

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

In San Fernando

Claim No. CV2016-02559

Between

Amatus Chuniesingh

Claimant

And

Sergeant Wendell Williams

The Attorney General of Trinidad and Tobago

Defendants

Before the Honourable Madam Justice Eleanor J. Donaldson-Honeywell

Delivered on: May 20, 2019

Appearances

Ms. Deborah Jean-Baptiste-Samuel, Attorney at Law for the Claimant

Mr Brenston Francois and Ms. Ryanka Ragbir, Attorneys at Law for the Defendants

JUDGEMENT

A. Introduction

1. The Claimant seeks damages for injuries and loss sustained due to an incident when he says he was physically ill-treated. This occurred during a purported arrest of the Claimant by a Defence Force Officer, namely Sergeant Wendell Williams, the 1st Defendant herein.

2. The Claimant was a long serving officer of the Defence Force at the time of the incident and retired as a Corporal in 2015. He alleges that the 1st Defendant committed assault and battery when he grabbed him by the arm and waist belt and dragged him some distance away, causing intense pain and injury to him until he successfully resisted by holding on to a post. Thereafter, the 1st Defendant caused further pain to the Claimant by continuing to try to pry him off the post. The incident ended when a Senior Officer commanded the 1st Defendant to release the Claimant, who was then attended to by the Defence Force medical personnel.

3. The Claimant further contends that by these actions there was a negligent breach of the duty of care towards him by the 1st Defendant and his employer, the State. The Claimant's immediate employer was the Trinidad and Tobago Defence Force. Accordingly, he too is an employee of the State. As the 1st Defendant and other officers involved in the matter were also employees of the State, the Claimant contends that the State is vicariously liable for the alleged Negligence. The relevant Particulars of Negligence pleaded are:
 - a) Failure to act in compliance with proper military conduct contrary to s. 73 and s. 74 of the Act;
 - b) Failure to act in a proper professional manner when dealing with the Claimant;
 - c) Failure to observe protocols when dealing with the Claimant who is a corporal;
 - d) Failure to provide a safe working environment;
 - e) Failure to observe disciplinary protocols and exercising an abuse of power;
 - f) Failure of the Defence Force to act upon a report of such an incident.

4. The Claim is defended on the basis that, (a) the 1st Defendant acted properly in all respects in arresting the Claimant, the Defence Force having provided a safe system for discipline on the job which was applied by the 1st Defendant and maintained a safe work environment and (b) that the Claimant has failed to prove that he sustained any injury or loss arising from the incident.

5. The hearing of oral evidence at Trial concluded on February 20, 2019. Thereafter the parties were directed to file written closing submissions which were concluded on April 30, 2019.

B. Background facts

6. To an extent the basic facts are not in dispute on the pleadings filed by both sides. The parties are in agreement that on October 26th, 2012 the Claimant, after hearing a command from the 1st Defendant, stood still and at attention. Another officer, Corporal Mitchell was present. There was a verbal exchange between the Claimant and the 1st Defendant. The 1st Defendant then wanted to have the Claimant “put in bed space” and commanded Corporal Mitchell to do so.
7. The act of putting an officer in “bed space” was explained by Corporal Mitchell under cross examination. He said it is a form of close arrest for Junior Non Commissioned Officers [“NCOs”] including corporals, who would be put to remain by their bed space with an officer to stand watch. Corporal Mitchell refused to carry out this command in relation to the Claimant because he said the Claimant was senior to him. The Claimant made a comment agreeing that this was so.
8. The 1st Defendant then held the Claimant by his arm and his waist belt from behind and proceeded with him for around 20ft, eventually carrying him down a few steps. The Claimant called out and was shouting while being carried in this manner. Upon reaching down the steps and at the CO’s carpark the Claimant held on to a post. The 1st Defendant attempted to pry his hands off the post, unsuccessfully. Other soldiers gathered after much shouting from the Claimant. A senior officer, Sergeant Major Edwards, told the 1st Defendant to release the Claimant and go to the Sergeant’s Mess. The 1st Defendant did so immediately. The Claimant thereafter had medical attention on the same day.
9. The Claimant had commenced his Senior NCO CADRE a few weeks before the incident. The said CADRE, which started on October 15, 2012 was a training course involving physical skills as well as academic subjects such as military law and

communications. On completion of the CADRE on December 17, 2012, successful participants would be eligible for promotion, provided vacancies existed. It is not in dispute that the Claimant was not successful in the CADRE. His results are exhibited at "C" to the Amended Defence filed on October 27, 2017.

10. Arising from the incident the Claimant was charged with Military Offences for his alleged insubordination. He was found guilty and disciplined. However, the said proceedings are subject to a pending review.
11. Although the aforementioned basic aspects of the case are agreed, the parties pleadings reveal diametrically opposed accounts as to the way the incident unfolded. The Claimant's pleading is that he was ill due to a headache that day. He was en-route from the medical department heading to the Orderly room to get a medical signed. Then he had the encounter with the 1st Defendant and Corporal Mitchell.
12. The Defence pleaded is that the Claimant passed the 1st Defendant and Corporal Mitchell en-route upstairs to the office of the Commanding Officer ["CO"]. While the Claimant was upstairs, it is pleaded that Corporal Mitchell told the 1st Defendant that the Claimant was required to attend Court that day in a matter and was supposed to have a commissioned officer accompany him there, however no-one attended and he was upset.
13. The pleaded Defence is that the Claimant then stormed out of the CO's Office and came downstairs visibly upset and mumbling. This is when the 1st Defendant says he first spoke to him. The pleading is that it was an inquiry of concern on the part of the 1st Defendant regarding what was the matter.
14. Another fact that is not agreed is the number of times the 1st Defendant spoke to and called to the Claimant before he responded. The Claimant's pleading is that he was moving fast through the drizzling rain, enduring a headache when the 1st

Defendant approached him from behind and asked why he did not stand still when called. The Claimant says this was the first time he heard the 1st Defendant.

