

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2015-00640

BETWEEN

ARJESH RAGHUNATH SINGH

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Defendant

AND

**ACTING CORPORAL CUMMINGS
REGIMENTAL NUMBER 17912**

Second Defendant

Before the Honourable Madam Justice Margaret Y Mohammed

Dated the 13th April, 2017

APPEARANCES

Mr. Cedric Neptune Attorney at law for the Claimant.

Ms. Jade Charles instructed by Ms. Nisa Simmons Attorneys at law for the Defendant.

JUDGMENT

1. On Sunday 17th November, 2013 at approximately 4:30 a.m., the Claimant was socializing with two (2) friends at the Board Room Lounge and Restaurant (“the Lounge”) located at the San Fernando Siparia Erin Road, Debe. There were three (3) uniformed Police Officers on official duty at the door/front entrance of the Lounge. Whilst at the Lounge one of two (2) unknown men approached the Claimant and demanded that he purchase some beverages for them. The Claimant refused to accede to the said request and without warning one of the men tapped the Claimant on his head with his hand. The Claimant attempted to protect himself from the unprovoked attack but he was further assaulted by another unknown man. Whilst the Claimant was defending himself, he felt a blow to his head which was followed by other blows to different parts of his body.

2. The Claimant observed that he was being beaten about his head, shoulders, back and left arm with a baton by a uniformed Police Officer whom the Claimant later found out to be the Second Named Defendant (“Officer Cummings”). As a result, the Claimant experienced excruciating pains to his left arm and blood flowed down his face. The attack on the Claimant by Officer Cummings lasted for approximately one (1) minute and was witnessed by a crowd of approximately ten (10) persons. Later the Claimant protested his innocence to the aforementioned party of police officers and attempted to inform Officer Cummings that he was the victim of assault by unknown persons.

3. The Claimant enquired of Officer Cummings the reason why the two (2) unknown men were not arrested for their assault on him but Officer Cummings remained silent. The two (2) unknown men who initially assaulted the Claimant subsequently left the

vicinity of the Lounge without being spoken to and/or arrested by any of the police officers who were present on that day.

4. As a result of the alleged assault by Officer Cummings, the Claimant sustained injuries to his head and forearm. He subsequently sought medical attention at the San Fernando General Hospital on the same day. However, the Claimant left the said institution sometime around 5.45 a.m. without being attended to and around 6:00 a.m. on the said day he sought medical attention at the Gulf View Medical Centre for the injuries he sustained. The Claimant was treated for the injuries sustained which included abrasions to his upper back, left forearm, interscapular area, left shoulder, scalp laceration and fractured left proximal ulna. Further, an 'above elbow cast' was applied to the Claimant's left forearm. The Claimant subsequently underwent surgery at the San Fernando General Hospital to repair his fractured left forearm around the beginning of 2014 and he was discharged from the San Fernando General Hospital Orthopaedic Clinic on the 21st May, 2014.
5. As a result of the injuries sustained, the Claimant alleged that he was unable to work at his contractual job with the Ministry of Environment and Water Resources from the period 17th November, 2013 to 5th March, 2014 (a period of (3) months and (12) working days). The Claimant also alleged that he suffered a loss of income in the sum of \$32,400.00.
6. This action was instituted by the Claimant seeking damages including aggravating and/or exemplary and/or vindictory damages for assault and battery; damages for loss of earnings in the sum of \$ 32,400.00; interest and costs.

7. The Defendants' defence was that around 4:45 am, Officer Cummings and two other officers were standing in the car park area of the Lounge near to its entrance, when they heard the sound of bottles breaking. Officer Cummings looked in the direction of the verandah and observed that a group of persons who were previously sitting and drinking engaged in a fight. Officer Cummings noticed that some of the persons were armed with bottles in their hands and he decided to intervene to prevent casualties. Officer Cummings then ran to the verandah and yelled "*Police Stop!*". The fight continued in spite of this. As such Officer Cummings extended his police regulation issued baton to separate the fight. He hit two or three persons about their upper bodies (shoulders and backs) in order to part the fight. He did not hit anyone in their head or face.
8. After the fight stopped, some of the men involved in the fight ran off into the roadway, into vehicles and left the compound. Officer Cummings was then approached by two men who gave their names as Arjesh Singh and Shivanand Neebar. Officer Cummings observed that both men were bleeding from their heads. Both men then told Officer Cummings that "*them fellas buss we head*". Officer Cummings then advised them to seek medical attention and to make a report to the San Fernando Police Station.
9. Based on the pleadings it was not in dispute that: a fight occurred at the Lounge around or about 4:30am on the 17th November 2013 between the Claimant, his friend and other persons ("the fight"); the Claimant was in the fight with other persons before Officer Cummings' intervention; the Claimant knew there were three (3) uniformed police officers present prior to the fight; Officer Cummings hit a few persons about their bodies (shoulders and backs) with his baton; the Claimant and his friend had injuries after the fight; after the fight the Claimant and his friend

communicated with Officer Cummings; and Officer Cummings told the Claimant and his friend to seek medical attention urgently and then make an official report.

