$7,500.00 appears reasonable to this Court.

Wrongful arrest and False Imprisonment

[112] In **Wakeem Guishard v Attorney General of BVI** BVIHCV2016/0319 (delivered 4th October 2018) the claimant was arrested on suspicion of murder and imprisoned for a period of approximately 23 months. The evidence was that he endured very harsh conditions during his imprisonment which

lasted for a period of about 23 months. On the first day of his detention he was taken to 2 different police stations and had to sleep on plywood beds. He was not allowed to take a bath within the first 3 or 4 days of his detention. He spent most of his time at the prison in the "A" wing where inmates were on lockdown for 23 hours. He witnessed "many fights and bloody attacks". The accepted evidence was that the claimant had never been arrested and imprisoned before.

- [113] The Learned Master applied the two step process in awarding damages under this head: the first step was to arrive at a reasonable lump sum (not calculated at an hourly rate) to compensate the claimant for the initial shock of the arrest and detention and the second step was to arrive at a daily rate of compensation for the remaining period of detention after the first day. The Learned Master awarded the claimant the sum of \$20,000.00 as compensation for the initial shock. The Court of Appeal²⁵ confirmed the Learned Master's approach and upheld that award. The appeals court stated that the initial shock element requires taking into account,

*"the manner in which the appellant was arrested, his initial imprisonment, the conditions under which he was detained, any harsh or inhumane treatment meted out to him at the hand of police officers, any undue publicity attendant with his arrest and detention, any affront to his dignity. The amount of compensation for this element would naturally depend upon the particular facts and circumstances of each case and the quantum of any comparable awards for initial shock. An award for this element of damages is on a lump sum basis and not on a daily compensatory basis, which is quintessentially what applies under step 2."*²⁶

- [114] Both the Learned Master and the Court of Appeal in **Wakeem** cited with approval the statement of de la Bastide CJ in the Trinidadian case of **Millette v McNicholls**²⁷ that "[t]he extent of the compensation for the initial shock will depend on the facts of the case (and not the length of the imprisonment)...".

- [115] In **Cardon Johnny** (supra) the claimant was arrested at his workplace for theft of a vehicle and placed in handcuffs. While the claimant was in handcuffs, the police searched vehicles at his workplace and then drove him to his home where, at his request, his landlady brought out certain documents for the police to view. The claimant was then transported to the police station where he remained for several hours. During his detention, he was not questioned, and he was not offered anything to eat or drink

²⁵ BVIHCVAP2018/0006 (delivered on 2 October 2020)

²⁶ [39]

²⁷ Civil Appeal No. 14 of 2001

despite having informed the officers that he would experience migraines if he did not eat. The claimant's detention was for a total period of 7 ½ hours. The Learned Master awarded the claimant the sum of US\$20,000.00.

- [116] In the case at bar, the Claimant was at his home retired for the night with his infant son sleeping next to him when the police, some of whom bore guns, disrupted his sleep, pulled him out of his apartment, slammed him against his vehicle, arrested him and placed him in handcuffs. The suggestion was made for him to be tazered. Whilst in handcuffs, he was transported to the RTPS in the same vehicle in which his child and his child's mother were occupants. He was kept at the RTPS for approximately 14 hours before he was released. In the Court's view, the facts here do not justify any greater or lesser quantum for initial shock than the sum awarded in **Wakeem** and **Cardon Johnny**. Therefore, the sum of US\$20,000.00 is awarded for the Claimant's wrongful arrest and false imprisonment.