15. The Defence pleaded is that the Claimant walked passed him when he was inquiring as to what was the matter. Thereafter, the 1st Defendant called out in a loud voice "Corporal Chuniesingh stand still". The call was made three times while the Claimant continued walking. On the final call the 1st Defendant had followed the Claimant almost to the Orderly room where he was headed. On the final instruction the Claimant stood still.
16. The Claimant's case is that the 1st Defendant boasted of his status as the "biggest Regimental Police "RP" on the compound", then grabbed him roughly after Corporal Mitchell refused to arrest him. The Defendant's pleaded case seeks to present the 1st Defendant's action in a more positive light by indicating that he left the Claimant twice to go to the Orderly room and meet with CO, Major Dave Maharaj. The pleading is that Major Maharaj ordered the 1st Defendant to proceed with placing the Claimant under arrest.
17. The Defence as pleaded contends that the Claimant was insubordinate to the 1st Defendant, was offering violence and gesticulating with hand movements near the 1st Defendant's face while saying he didn't want to speak with him but with the CO.
18. The Defence further pleads that after the incident the Claimant walked away some 200 to 300 feet to the medical department. The Claimant's case is that he was stooped on the rain soaked ground, by the post after the incident. Officers came to his assistance and the medic attended to him at the scene.
19. The Claimant pleads that he was injured and has seen specialists who confirm this. He attached medical reports which indicate lower back pain and exacerbation of an injury sustained to his back some four years prior to the incident. The medical

reports attached at “A” and “C” to the Statement of Case are dated January 4, 2013, January 18, 2013 and February 21, 2013.

20. The Claimant’s injuries are also in dispute on the pleadings in that the Defendant contends that the medical reports relied upon were dated too long after the incident for the diagnosis to be related to it. However, the medical report of Dr Persad dated February 21, 2013 sets out the Claimant’s contention that he was attended to by the medic on site of the incident and saw army doctors thereafter from time to time. Eventually, due to increasing pain he went to the Arima Hospital. The said visit is supported by a report dated November 23, 2012.

21. The Claimant’s pleading is that he took sick leave. The certificates attached to his Statement of Case indicate intermittent periods of leave including in November 2012, December 2012 and January 2013. He continued in the CADRE but could not complete it due to injury and pain. As a result he claims to have retired without having the opportunity for promotion and the higher retirement benefits that would go with it. The Defendant pleads that the Claimant wanted to stop participating in the CADRE before the incident.

C. Issues

22. The issues to be determined, as concisely set out in the submissions of Counsel for the Defendants, are as follows:

- a) Whether the Claimant has proved on a balance of probabilities that the 1st Defendant committed assault and battery against him?
- b) Whether the Defendants owed to the Claimant a duty of care?
- c) Whether the Defendants breached that duty of care?
- d) Whether that breach caused the Claimant to suffer personal injuries, loss and damage?
- e) Whether the Claimant should be awarded general damages and if so, how much?
- f) Whether the Claimant should be awarded special damages and if so, how much?

g) Whether the Claimant is entitled to aggravated and exemplary damages?

D. Submissions on law

Assault and Battery

23. The law governing the first issue outlined above, as to whether the tort of assault and battery was committed against the Claimant, is summarised with clarity in the submission filed by Counsel for the Defendant. Reference is made to **Youk-See, Youk-See and Baptiste v the Attorney General of Trinidad and Tobago CV 2011-04459** where Des Vignes J, as he then was explained that a person commits an assault if he intentionally or recklessly causes another person to apprehend the application to his body of immediate, unlawful force. An assault can be committed by words alone if the words cause the necessary apprehension. The requirement of the apprehension of immediate force is satisfied if the prosecution proves a fear of force at some time not excluding the immediate future. A person commits battery if he intentionally or recklessly applies unlawful force to the body of a person. The slightest degree of force, even mere touching, suffices.
24. In the instant matter it is not in dispute that there was intentional touching of the Claimant by the 1st Defendant. So the element of application of force has been established. However, in order to prove liability for assault and battery it must further be established that the use of force was unlawful.
25. Counsel for the Defendant underscores, citing **Halsbury's Laws of England, Vol 4, para 103**, that the use of force to effect lawful arrest can be a defence to assault and battery. A person may use such force as is reasonable. Therefore, as long as the force used is reasonable, there is no assault or battery. Evidence of reasonableness is however required and in **Farrell v. Secretary of State for Defence** [1980]1 All E.R. 166., Viscount Dilhorne clarified that,
- "In each case when such a defence is put forward the question to be determined is whether the person who is accused or is sued used such force as was reasonable in the circumstances in which he was placed in the prevention of*

crime or in bringing about a lawful arrest of an offender or suspected offender..."

26. In further seeking to support that the Defence of reasonable use of force to carry out a lawful arrest applies in this case, the Defendant cites the provisions of **Sections 43, 44, 45, and 47 of the Defence Act Chapter 14:01**. The said sections provide that certain actions, including defiance of authority, disobedience to lawful commands and threatening or insubordinate language to a superior officer, are offences. When those offences are committed by persons who are subject to Military Law they can be convicted after a court martial trial.

27. The lawfulness of the actions of the 1st Defendant is argued by Counsel in submissions to be based on the **Trinidad and Tobago Regiment Standing Orders ["Standing Orders"], section 3 – Warrant Officers, Non-Commissioned Officers and Men**. In particular **order 313** provides that:

a. The Provost Sergeant will be responsible to the Adjutant Svc Sp Bn for the discipline, efficiency and turn out of the Regimental Police and, with their assistance, he will be responsible for the general order and good behaviour of all soldiers in barracks. "

28. In the same Standing Orders **Section 4 – Discipline, Order 404** provides that:

"A soldier who commits an offence will either be warned that he is on a charge or will be placed in open or close arrest by an officer or NCO (non-commissioned officer).

a. A soldier will normally be warned that he is on charge. He will be placed in open arrest on those occasions when it is desired that he should be confined to barracks but the offence does not warrant his being in close arrest.

b. A soldier will be placed in close arrest immediately for the following offences:

(1) Insubordination"