10. It was disputed whether: the Claimant and his friends were having alcoholic drinks on the verandah of the Lounge; the unknown alleged attackers were also consuming alcohol; an East Indian man dealt the Claimant blows; Officer Cummings hit the Claimant on his head/intentionally or at all; Officer Cummings used reasonable force or not; there was a bottle fight or not; after the fight had ended the Claimant and his friend indicated to Officer Cummings that *"them fellas buss we head"*; any or all of the injuries sustained by the Claimant was as a result of Officer Cummings' intervention in the fight; Officer Cummings is responsible in damages for any losses which accrued to the Claimant as a result of the fight.
11. Based on the facts in dispute the issues for determination are:
 - (a) Did Officer Cummings cause the injuries that were sustained by the Claimant?
 - (b) If yes, whether Officer Cummings in causing those injuries, acted reasonably and used reasonable force in the circumstances?
 - (c) If no, what measure of damages is appropriate in the circumstances?
12. The current claim turns primarily on a factual basis. The determination of liability concerned the Court finding which version of the events from the evidence of the witnesses was more likely. In **Winston McClaren v Daniel Dickey and ors** ¹ Rajnauth–Lee J (as she then was) repeated the approach the Court should adopt where there are different versions of the events as:

¹ CV 2006-01661, unreported

“12. Where there is an acute conflict of evidence, the Judicial Committee of the Privy Council has laid down the following principles in the case of **Horace Reid v Dowling Charles and Percival Bain** Privy Council App. No. 36 of 1987. At page 6, Lord Ackner delivering the judgment of the Board examined the approach of the trial judge:

“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 seen and heard the witnesses.”

13. Accordingly, the trial judge must check the impression that the evidence of the witnesses makes upon him against
- (i) contemporary documents, where they exist;
 - (ii) the pleaded case; and
 - (iii) the inherent probability of improbability of the rival contentions.

14. The Judicial Committee of the Privy Council adopted a similar approach in the case of the Attorney General and another v Kalicklal Bhooplal Samlal (1987) 36 WIR 382. Lord Ackner who delivered the judgment of the Board made the following statement at page 387:

“The trial judge may well have reached his decision entirely as a result of the impression made upon him by the manner in which the witnesses gave their evidence. Indeed, it is difficult to draw any other conclusion. But a judge must check his impression on the subject of demeanour by a critical examination of the whole of the evidence (see *Yuill v Yuill* [1945] P 15 at page 20). In this case the Court of Appeal were fully entitled to conclude that he did not balance demeanour against the rest of the evidence and had thus not taken proper advantage of having seen and heard the witnesses. It is essential when weighing the credibility of a witness to put correctly into the scales the important contemporaneous documents (the brochure and the letter of 12th October 1981) and the inherent improbability, as the Court of Appeal percipiently pointed out, that the licence would have been granted without samples of those tiles which were not depicted in the brochure, being produced. Thus the balancing operation, which is of the very essence of the judicial function, was not properly carried out.” (Emphasis added)

13. At the trial the Claimant gave evidence in support of his case and the Defendant had two witnesses, Officer Cummings and Woman Police Constable Paul (“Officer Paul”)

Did Officer Cummings cause the injuries that were sustained by the Claimant?

14. Des Vignes J in **Youk-See, Youk-See and Baptiste v The Attorney General of Trinidad and Tobago**² provided an accurate reflection of the law on the torts of assault and battery. Des Vignes J stated:

“71. In relation to the tort of assault and battery, Halsbury’s Laws of England, [Volume 26 (2010) at para. 157] states as follows: “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 they 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 a battery if he intentionally or recklessly applies unlawful force to the body of another person. The slightest degree of force, even mere touching, suffices. It is not necessary that the victim should feel the force through his clothes: a touching of a person's clothes is the equivalent of touching him...