Malicious prosecution

- [117] In the case of **Clark v Chief Constable of Cleveland Police** [1999] EWCA 1357²⁸, Roch LJ identified 3 aspects of compensation for malicious prosecution:

*"First, there is the damage to a person's reputation. The extent of that damage will depend on the person's actual reputation and upon the gravity of the offence for which he has been maliciously prosecuted. The second aspect is the damage suffered by being put in danger of losing one's liberty or of losing property. Compensation is recoverable in respect of the risk of conviction. McGregor on Damages 16th edition paragraph 1862- considers that an award under this head is basically for injury to feelings, unless there has been a conviction. The third aspect is pecuniary loss caused by the cost of defending the charge."*²⁹

- [118] In **Wakeem**, the claimant was acquitted of a murder charge after 3 trials and the passage of 2 years. Under this head, the Court of Appeal substituted the Learned Master's award of US\$25,000.00 with an award of US\$50,000.00 holding that the Learned Master had failed to take into account the element of damage to the appellant's reputation and in all the circumstances, including the fact that the appellant had been subjected to 3 trials for the charge of murder, the award of \$25,000 was too low.

²⁸ Discussed in **Manley v Metropolitan Police Commissioner** [2006] EWCA Civ 879 at para 23

²⁹ **Saville v Roberts** (1699) 1 Ld. Raym. 374 at 378 cited **Mc Gregor on Damages**, Twentieth Edn. page 1536 paras 44-002.

[119] In **Dexter Smith v Attorney General et al**, GDAHCV2008/0328 (delivered on 7 October 2010) the claimant was charged with the possession, importation and trafficking of a controlled drug. His prosecution lasted for a period of 3 years. The claimant was awarded the sum of \$40,000.00 as general damages and \$6,000.00 as special damages for legal fees incurred in defending the charges.

[120] The charge of common assault is not a serious charge as compared with the charges of murder or possession/importation/ trafficking of a controlled drug. Under the **Criminal Code (Amendment) Act**, No. 15 of 2018, on conviction of common assault a person is liable to imprisonment for a term not exceeding three years or to a fine not exceeding US\$3,000.00, or both. A criminal conviction of any kind or degree may affect one's reputation in some quarters. The evidence is that the Claimant had been convicted of two counts of common assault in 2013, which were not of a domestic nature. It took 14 months before the Office of the Director of Public Prosecutions discontinued the Claimant's prosecution for common assault on 7 October 2019. Taking all of the above into account, the Court considers that an award of US\$5,000.00 is reasonable as general damages under this head.

Special damages

[121] The Claimant claimed the sum of US\$3,000.00 as special damages for legal fees incurred in defending the charge of common assault at the Magistrate's Court but produced no receipt or invoice as proof of same. In the absence of such proof and any details of how the prosecution proceeded, including the number of appearances he made at the Magistrate's Court, the Court awards a nominal sum of US\$1,500.00 as special damages for legal fees.

INTEREST AND COSTS

[122] In **Wakeem**, the Court of Appeal confirmed that a court in the BVI has jurisdiction to award pre-judgment interest both on special and general damages and that such damages are to be awarded on loss or damage already incurred at the time of the filing of the claim. The court therefore ordered the award of pre-judgment interest on the full quantum of damages assessed to be awarded to the claimant for wrongful detention, false imprisonment and malicious prosecution.

[123] The Claimant is awarded pre-judgment interest on the full quantum of the damages awarded to him at the rate of 3 per cent per annum from 6th August 2018 to the date of delivery of this judgment. Post judgment interest applies at the statutory rate of 5% per annum from the date of judgment.

[124] The Defendant shall pay the Claimant prescribed costs.

[125] **The Court therefore orders the following to be paid to the Claimant:**

- (a) Damages for unlawful search in the sum of US\$7,500.00;
- (b) Damages for wrongful arrest and false imprisonment in the sum of US\$20,000.00;
- (c) Damages for malicious prosecution in the sum of US\$5,000.00;
- (d) Nominal damages for legal fees in the sum of US\$1,500.00;
- (e) Pre-judgment interest on the global sum from 6th August 2018 to the date of this judgment at the rate of 3% per annum;
- (f) Statutory interest (5% per annum) from the date of judgment until payment in full;
- (g) Prescribed costs.

[126] The Court is grateful to Counsel for the manner in which the trial was conducted and their helpful written submissions.

**Heather Felix-Evans
High Court Judge (Ag.)**

By the Court


Registrar