29. **Order 409** states that *“In the event of it being necessary to arrest an officer, he will be placed under escort of another officer of the same rank if possible and will be confined to his quarters or to a bedroom in the Officers' Mess.”*
30. The applicable law is set out with commendable thoroughness and clarity by Counsel for the Defendant. However, in order for the law cited to apply in the Defendants' favour there would need to be a finding on my part that the 1st Defendant's version of events was credible as to the lawfulness of the arrest due to the Claimant's alleged insubordination and his offering violence. A finding that he took only reasonable steps in carrying out the arrest would also be required for the Defence to succeed.
31. In refuting the possibility that the arrest steps were reasonable, Counsel for the Claimant also relies on the Standing Orders. She underscores that pursuant to **orders 405 to 409** the procedure to be followed in arresting an officer, where an offence is committed in the day and off parade, does not involve necessarily the personal hands on approach adopted by the 1st Defendant. All that **Order 313** gives the 1st Defendant, as Provost Sergeant, is overall responsibility for discipline, general order and good behaviour of officers.
32. As it relates to an arrest **Order 406** provides that the procedure is: *“The WO or NCO orders the first two men available to form the escort and himself marches the offender to the Guardroom. The remaining procedure will be at para 405 above”. That procedure set out at Order 405 mandates that the NCO who initiated the arrest will “keep well in rear of the escort, which is not to be marched in file”.*
[Emphasis added.]
33. The procedure essentially is one of marching orders under guard of two escort officers. It makes no stipulation for the arresting officer grabbing hold of the offending officer. Instead, he is to march behind the escort. The arrest ends with the offending officer being handed over at the guardroom to the Provost or Guard Commander.

34. During the proceedings, having no personal experience of the Military work environment, clarification was sought by the Court as to whether rough treatment of junior officers was part of the expected lawful course of things in the Defence Force. Counsel for the Claimant has underscored that this is not so by reference to **Sections 73 and 74 of the Defence Act**. They provide as follows:

“Section 73

Where

(a) an officer subject to military law strikes or otherwise ill-treats an officer subject to service law of inferior rank or less seniority or another rank subject to service law: or

(b) a warrant officer or non-commissioned officer subject to military law strikes or otherwise ill-treats a person subject to service law, being of inferior rank or less seniority

He is liable, on conviction by court-martial, to imprisonment for two years or less punishment

Section 74

Any person subject to military law who is guilty of disgraceful conduct of a cruel, indecent or unnatural kind is liable, on conviction by court-martial, to imprisonment for two years or less punishment.”

35. Based on these sections of the Act it is clear that any ill-treatment, disgraceful and or cruel conduct towards a junior officer would not be considered reasonable in the context of an arrest under Military Law in the Defence Force work environment.

Negligence

36. There is no difference between the parties as to the facts to be established to prove Negligence. A useful starting point is the definition of Negligence provided in **Volume 97 Halsbury’s Laws of England (5th Edn) (2015) para 497** as follows:

“Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which it can be reasonably foreseen may cause harm to the claimant's interests in so far as they fall within the scope of the duty. The claimant must prove that the defendant's negligence was a cause of the harm.”[Emphasis added]

37. The Defendants have conceded, in submissions, that the 2nd Defendant owed a duty of care to the Claimant and was vicariously liable for the acts of the 1st Defendant that were done in the course of his duty. There can be no basis for contending that harm to the Claimant is not reasonably foreseeable in the carrying out of an arrest using the force of holding him by the arm and waist belt.
38. The first of two remaining points in contention is whether the 1st Defendant and his employer the State failed to exercise the care which the circumstances of the arrest required, so as to avoid acts that could foreseeably harm the Claimant.
39. On this point of breach of duty of care, the law governing Employer's Liability for Negligence is relevant. As set out by counsel for the Defendant in submissions, the Employer's duty of care extends to: safe staff, safe equipment, safe place of work and a safe system of work. Of relevance to this claim are safe staff, safe place of work and a safe system of work.
40. The Defendants rely on the Standing Orders and contend that the Claimant committed military law offences, that the correct arrest procedure was followed in relation to him and that he was not ill-treated. Further they contend the 1st Defendant exercised due care by going to the CO to seek directions to continue his arrest. Therefore they argue, there could be no breach of the duty of care.
41. The Claimant on the other hand, in contending that there has been a breach by the Defendants of the duty of care to him, relies once more on the Standing Orders. From the Claimant's perspective the Standing Orders set the standard of

care to be adhered to by the 1st Defendant in carrying out the arrest. The procedure is geared to ensuring safe staff, a safe place and system of work as it relates to disciplining officers.

42. To the extent that the 1st Defendant used a hands on method not provided for in the Standing Orders and did not utilise the specified procedure of an escort with marching orders, there was a breach of the duty of care. The Claimant contends further that the failure of the CO to respond appropriately to the screaming of the Claimant added a further element of breach of the duty to provide a safe place of work.

43. The second remaining element of negligence, which is whether the Claimant was harmed, will be addressed more fully herein when addressing the analysis of the evidence and the assessment of damages. There is a factual issue as to whether the Claimant's CADRE failure resulting in non-eligibility for promotion was due to the incident.

44. As to the medical evidence, the Defendant in submissions highlights the Claimant's prior back injury to shed doubt on whether any harm he suffered was caused by the incident. Importantly however, counsel for the Claimant has cited relevant well established principles in **McGhee v National Coal Board (1972) 3 All ER 1008**, as authority that that causation can be proved if the Defendants' negligence materially increased the risk of serious injury, even if there was another or prior vulnerability.

45. Also of relevance is the eggshell skull principle, cited by Counsel for the Claimant, whereby Defendants take Claimants as they find them. It means that there can be liability for Negligence even if the damage is worse than the Defendants expected, due to weakness or pre-existing condition or infirmity of the Claimant. This was established in **Smith v Leech Brain & Co Ltd (1962) 2 QB 405**.

E. Evidence and analysis

46. The evidence before the Court included the Claimant's Witness Statement with the documents attached to it and his cross-examination answers. He brought no supporting witnesses. The Defendants filed Witness Statements of the 1st Defendant, Corporal Mitchell and Major Maharaj, with documents attached. They were also cross-examined.

47. The approach taken herein to assess the evidence and determine the issues follows the oft applied dicta of Lord Ackner in **Horace Reid v. Dowling Charles and Percival Bain** PC App. No. 37 of 1987, page 6. He observed as follows:

"Mr. James Guthrie in his able submissions on behalf of Mr. Reid, emphasized to their Lordships that where there is an acute conflict of evidence between neighbours, particularly in rights of way disputes, the impression which their evidence makes upon the trial judge is of the greatest importance. This is certainly true. However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of witnesses, it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seeing and heard witnesses."