Although an assault is a separate, independent crime and should be treated as such, for practical purposes the term 'assault' is generally synonymous with 'battery' and is used to mean the actual use of unlawful force to another person with the requisite mens rea...”

72. In Skinner v The Attorney General of Trinidad and Tobago, [HCA No. CV 2006-03721] Pemberton J. stated that both assault and battery are

² CV 2011-04459

actionable per se, which means that once its occurrence is established, the Claimant is entitled to compensation even if no actual damage was suffered.”

15. The tort of assault and battery is actionable per se. Therefore the Claimant need not prove damage. The Claimant averred that he sustained abrasions to his upper back, left forearm, interscapular area and left shoulder; scalp laceration; fractured left proximal ulna. This was evidenced by a medical report dated 23rd November 2013, by Dr. Ian Persad of the Gulf View Medical Centre (“the medical report”). The Claimant admitted that he was in a fight before the intervention of Officer Cummings. However, it was disputed who actually caused the injuries sustained by the Claimant. The onus was on the Claimant to demonstrate on a balance of probabilities that at the time of Officer Cummings’ intervention he was in imminent fear of the said battery.
16. In my opinion, the Claimant failed to discharge this burden for the following reasons.
17. Firstly, the Claimant’s judgment at the time of the fight was impaired by alcohol. The Claimant averred at paragraph 5 of the Statement of Case that on Sunday 17th November 2013 at approximately 4:30 am he was socializing with 2 friends Mr Suruj Dookie and Mr Shivanand Neebar at the Lounge. At paragraph 4 of his witness statement he repeated his pleading and he added that they were sitting at a table in an area just outside the main entrance of the Lounge. They were talking and having a few drinks.
18. In cross-examination, the Claimant stated that he and his friends arrived at the Lounge at 2:30 am. The purpose for being at the Lounge was because they were planning an event for work to be scheduled in December and they had a few beers. In particular

the Claimant stated he had drank between 3- 4 beers in cans during that period. Notably, the Claimant's pleadings and witness statement were silent on the Claimant's whereabouts before arriving at the Lounge at 2:30 am.

19. In my opinion it was not plausible that the Claimant would have left his home shortly before 2 am on a Sunday morning to meet his two friends to plan an event for work in December. The Claimant appeared to have embellished this aspect of his evidence under cross-examination to add credibility to his story. Further, it was also not plausible that the Claimant, who admitted that he was drinking beers for a 2 hour period between 2:30 am and 4:30 am, would have recalled with such clarity that he had only consumed 3-4 beers. In my opinion it was highly probable that the Claimant and his friends were not planning any event but was simply socializing and that since he was drinking beers during that two hour period he consumed more beers than his purported recall which impacted on his judgment at the time of the fight.
20. Secondly, I found that there were material inconsistencies between the Claimant's pleading, his witness statement and his evidence in cross-examination on matters before the fight which undermined the credibility of his evidence. In **The Attorney General of Trinidad and Tobago v Anino Garcia**³, the Court of Appeal stated that any deviation by a Claimant from his pleaded case immediately calls his credibility into question.
21. The Claimant's Statement of Case and/or witness statement were silent on the condition of the two unknown men who attacked him. In cross-examination, the Claimant stated for the first time that they were drunk. He said that he knew that they were drinking when they called out to him to buy beers. He stated at that time, he

³ Civ. App. No. 86 of 2011 at paragraph 31

observed that they were drinking beers in cans and not bottles. When it was pointed out to the Claimant by Counsel for the Defendants that such an important fact should have been included in his Statement of Case and/or his witness statement he reluctantly admitted that this information was omitted. Notably, the Claimant made this assessment of the two (2) unknown men whom he said attacked him when he had admitted that he had been drinking beers from 2:30am-4:30pm. In my opinion this new material evidence which suddenly emerged from the Claimant's lips at the trial was an effort by the Claimant to embellish his story and which undermined the credibility of this aspect of his evidence.