48. Accordingly, in my analysis of the evidence the consideration of demeanour was merely one factor taken into account. The other factors considered as against demeanour and in the round were as follows:

- a) Inconsistencies – within the pleaded case and between the pleadings and the witness statements,
- b) Contemporaneous documents – Whether these supported the pleaded case,

- c) Cross-examination – the extent to which witnesses’ versions of events were bolstered or discredited thereby and
- d) Inherent probability of the contending versions of events or lack thereof.

Demeanour

49. The Claimant’s February 2013 medical report indicates that he then weighed 135 pounds. In Court he appeared to be of average height, very slight build and somewhat frail, as he had difficulty standing. His attire was not very well put together. In giving evidence he was calm, soft-spoken and respectful.

50. The 1st Defendant is of a much burlier, muscular build than the Claimant. He was polished and professional in appearance. Though retired, he exuded full military posture and insisted on his correct title. His manner of responding to questions was somewhat abrasive at times and at others he was on the defensive, seeming to doubt the merit of his own case.

51. The second witness for the Defendant was Corporal Mitchell. He was respectful and displayed a great deal of empathy towards the Claimant. He clearly had no confidence in the case for the Defendants but appeared to be testifying in fulfilment of his duty.

52. The third Defence witness Major Maharaj impressed me as a truthful in that he did not volunteer any information about the incident that he did not witness. His approach was a caring one, as he appeared to be concerned for the reputation of the Defence Force and the retired 1st Defendant. He was in attendance to assist, as far as possible, with the case for the defence, without fabricating evidence.

Inconsistencies within pleaded case

53. Although there are few glaring inconsistencies within the pleaded case of the parties, one point of concern relates to the location of the CO during the incident. This is important because the credibility of the averment in the Defence that the

1st Defendant sought orders from the CO to continue the arrest turns on the varying accounts of where the CO was during the incident.

54. The Defendants' pleadings fall short in this regard. In the first instance at paragraph 6(a) and (b) reference appears to be made of the CO in his office upstairs from where the 1st Defendant and Corporal Mitchell were standing and saw the Claimant pass by to go up. Thereafter, at paragraph 6(e) the Defence states that the CO was in the Orderly Room.

55. He could not have been at both places during the incident so from the outset on their own pleadings the Defendants' case is discredited. This aspect of a failing on the part of the Defence, is compounded when later in evidence the 1st Defendant says he met the CO in the Orderly room while the CO's witness statement says he was in his office upstairs.

Inconsistencies between the pleadings and the Witness Statement – i.e. differences from the pleadings and where the evidence does not support the pleadings.

56. The Claimant and the 1st Defendant gave evidence in their witness Statements that was consistent with the Statement of Case and Defence respectively. However, the Defendants' supporting witnesses both contradicted the pleaded Defence as well as the 1st Defendant's evidence.

57. The first of the two supporting witnesses, Corporal Mitchell, firstly contradicted the Defendants' pleadings. He did not confirm in his witness statement that the Claimant came from upstairs or that the 1st Defendant then spoke with him. He merely says that the Claimant entered the room where they were and passed them.

58. He doesn't confirm that he, Corporal Mitchell, told the 1st Defendant anything about the Claimant or his alleged issues with the CO. He does not confirm that the

Claimant was upset or that the 1st Defendant asked him what was wrong. Corporal Mitchell instead just says the 1st Defendant called out to the Claimant "Soldier". No reason for the call is volunteered by Corporal Mitchell but, in one of the few instances where he supports the 1st Defendant's version of events, he says there was no response. There is a difference even in this part of the evidence however, as the 1st Defendant's witness statement says that he first called out to the Claimant by his name.

59. Corporal Mitchell, in his evidence, adds an element to the evidence that is missing from the 1st Defendant's account. He says that after the calls another soldier signalled to the Claimant that the 1st Defendant was calling him. As this was brought to his attention the Claimant stopped walking and stood to attention as commanded.

60. Corporal Mitchell confirms that the Claimant and the 1st Defendant were conversing but says he did not hear what they said. He does not corroborate that he observed any insubordination or offering of violence on the part of the Claimant. Instead he says the 1st Defendant started questioning the Claimant who became upset. Corporal Mitchell confirms that he was then directed to arrest the Claimant but declined to do so based on being of lower seniority to the Claimant. The 1st Defendant disagreed that this was an issue but the Claimant expressed agreement.

61. The 1st Defendant then arrested the Claimant himself by holding him by the arm and waist belt. Corporal Mitchell followed behind while the Claimant was "carried" by the 1st Defendant. After the 1st Defendant released the Claimant Corporal Mitchell says in contradiction to the Defence, that the Claimant remained stooped, holding the post and crying and soldiers came to help him onto a bench. Thus the pleading that the Claimant walked off some 300 feet after the incident is unsupported by Corporal Mitchell's Witness Statement.

62. The Witness Statement of the CO, Major Maharaj in no way corroborates the pleaded Defence and the 1st Defendant's evidence as to the COs alleged involvement in the incident. The CO does not confirm that the 1st Defendant visited him or that he, the CO, ordered continuation of the Claimant's arrest. He says he only knew of the incident because of the screaming he heard from his office. He sent an unnamed officer to check on what was happening. When he heard it was the 1st Defendant dealing with a matter he said he had no reason to question anything further because of the 1st Defendant's rank, position, training and authority for discipline in the camp. As a result Major Maharaj says he was not directly involved in the incident that day.

63. His involvement came later on as presiding officer for the disciplinary proceedings against the Claimant. He found the Claimant guilty of all charges. This was in circumstances where the Claimant was unrepresented, called no witnesses and declined to say anything during the Trial. In Major Maharaj's Witness Statement however, there is confirmation of one aspect of the Claimant's case, namely that the Claimant was running through the drizzle when the incident of his alleged insubordination occurred.

Whether either case is supported by contemporaneous documents

64. There are no contemporaneous documents dated just after the incident on October 26th, 2012 that prove that he was on sick leave from that time. Documents relied on by the Claimant do support however, that he was on sick leave from time to time commencing around November 23, 2012. A sick leave certificate of that date is attached to the Claimant's Witness Statement. The earliest medical reports relied on by the Claimant are dated November 23, 2012, January 4, 2013 and January 18, 2013. The medicals indicate that the Claimant had a prior back injury but record that the said injury flared up due to a work related incident.