22. Further, the Claimant's pleading and witness statement were silent on whether there were bottles in the Lounge at 4:30 am on the Sunday morning in question. In my opinion this was material since the Defendants position was that before the intervention by Officer Cummings both Officer Cummings and Officer Paul heard the sound of bottles breaking and they saw persons fighting with bottles in their hands in the vicinity of the verandah of the Lounge.
23. In cross-examination, the Claimant was adamant that he and his friends drank beers from cans and that he observed that the two unknown men who attacked him were drinking beers in cans. The Claimant was asked whether there were any empty bottles lying around on the ground. He responded that there were persons cleaning the area on a regular basis. The Claimant did not affirmatively state that there were no empty bottles on the ground which suggested that it was very likely that there were bottles in the area where the fight took place. In my opinion, the Claimant embellished this aspect of his evidence to add credibility to his assertion.
24. Thirdly, the Claimant's evidence on the sequence of the fight which he referred to a "scramble" as set out in his Statement of Case and his witness statement was different

in material aspects from his evidence in cross-examination which again diminished the credibility of his evidence.

25. According to the Claimant's Statement of Case, while he and his friends were at the Lounge, there were two (2) unknown men seated at a table approximately five (5) feet away from them. One of the unknown men approached the Claimant and demanded that he buy a "*rounds for we*". The Claimant refused to comply with the demand and without warning one of the unknown men "tapped" the Claimant. The Claimant attempted to protect himself from this unprovoked attack but he was further assaulted by another unknown man. Whilst the Claimant was defending himself, he felt a blow to his head which was followed by other blows to different parts of his body. The Claimant observed that he was being beaten about his head, shoulders, back and left arm with a baton by a uniformed police officer whom the Claimant later found out to be the Officer Cummings.
26. In the Claimant's witness statement he stated that there were two (2) men one of whom was of African descent and the other was an East Indian man at the Lounge and he had never seen them before. He did not know them and the men were seated at a table approximately five (5) feet away from him and his friends. While he and his friends were seated at the table, the man of African descent watched him and demanded that he "*buy a rounds of beers*" for them. The Claimant responded "*No*". After the Claimant said "*No*" the man of African descent approached the Claimant and without warning or saying anything just "tapped" him.
27. The Claimant then stated that as he attempted to defend himself from the unprovoked attack, (which must have been from the man of African descent), or any other attack he was further assaulted by the East Indian man who started to pelt cuff at him. He

tried to defend himself and both he and the East Indian man started to scramble. He then saw his friend Shivanand pull the man of African descent off him as he was in the scramble. During the scramble, whilst the Claimant was trying to defend himself he felt a serious blow to his head which was followed by other blows to different parts of his body. In a split second, the Claimant said that he looked up and observed that he was being beaten about his head, shoulders, back and left arm with a baton by a uniformed police officer whom he recognized to be one the officers he had seen earlier that night working by the door of the Lounge with 2 stripes on his shoulder whom he later found out to be Officer Cummings.

28. Whilst being beaten by Officer Cummings the Claimant said he did not retaliate but using reflex actions, he tried to shield his face and vital organs which he demonstrated to the Court by gesticulating a defensive position with his arms across his face and torso. The Claimant also stated that he received injuries to his head and left arm in addition to the other parts of his body. During the beating by Officer Cummings, the Claimant stated that he experienced severe pains to his left arm and blood flowed down his face from a wound and the attack on him by Officer Cummings lasted for 1 minute in full view of a crowd of ten (10) persons.
29. According to the Claimant, Officer Cummings was approximately 5 feet 9 inches in height, stocky built and appeared to be of mixed descent. The other police officers he had observed at the entrance of the Lounge were a woman and a slim man of East Indian descent.
30. In cross-examination, the Claimant described the sequence of the incident as follows. The two unknown men called out to him asking him to buy a round of beers for them (In his witness statement the Claimant had said that it was the man of African descent

called him out). He replied “No” and they then approached him and slapped him (In his witness statement he had said only the man of African descent approached him first and not both men simultaneously). Before they shouted out to him he did not observe them (In his witness statement he said that the man of African descent shouted out to him). The “scramble “was triggered when the man of African descent approached him and tapped him hard on his head (Both the Statement of Case and the Claimant’s witness statement were silent on the force of the tap). He put his hands up in a defensive position to defend himself. He got up. He did not engage in a fight since he was in shock. He pushed the man of African descent off him. The East Indian man came towards him pelting cuffs. Both he and the East Indian man were still standing as he was pushing him away and the man of African descent was pulled away by his friend Shivanand. He did not know what the man of African descent was doing since he could not turn around to watch. Based on the Claimant’s witness statement the man of African descent attacked him first and his friend pulled him off the Claimant and then the East Indian man attacked him but from his evidence in cross-examination he was attacked by both of them at the same time.

31. During the scramble a police officer intervened but he did not hear anyone yell “*Police Stop*”. The attack from the police officer was one (1) minute and the scramble was one (1) minute. The police officer arrived in the last part of the first minute of the scramble.

32. The Claimant further stated in cross-examination that while he and the East Indian man were in the scramble he felt a serious blow from behind him. Notably, this material information was absent from his Statement of Case and his witness statement and this was the first time the Court was told the direction the Claimant alleged he was dealt the blows. Despite the blows coming from behind him, the Claimant still stated that he was certain that he was getting blows from Officer Cummings since,

according to him, from the very first blow on his head he turned around he saw Officer Cummings with the baton in his hand and it was coming down to strike him.

33. The Claimant also stated that he did not observe the police officer hitting the East Indian man and the police officer did not try "*to part the fight*". He recalled that while he was being hit by the police officer, he was attempting to push the East Indian man away from him He did not recall all the details of the incident which happened very quickly and although he was in shock he estimated that the whole incident took a minute and a half and despite being in shock, his judgment was not affected.
34. Apart from the aforesaid inconsistency in the sequence of the attack on the Claimant by the two unknown men, there were many aspects of the Claimant's evidence about the persons in the fight and what happened during the fight that were neither credible nor plausible. For the first time, the Claimant described the East Indian man as much bigger than him in size. In my opinion this was a material omission from the Claimant's pleadings and witness statement since his position was that the only person who caused his injuries was Officer Cummings. Having stated that the East Indian man who attacked him was much bigger than him it undermines the credibility of the Claimant's assertion that it was *only* Officer Cummings who caused his injuries.
35. The Claimant also never mentioned in his Statement of Case or witness statement that he was surrounded by his attackers, the two unknown men. Yet he still maintained that at the point of Officer Cummings intervention there were only two persons engaged in the scramble namely he and the East Indian man. In my opinion it was not plausible that the Claimant's two friends would have seen him being attacked by two unknown men and they would have stood by and done nothing. It is very plausible that both of the Claimant's friends would have come to the Claimant's assistance.

36. The Claimant under cross-examination admitted that four (4) persons were involved in the scramble, but he maintained that at no point in time did all the persons fight at the same time. This was not stated in his Statement of Case or witness statement at all. In fact, the Claimant stated that he was involved in a scramble with the two unknown persons. In my opinion, it is unlikely that his friend would have pulled one of the unknown attackers off him without retaliation from the other parties involved. Therefore, there would have been at least five (5) persons involved in the fight. In any event, if according to the Claimant he was being attacked or as he said he was surrounded it is highly plausible that the Claimant's vision of all the persons who were involved in the scramble was limited since he said that he adopted a defensive position with his arms to shield his body and his face and the whole incident happened in a minute.
37. Fourthly, there was no reasonable explanation for the Claimant and his friends falling to alert the police officers of the unprovoked attack. Even if I am to accept the Claimant's evidence that there were only two (2) persons who were involved in the "scramble" at a time, then there was no reasonable explanation by the Claimant why neither he nor his friends failed to alert the police officers who were on duty at the Lounge and who based on his evidence were in close proximity to them. According to the Claimant, the reasons he did not report the attack by the man of African descent to the police officers who were at the Lounge was because he was so shocked that he fell off his chair and the man of African descent was standing in front of him so he could not walk away and the East Indian man was partially behind him. However he later stated that he was only surrounded for part of the incident but he still had no opportunity to go to report it to the police officers. In my opinion, this is not a plausible explanation since according to the Claimant his two friends were not involved in the fight so they had the opportunity to call out to the police officers.

38. Fifthly, the Claimant either deliberately or otherwise omitted the details of his involvement or contribution to the fight. The Claimant admitted in cross-examination that he was very upset by the actions of the two unknown men yet he claimed that he never retaliated after receiving a "hard tap " on his head, being pushed and receiving blows from the two unknown men.
39. Further, the Claimant's Statement of Case and witness statement clearly stated that he was involved in a scramble however under cross-examination he said that he never engaged in a fight or scramble and he only shielded himself from the blows being dealt to him. In my opinion, the Claimant's credibility was undermined since having admitted in his pleading and witness statement that he was involved in a scramble he sought to reduce his role by stating that he only acted defensively.
40. In any event, it was not plausible that the Claimant who admitted that he was attacked first by the man of African descent and then the East Indian man did no more than shield himself defensively. It is more believable that in such circumstances, the Claimant would have shielded his head and/or retaliated by engaging in a "scuffle", as he earlier described it.
41. Sixthly, the Claimant's actions after Officer Cummings' intervention in the fight were not plausible. The Claimant pleaded that after the fight he protested his innocence to the aforementioned party of police officers and attempted to inform Officer Cummings that he was the victim of assault by unknown persons. The Claimant enquired of Officer Cummings, the reason the two (2) unknown men were not arrested for their assault on him but Officer Cummings remained silent.