65. The case for the Defence purports to rely on documents that are of more assistance in terms of being dated close enough to the incident. On close review

of the documents however, they in my view bolster the Claimant's case more so than the Defendants'.

66. In order to establish that the Claimant is untruthful about his mission at camp that day and that he had planned to opt out of the CADRE, the Defendants cite an Extract from the "Officer Commanding Support Squadron Order to Attend Book" at entry 56-57 dated on the same October 26, 2012 day of the incident. The extract is attached as "DM3" to the COs Witness Statement. It indicates that the Claimant met with his O/C about his concern that no officer accompanied him to the Magistrates Court for a matter he had there.

67. This does not discredit the Claimant's account as the fact that he may have come to the camp to address that issue does not mean that when he was arrested he could not have been on the way from the medic. All "DM3" records is that the claimant was told a time would be set for him to meet the CO. There is no indication that the CO was refusing to meet the Claimant such that he would have been upset as alleged. Further, "DM3" records that the Claimant said he wanted to stop attending the SNCO CADRE. As will be seen later in this Judgment, this was denied by the Claimant.

68. The Defence relies on the Claimant's CADRE results to prove that he failed the CADRE. However, the said failure is not in dispute. The document relied on instead assists the Claimant's case by supporting that he was on sick leave for many days of the CADRE. The document at "DM2" entitled "Senior Non-Commissioned Officer's CADRE 1201 Course Report for October 15 to December 17, 2012" includes comments by the Claimant's assessors, that due to medical and personal issues he could not be taught properly or assessed, in certain subject areas during that period.

69. Finally, the Defendant relies on the charges written up against the Claimant for the alleged actions, in relation to which he was arrested during the incident. Glaringly, the said charges in the document at "DM1" do not include the alleged "offering of

violence.” Accordingly, the most serious aspect of the Claimant’s alleged behaviour that the 1st Defendant claims justified his arrest appears to have been an afterthought on his part.

Inconsistencies under Cross Examination

70. Generally, the Defendant’s case was more adversely affected by the cross-examination than the Claimant’s case. Indeed, the Claimant withstood cross-examination and provided additional information therein in a way that strengthened his case. The Claimant, for example, benefited from the opportunity under cross-examination, to explain why he waited a few months before submitting a report. It was because he was informed that he would be charged. In such circumstances it was understandable that he would exercise caution.

71. The Claimant also refuted the relevance of his dual purpose in visiting Camp Cumuto that day. It was true that he came to see the CO about the magistrates’ court matter. However, the proximate matter he was attending to at the time of the incident was getting a medical signed. He explained that the process to see the CO involves waiting. This, as aforementioned, is supported by what is noted in “DM3”.

72. During the waiting period the claimant says he got a headache and decided to get two Panadol from the medic. The medic said the Claimant needed to take a sick report and get it signed. Hence his mission that day, hustling through the drizzling rain, was not in search of the CO but to get a medical signed.

73. The Claimant’s truthfulness was illustrated when he admitted under cross-examination that the 1st Defendant asked him why he did not stand still. The Claimant was resolute in denying that his response was that he wanted to see the CO and not the 1st Defendant. Reasonably, he explained that he would not have said that because that would not be the answer to the question he was asked. Instead the answer was that “If it is after 8 the special sick report had to be signed by a commissioned officer and he needed a sick certificate.” The Claimant

admitted giving resistance when he was grabbed and as a result the 1st Defendant dragged him along.

74. When pressed regarding the lack of contemporary medical reports the Claimant explained that he was treated at first by the Defence Force Medic. This is credible because even in the Defence it is admitted that the Claimant saw a medic on the day of the incident. The Claimant said the Defence Force may have records of his visit that day and on other occasions before January 2013, when the pain became so severe he attended at the Arima Hospital.

75. The Claimant denied that he had asked to be taken off the CADRE before the incident, rhetorically exclaiming “why should I?” This remained unanswered by anything put forward by the Defence.

76. The only aspect of the Claimant’s case in relation to which he was shaken under cross-examination was regarding mitigation of his alleged loss of promotional opportunities by failing the CADRE due to the injuries from the incident. He was not very forthright as to whether he had made requests for arrangements to be made, such as possibly being allowed to re-sit courses. Accordingly he was discredited as to loss of pension earnings at a higher rate.

77. The first of the Defence Witnesses was the 1st Defendant, Sergeant Williams. Under cross-examination his account did not ring true in many respects. Firstly, he was unable to give a rational reason for ordering the Claimant to stand still. He just said that he did so because the Claimant “looked a little frustrated and not at ease.”

78. He admitted that such a look does not require disciplinary action, when answering questions about why he pursued the Claimant. He could make no comment when asked why the accounts of the other Defence Witnesses differed from his. He admitted that the charges drawn up did not include the “offering of violence.” When it was put to him that the Claimant answered when he heard the 1st

Defendant, stood still and to attention on command, the 1st Defendant said “I can’t say”.

79. Corporal Mitchell was a Defence Witness but he supported the Claimant’s version of events more than the 1st Defendant’s. He appeared to empathise with the Claimant.

80. As an officer with disciplinary duties, Corporal Mitchell agreed with the Claimant’s Attorney under cross-examination that Regimental Police could have been called to assist. He further admitted that calling the Claimant “Corporal” instead of “soldier” may have more readily identified him. Further he concurred that getting the Claimant from one point to another could have been done without laying hands on him.

81. As it relates to the actual incident, Corporal Mitchell did not corroborate that the 1st Defendant was taking the Claimant to his bed space. He said that at that time the Claimant was demanding to be taken to the CO and the 1st Defendant said he could do that.

82. Corporal Mitchell confirmed the Claimant’s account that the medic came to attend to him at the scene of the incident. This contradicted the Defence and the 1st Defendant’s account that the claimant walked 200 -300 feet away after the incident to see the medic.

83. Mitchell admitted that the morning began with the Claimant going to the medic to get a sick leave certificate to be signed. Mitchell denied the 1st Defendant’s evidence that he inquired with concern about how the Claimant was feeling i.e. by asking what’s wrong.

84. The most telling feature of the cross-examination of Corporal Mitchell came at the end when the Claimant’s case was being put to him. In answer to having put to

him aspects of behaviour on the part of the 1st Defendant that were so outrageous that Corporal Mitchell “knew something was wrong”, he answered “I am not responding”. Finally he admitted that the day of the incident was “a day of shock” that he would remember. He said he was one of the soldiers who came to the assistance of the Claimant when he was left slumped by the post crying on being released by the 1st Defendant.