42. The Claimant's evidence in his witness statement was that after the incident the persons who initially attacked him at the Lounge left the scene. The Claimant inquired from Officer Cummings why he did not arrest them for assaulting him however Officer Cummings remained silent but Officer Cummings subsequently told the Claimant to seek medical attention and then to lodge a report at the police station.
43. During cross-examination, the Claimant admitted that he approached Officer Cummings but it was to enquire the reasons he did not arrest the two unknown men for attacking him. He stated that while he had a '*buss head*' he did not say to Officer Cummings or anyone else that '*Dem fellas buss meh head*'.
44. In my opinion, if Officer Cummings had beaten the Claimant as he had alleged, it is not plausible that the Claimant would have gone to confront Officer Cummings to discuss what he should have or should not have done. A reasonable thinking person in such circumstances may have been reluctant to do so, for fear of being further assaulted.
45. Lastly, the only contemporaneous document was the medical report. According to the medical report, the Claimant was examined later on the same day of the incident and by the 21st November 2013 all the Claimant's abrasions were clean and healthy and he was advised that surgery was the best option for treating the fracture. I have attached very little weight to the medical report since the contents of the report were not tested in cross-examination as the doctor was not called as a witness. In my opinion the medical report did not assist the Claimant's assertions that all his injuries were caused only from the baton of Officer Cummings and not from the fight where bottles were used.

46. Having observed the Claimant during cross-examination he was respectful in his responses. However I found that he was also prone to exaggeration and he sought to embellish his responses as his cross-examination progressed. In my opinion, having examined the totality of the Claimant's evidence, I have found that at the time of the fight the Claimant's judgment was impaired from his consumption of alcohol. The Claimant fabricated the reason for being at the Lounge on the morning of the fight. At least five (5) persons were involved in the fight before Officer Cummings intervened. The Claimant, his friends and the two unknown men who were engaged in the "scramble" had access to bottles which were used in the fight. The Claimant did not see when Officer Cummings intervened in the fight since Officer Cummings initially was behind him and it was highly likely that the Claimant had already received injuries during the fight from the two unknown men who attacked him before Officer Cummings intervened.
47. Officer Cummings gave evidence before the Court. The Court observed his height to be 5 feet 9 inches as described by the Claimant. He was medium built. His evidence was that on the 17th November, 2013 he was on extra-duty at the Lounge in company with two other police officers namely Police Constable Mootilal and Officer Paul. They were all dressed in police uniform. Around 4:45 a.m. he was in the car park of the Lounge when he was alerted by the sound of bottles breaking. He observed that the sound emanated from the verandah of the Lounge.
48. Officer Cummings then looked in the direction from where the sound emanated and he observed approximately eight (8) persons were fighting. He testified that he observed that some of the persons had bottles in their hands and they were throwing bottles at each other.

49. Officer Cummings then ran to the verandah and shouted to the men to stop fighting but they continued. He therefore became concerned for his safety, the safety of other patrons as well as the people who were fighting. Officer Cummings assessment of the situation was that someone could have been fatally wounded. In order to gain control of the situation, Officer Cummings went to the verandah and used his police issued baton to separate the fight. He stated that he hit two (2) or three (3) persons about their upper bodies (shoulders and back) in order to separate the fight and that at all times during the incident he aimed his baton at the persons' bodies and he never aimed at their head. He further stated that the incident was over very quickly, i.e. no longer than two minutes, after which some of the men who were fighting ran off into the roadway and into vehicles and left the compound.
50. Officer Cummings also testified that whilst standing in the car park after the fight, two brown skinned men of East Indian descent approached him. He observed blood on their foreheads and it appeared that they had sustained injuries in the fight. They told him that "*them fellas buss we head*". He asked them their names and one of them said that his name was Arjesh Singh, the Claimant in this matter. The other stated that he was Shivanand Neebar. He subsequently advised them to seek medical attention at the San Fernando General Hospital and thereafter to make a report to the San Fernando Police Station and they agreed to do so. They left the compound of the Lounge soon after.
51. It was also the evidence of Officer Cummings that he did not arrest anyone who was involved in the fight as most of the persons had either ran away or exited the premises very quickly in their vehicles and that the Claimant and his friend were the only two persons who remained on the compound and he did not think it fair to arrest them because the other persons had already ran away and it was not practical for the police

to pursue them. He said that he did not know who caused the fight and the Claimant and his friend had represented themselves to him as victims. He noted that they had injuries and he preferred that they sought medical attention.

52. In cross-examination, Officer Cummings admitted that when he intervened to stop the fight he hit persons about their shoulders and backs using his baton. He was tested on the reasons he changed paragraph (6) (c) of his initial Defence from stating “ *The said officer attempted to separate persons who were fighting but was overwhelmed due to the number of persons involved. Not being able to separate the fight by hand, the officer drew his baton and extended it horizontally to push the persons fighting off each other. “to” the said officer used his police regulation issued baton to separate the fight. He hit two or three persons about their upper bodies (shoulders and backs) in order to part the fight. He did not hit anyone on their heads.*” He stated that the reason for the change in the defence was because he wanted to be accurate.
53. In my opinion, the change in the particular of the Amendment was not significant in undermining Officer’s Cumming’s evidence since as a party to the proceedings he had a duty to set out an accurate pleading of his case.
54. However at certain times during cross-examination Officer Cummings demeanour was evasive and he responded as if he was uncertain. Officer Cummings accepted in the initial part of his cross-examination that one of the functions of the police officer was to detect crime and other infractions of the law as well as to arrest persons who may be reasonably suspected of having committed such offences. He accepted that the Claimant and his friend made a report. Yet he admitted that he did not ask a single question of anyone in relation to the ‘report’ made to him by the Claimant and his friend. He did not attempt to arrest anyone who was allegedly involved in the

incident. When confronted with his inactions/negligence in the face of report being made to him based on his account of the events on the relevant date, he indicated to the Court that he was only required to 'advise' the Claimant and his friend and not to investigate to report. There was no evidence that he conducted any investigation. Indeed he contradicted himself when his explanation for not conducting an investigation was because everyone had left the Lounge but later changed it to the persons in the fight. In my view the contradiction undermined the credibility of Officer Cummings' action after the fight.

55. Officer Cummings evidence in cross-examination was that he logged a report of the incident at the San Fernando Police Station. However this was not consistent with his witness statement which was silent on the matter. This further diminished the credibility of his action after the fight. He also admitted in cross-examination that he did not provide an extract of the alleged station diary entry and that he did not investigate the report nor did he ever check to ascertain whether or not the said report was ever investigated by any other police officer and/or the results of such investigation. In my opinion, since Officer Cummings knew about the Claimant's allegations against him since 2015, I thought that he would have been eager to produce the extract of the station diary to the Court to assist in his defence. In my opinion, Officer Cummings' evidence *after* the fight was shaken in cross-examination.
56. However, Officer Cummings evidence before and during his intervention in the fight in my opinion was not challenged in cross-examination. There was no evidence that Officer Cummings' assessment of the situation was impaired by alcohol as I have found with the Claimant. In my opinion Officer Cummings had a better line of vision and perspective of the fight, than the Claimant, since he was in the car park of the Lounge which according to him was 70 to 80 feet away.

57. Further, Officer Cummings' evidence revealed that he saw at least eight (8) persons in the verandah, who were previously sitting and drinking, involved in the fight, was unshaken in cross-examination. In my opinion Officer Cummings' evidence on the number of persons he saw fighting was more plausible when considered in the context of the Claimant's evidence. The Claimant admitted that he and his two (2) friends were drinking beers and the two unknown men who attacked him were drunk. He also said that he was attacked in full view of ten (10) persons. So there were at least five (5) persons in the fight with more persons looking on.
58. I also accept Officer Cummings evidence that he noticed that some of the persons who were involved in the fight had bottles in their hands and they were throwing bottles at each other and hitting each other with the bottles. In my view this aspect of Officer Cummings' evidence was not challenged. Indeed, compared to the Claimant he had a better state of mind and line of vision to make that observation. Further, even if I had accepted, the Claimant's evidence that he and the two unknown men who attacked him were drinking beer from cans, there was no evidence that the verandah of any other area in close proximity to the fight had no bottles. Therefore, it was highly likely that bottles were used in the fight.
59. Officer Cummings evidence that when he intervened in the fight he yelled " *Police Stop*" was also unshaken in cross-examination. The whole incident lasted no more than two (2) minutes. In my opinion, it is highly possible that the reasons the Claimant did not hear the words yelled by Officer Cummings was because he was preoccupied in the fight.
60. Officer Cummings also stated that he aimed his baton at the persons bodies and he did not hit anyone on their heads. The Claimant's evidence was that the East Indian man who attacked him was much bigger than him. He did not say how much bigger.