85. The CO, Major Maharaj’s, evidence under cross-examination in no way corroborated the 1st Defendant’s account of the incident. He too admitted that Regimental Police can assist with arrests.

86. Contrary to the 1st Defendant’s account, he said that he was in his office not in the orderly room when the incident occurred. This lack of verification from the CO shows up an element of “fantasy” in the Defendants’ account of the Claimant going upstairs where he met the CO and then heading to the orderly room to meet the CO. It is likewise incredulous that the 1st Defendant went to see the CO in the orderly room downstairs to seek directions as to continued arrest, when the CO was always upstairs in his office. The CO was unshaken in his testimony that he was not involved in the incident.

Inherent Improbability of the divergent accounts

87. The Defendants’ case as pleaded was in my view far less probable than the Claimant’s. This is so, as can be seen from the foregoing analysis, because there was neither corroborated nor consistent evidence as to the alleged insubordinate, violent actions of the Claimant and that the COs directions were sought to arrest him.

88. There are other inherent aspects of the Defendants’ case that defy logic to such an extent that the Defence cannot succeed. It is incomprehensible that alleged violent, insubordinate actions by the Claimant would not be observed by Corporal Mitchell standing nearby. Thus it is more likely that such behaviour was a fabricated afterthought by the 1st Defendant to justify his outrageous actions.

89. Likewise it is not credible that a violent insubordinate person would stand at attention and wait on the spot while the 1st Defendant left him repeatedly to seek orders from the CO. That entire aspect of the case is a fabrication that adversely affects the credibility of the 1st Defendant as a witness to other facts.
90. Another fact that makes the Defendants' case less probable is that the only person to have undoubtedly disobeyed a command from the 1st Defendant was Corporal Mitchell. Yet he was not disciplined while the Claimant was. Furthermore, if the Claimant was "offering violence" as alleged it is not credible that Corporal Mitchell would have just discussed seniority, refused to arrest the Claimant, followed behind and not have assisted in pacifying the Claimant.
91. There is inherent logic in the Claimant's account of running through the rain with a serious headache to secure a signature on his medical certificate. It is more probable than not that he did not hear the first few times that the 1st Defendant addressed him. This is so because when it was brought to his attention he stopped right away.
92. The idea that the Claimant was walking and not dragged during the arrest is improbable. By the time he was held by his arm and waist belt it would be difficult to walk. He was in fact dragged and carried down some steps.
93. The reaction of the senior officer who made the 1st Defendant release the Claimant and of other soldiers who came to his assistance belies that the arrest involved mere walking on the Claimant's part. Instead it is more likely that he was dragged down the steps and pried off the post in a manner that caused him the pain and injury that left him slumped on the wet ground.
94. The other soldiers reacted as they did because they observed that the 1st Defendant's conduct was outrageous and the Claimant was being ill-treated. The 1st Defendant's immediate release of the Claimant, makes it highly probable that

he knew he had been caught engaged in actions against the Claimant that were outrageous and unlawful. He made no mention at the time, of his alleged orders from the CO or that the Claimant was violent. Again it is highly probable in my view that these two aspects of the Defence were afterthoughts.

95. The fact that the Claimant suffered pain is beyond doubt from the evidence of Corporal Mitchell who assisted him and the CO who heard his screams. It is also highly probable that, having been injured and humiliated in front of many of his peers, he would as a result have had the medical and personal issues mentioned in his CADRE report that caused him to fail the CADRE. Any entitlement to damages for resulting loss of pension must be discounted however. He did not prove on a balance of probabilities that he did everything possible to explore alternate avenues to being eligible for promotion, including resitting the CADRE.

F. Findings on Liability

96. Having considered all aspects of the pleadings and the evidence, the Claimant's version of the case has been proven factually on a balance of probabilities. The case for the Defence, which as pleaded appears to be based on the 1st Defendant's version of events, is too rife with contradictions to be accepted as a true account.

97. It is my finding that the evidence before the Court establishes that the 1st Defendant overreacted when he thought the Claimant was deliberately not responding to his commands to stand still. The 1st Defendant felt disrespected but the Claimant was not in my view in fact insubordinately disobeying the commands. He had in fact not heard them until he was alerted by another soldier.

98. The 1st Defendant's reaction to this misplaced feeling of being disrespected was to boast of his title and demand that Corporal Mitchell take the Claimant to his bed space. The 1st Defendant felt further humiliated when there was a refusal to do so. He then acted in anger, grabbing hold, dragging and pulling at the fingers of the Claimant when he eventually held a post. This constituted an assault and battery as well as a breach of the duty of care towards the Claimant.

99. The Defendants' legal submissions regarding lawful arrest are neither applicable as a Defence to assault and Battery nor as showing that due care was exercised. This is so because the Defence Act provisions cited bear no relation to the outrageous actions of the 1st Defendant which were not truthfully in response to any actual offence by the Claimant under the said Act. Furthermore even if there had been an arrestable offence the force used was unreasonable in all the circumstances.

100. Counsel for the Claimant's submission on the appropriate procedure of an escort of two regimental police and marching orders is not only supported by the standing orders but also by the evidence of the Defence Witnesses. The actions engaged in by the 1st Defendant were proven by the Claimant to fall more closely within the realm of unlawful, negligent, ill-treatment of a junior officer which is an offence under the Defence Act. The failure of the CO to attend to the screams of the Claimant was an aggravating factor of the liability of the 2nd Defendant as employer.

101. All aspects of the torts of Assault, Battery and Negligence including injuries and loss caused by the breach of duty of care have been proven by the Claimant. The Defendants are therefore liable to the Claimant for Assault, Battery and Negligence as pleaded in his Statement of Case. The Claimant will be awarded damages as claimed, including aggravated and exemplary damages.

G. Assessment of Damages, interest and costs

102. The Claimant claims general damages for pain and suffering, psychiatric injury, future medical expenses, future loss of earnings and loss of amenities with an uplift for aggravation, as well as special damages in the sum of \$6,928.50 for medical care.

General Damages

103. The principles set out in the *locus classicus* of **Cornilliac v St Louis (1965) 7 WIR**

491 guide the assessment of the general damages to be awarded:

- (i) The nature and extent of the injuries suffered;
- (ii) The nature and gravity of the resulting physical disability;
- (iii) The pain and suffering which had to be endured;
- (iv) The loss of amenities suffered; and
- (v) The extent to which the plaintiff's pecuniary prospects have been materially affected.

104. The particulars of the Claimant's personal injury are outlined in his Amended Statement of Case as follows:

- a) Severe lower back pain with lumbar disc degeneration of the lower back
- b) Degenerated discs at L3-L4, L4-L5, and L5-S1
- c) Ligamentum flavum hypertrophy and foramen stenosis
- d) Variable disc desiccation at all levels with posterior annular tear in L5-S1 intervertebrate disc
- e) L1-2 and L2-3 levels: mild disc bulge causing indentation on the thecal sac
- f) L3-4 and L4-5 levels: diffuse disc bulge with mild facet arthropathy, causing mild narrowing of spinal canal and bilateral neural foramina
- g) L5-S1 level: diffuse disc bulge with mild ligamentum flavum hypertrophy and facet arthropathy, causing mild to moderate narrowing of spinal canal with impingement of bilateral S1 traversing nerve roots and mild narrowing of bilateral neural foramina
- h) Inability to sit or stand for long periods of time, or to bend significantly
- i) Inability to lift infant daughter, or to lift moderate to heavy objects
- j) Inability to move hips or lower back without severe pain
- k) Inability to run, or to walk at any accelerated pace for long
- l) Loss of amenities
- m) Reduced sex life

105. The Claimant relies on the following medical reports to support his claims:
- a) Medical report from Arima Health Facility dated 23 November, 2012:
This report found that the Claimant has a herniated intervertebral disc and suggested at least seven days' sick leave.
 - b) Medical report of the Medical Services Department of the Trinidad and Tobago Coast Guard dated 4 January, 2013:
This report stated that the Claimant was experiencing lower back pain with sciatica. It observed that he was a previous patient whose condition had improved after physiotherapy but had not flared up due to a work incident. It recommended further physiotherapy.
 - c) Medical report of Mr Neil Persad, Trauma and Orthopaedic Surgeon dated 21 February, 2013:
This report summarised the Claimant's account of how his injury occurred. It stated that he experienced continuous, severe lower back pain which interferes with his sleep and ability to do household chores and ability to be intimate with his spouse. It stated that he used pain medication three times daily. The clinical findings indicated that he had soft tissue injury to his lumbar spine that required an MRI scan for further assessment.
 - d) Medical report from St Clair MRI Centre dated 13 October, 2015:
This report indicated the diagnoses at b) to g) of the particulars of injury listed at paragraph 104 above.
 - e) Medical report of Dr Robert Ramcharan dated 13 January, 2016
This report indicated that the Claimant continued to experience lower back pain radiating into his right lower extremities. It stated that the Claimant has been undergoing physiotherapy but has had no significant improvement to his degenerated discs. It concluded that he had a permanent partial disability of 15% and was medically unfit to perform heavy duties that would aggravate his lumbar disc disease.

106. The Defendant submits that a sum of \$60,000 in general damages is proportionate in line with the authorities of **Nekeisha Candace Moe v Caribbean Airlines and Airport Authority of Trinidad and Tobago CV2014-04881** and

Annmarie Williams v AG CV2017-00671. In **Moe**, the Claimant had a pre-existing back condition like in the present circumstance. However, although she experienced pain and tenderness, there was no diagnosis of degeneration of her spinal discs as in the present case. Similarly, in **Williams**, the claimant sustained soft-tissue injuries that resulted in pain and suffering but these were not as grave as the spinal degeneration assessed in the present Claimant.

107. However, the Defendant also cites the cases of **Dexter Sobers v AG CV2008-04393** and **Raquel Burroughs v Guardian Life of the Caribbean Limited CV2011-04315** as possible comparators where awards were made closer to \$80,000. In these decisions the injuries included annular tears and herniation in the spinal discs which appear to be more comparative to the Claimant's injury. The Defendant highlights the finding of the Master in Burroughs that the lack of proof of purchase of painkillers showed that the claimant had exaggerated her pain. However, this does not equally apply to the present case as although receipts for painkillers for the entire period have not been attached, there is evidence of the Claimant's attendance at physiotherapy and the supporting report of Dr Neil Persad that the Claimant was taking painkillers up to three times a day up to 2013. Although this is not direct evidence it does have some weight as it is evidence that he did make such a statement to his doctor in 2013.

108. The Claimant submits, in Reply submissions, comparator cases in the range of \$80,000 to \$300,000. The case of **Lennard Garcia v Point Lisas Industrial Port Development Corporation Limited CV.2010-03061**. I find to be most similar in relation to injuries, pain and discomfort suffered and loss of amenities. This case made an award comparable to those cited by the Defendant of \$80,000. The case of **Darryl Abraham v AG CV.2011-03101**, although involving similar injury and pain involved a "wider gamete" of injury with injuries sustained to the ankle area as well as the spine.

109. With regard to the claim for psychiatric injury, I agree with the Defendant's submission that there is no medical evidence from a psychiatrist to support this claim and therefore the award should not take this into account.

Aggravated/Exemplary Damages

110. Exemplary damages are aimed overtly at punishing the defendant and dissuading wrongdoing while Aggravated Damages are compensatory in nature in cases where a defendant's motives, conduct or manner of inflicting the injury may have aggravated the claimant's damage by injuring his proper feelings of dignity and pride – **Halsbury's Laws of England on Damages (Volume 29 (2019) at [322] & [325]**.

111. In the present case there was clearly an element of high-handed and oppressive conduct by the Defendant, an agent of the State, which caused injury to the Claimant's pride. As a result, both a compensatory and a punitive award is required. An award of \$100,000 in general damages will therefore be made to the Claimant which would include an uplift for aggravation and an additional award of \$15,000 will be awarded as exemplary damages for the assault and battery of the Claimant by the Defendant in effecting the arrest.

Loss of Future Earnings

112. The Claimant claims that he is restricted in physical mobility due to pain from the injury and as a result he is unable to stand for long periods or to bend excessively. This, he claims affects his ability to work as a mechanic after his retirement from the Defence Force. It is outlined by the Defendant, however, that the Claimant continued at the Defence Force until retirement and thereafter began, by his own admission, working as a mechanic. It is submitted, therefore, that there is insufficient proof that there was any loss of earnings by the Claimant that would continue as future loss of earnings. Indeed, there is no documentary proof of current income attached to the Claimant's case upon which an inference could be made that he is unable to perform effectively as a mechanic.

113. The Claimant also claims that as a result of the injury he was unable to perform his CADRE and as such he lost the prospect of promotion and was forced to retire at a lower rank. However, there has been no proof by the Claimant that he attempted to pursue the CADRE after the incident although, as submitted by the Defendant, it was open to him after a period of six months from his punishment of “severe reprimand”. There appears to have been no bar to him pursuing the CADRE after his injury. The Claimant is under a duty to mitigate his own loss and re-sitting of the written exams would have shown his intention to complete the CADRE. It appears, however, that the Claimant did not pursue the CADRE of his own volition and therefore no award will be made in this regard.

Special Damages

114. The Particulars of special damage are outlined in the Amended Statement of Case as follows:

- a) Cost of medication – Tramalet, Auroflam, Lancer - \$578.50
- b) Cost of medical examination and report of Dr Neil Persad - \$1,000
- c) Cost of MRI - \$3,420
- d) Cost of Dr Esack bill - \$400
- e) Cost of physiotherapy - \$230
- f) Cost of medical examination and report Dr Robert Ramcharan - \$500
- g) Medical Associates visit - \$300
- h) Medical services of Dr Ramcharan - \$500

115. The Claimant sets out in its Reply Submissions a list of claims for special damages outside of these particulars:

- a) Renew-Star Serpentine 2013 – \$350
- b) Renew-Star Serpentine 2013 – \$230
- c) Renew-Star Serpentine 2013 – \$230
- d) Renew-Star Serpentine 2013 – \$4,050
- e) Reflexology 2016 - \$250
- f) Reflexology 2018 - \$250

- g) Hermitage Pharmacy - \$87
- h) St Thomas Medical - \$273
- i) Hermitage Pharmacy – \$217.50
- j) Hermitage Pharmacy - \$94.50

116. It is well accepted that special damages must be specifically *pleaded* and proven – **Anand Rampersad v Willie’s Ice Cream CA 20/2002; Ratcliffe v Evans [1982] 2 QB 524**. In the present case, although not particularised under the heading of Special Damages, the Claimant indeed attached proof of receipt of payment for the physiotherapy services outlined at paragraph 115 a) to d). It appears that the Defendant would have been on sufficient notice of these claims from the attachment of those receipts, the heading “Physiotherapy” and the pleadings and evidence of the Claimant that he attended physiotherapy several times.

117. However, there is also attached certain requests for refund of these items and it is unclear whether these refunds, signed as Recommended by the Medical Officer, were actually made. The Defendant although aware of the attachment of the receipts to the Amended Statement of Case would not have been aware of the claim for these sums as they were not sufficiently particularised. Only in his Witness Statement at para. [17] does the Claimant aver that the forms were filled out and submitted but never paid. Therefore, the Defendant did not have an opportunity to answer this allegation.

118. With respect to the items from paragraph 115 e) to j) the Claimant has only attached receipts for these items in his witness statement at annexures “G” and “H”. The Defendant was not therefore given notice that it had to answer these claims and no awards will be made under these heads.

119. The Defendant’s only submission regarding the cost of medication at paragraph 114 a) is that the medications labelled in the receipts are not those prescribed by the medical officer i.e. “Lyrica” and “Flamar”. However, judicial

notice can be taken of the fact that the medications “Tramacet” and “Auroflam” are pain relievers/anti-inflammatories/muscle relaxers similar to those prescribed. \$90 in relation to the Lancer medication will not be allowed.

120. It is further noted that the receipt for \$300 for Medical Services rendered is unstamped. It is unclear who would have received these moneys and this sum therefore will not be allowed

121. In the circumstances the Claimant will be awarded special damages in the sum of \$6,538.50 being the sum particularised in the Amended Statement of Case, excluding the sum of \$300 insufficiently proven and \$90 for the un-prescribed medication.

Interest

122. The Defendant cites the Court of Appeal decision in **AG v Fitzroy Brown CA 251 of 2012** as authority for the proposition that in line with commercial rates, the interest on general damages should be calculated at 2.5% from the date of service of the Amended Claim Form and Statement of Case to the date of judgment. The Defendant also submits that interest on special damages should be awarded at half the rate allowed on other damages from the date of accident to the date of trial – **Jefford v Gee 2 QB 130**.

123. The Claimant in its Reply Submissions makes no submission on the rate to be applied but accepts a “prescribed rate as it applies to general and special damages”.

124. I accept the Defendant’s submission that in line with current commercial rates and the guidance of **Jefford v Gee**, the rate of interest on general damages will be awarded at 2.5% and on special damages at 1.5%.

H. Order

- i. On the First Claimant’s claim for general damages for personal injuries arising from the Negligence and Assault and Battery, the Defendant is to pay the amount of \$100,000 inclusive of an uplift for aggravation, plus interest at the rate of 2.5% from the date of the incident to the date of Judgement.
- ii. On the Claimant’s claim for exemplary damages owing to the high-handed and oppressive conduct of the Defendant, an agent of the State, the Defendant is to pay the amount of \$15,000, plus interest at the rate of 2.5% from the date of the incident to the date of Judgement.
- iii. On the Claimants’ claim for special damages an award is to be paid by the Defendant as follows:

Cost of medication (Tramalet, Auroflam):	\$ 488.50
Cost of medical examination and report of Dr Neil Persad:	\$1,000.00
Cost of MRI:	\$3,420.00
Cost of Dr Esack bill:	\$ 400.00
Cost of physiotherapy:	\$ 230.00
Cost of medical examination and report Dr Robert Ramcharan:	\$ 500.00
Medical services of Dr Ramcharan:	\$ 500.00
TOTAL:	\$6,538.00

Plus, interest at a rate of 1.5% from the date of the incident to the date of judgment.

- iv. The Defendant is to pay the costs of the Claimant on the prescribed basis.

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Eleanor Joye Donaldson-Honeywell
Judge

Assisted by: Christie Borely JRC 1