The Court was able to observe that the Claimant was shorter and smaller in built than Officer Cummings. When Officer Cummings intervened in the fight there were at least five (5) persons involved and there was no evidence of the stature and built of the Claimant's friends and the man of African descent. The fight lasted for no more than a minute after Officer Cummings' intervention, which meant that his intervention ended the fight. It also meant that the injuries sustained by everyone in the fight were such that the persons involved in the fight were able to leave the Lounge immediately after. For these reasons, I am prepared to accept Officer Cummings evidence that he did not hit anyone on their heads on the basis that if he had indeed hit persons on their heads with his baton, there would have been complaints against him for serious injuries from other persons.

61. Therefore the totality of Officer Cummings' evidence was he was in the car park of the Lounge when he saw at least five (5) to ten (10) men who had been drinking alcohol in the verandah of the Lounge fighting with bottles in their hands. He intervened yelling "*Police Stop*" and using his baton, he hit the said persons about their bodies, not on their heads, and the fight ended shortly after.
62. Officer Paul's evidence was that on the 17th November, 2013 she was on duty at the Lounge together with Officer Cummings and Police Constable Mootilal. Around 4:45 a.m. she and Constable Mootilal were in the car park of the Lounge 'dealing with a situation with a drunk driver'. She saw a fight 'break out among several persons' at the entrance to the Lounge and she heard the sound of bottles breaking. Officer Cummings then proceeded in the direction of the fight with his baton in his hand but his back was turned to her. She said she saw that Officer Cummings was gesticulating with his hands and attempting to get the fight under control then he 'suddenly

disappeared' from her eyesight as the crowd had surrounded him. She did not see him after that but she saw people fleeing the scene.

63. Officer Paul further testified that following the incident, two young men of East Indian descent approached her and Officer Cummings and she saw blood on their heads. They asked her if she saw the other men who were involved in the fight and they asked the Officers what they should do. She advised them to first seek medical attention and then to make a report to the San Fernando Police Station. The men also spoke to the Officer Cummings. Notably she did not state that the Claimant complained to her that Officer Cummings had hit him on his head.
64. In cross-examination, Officer Paul stated that the incident occurred approximately one hundred feet away from where she was standing. It was a fight involving approximately ten (10) persons. The persons were fighting with and throwing bottles at each other. Officer Cummings intervened and he 'disappeared in the crowd' for about two to three minutes. Neither she nor Constable Mootilal made any attempts to assist Officer Cummings although the situation was a dangerous one because they were 'dealing with a drunk driver. However she accepted that she could have left PC Mootilal to attend to the 'drunk driver' in order to assist Officer Cummings.
65. Officer Paul also stated that after the fight persons dispersed and she made no attempt to arrest anyone although she accepted that on her version of the incident, offences were committed in her presence.
66. Officer Paul's evidence on her line of vision from the car park to the verandah where the fight was taking place was not challenged in cross-examination. In my opinion she had a clear view and her evidence that there were about eight (8) persons who were fighting with bottles in their hands corroborated Officer Cummings evidence.

She was forthright since she indicated that after Officer Cummings disappeared into the crowd she did not see him until after the fight ended and the crowd dispersed. She corroborated Officer Cummings evidence that the Claimant and his friend approached them after the fight and they told them to seek medical attention and to make a report at the San Fernando Police Station. In my opinion, her choice not to intervene to assist Officer Cummings did not undermine the credibility of her evidence of what she saw.

67. It was disputed who actually caused the injuries sustained by the Claimant. There was no doubt that a battery had taken place. However, the onus was on the Claimant to show that he was in fear of the said imminent battery. Having considered the Claimant's, Officer Cummings and Officer Paul's evidence in my opinion the weight of the evidence did not support the Claimant's assertion that *all* his injuries were caused by Officer Cummings.
68. Both the Claimant and the unknown attackers had been drinking alcohol. The Claimant admitted he was in a fight prior to Officer Cummings intervention and that the East Indian man who was drunk was much bigger than him. The fight involved at least five (5) persons. The Claimant was in shock whilst was holding his hands in the air over his face defending himself during a one minute altercation. It is unlikely that the Claimant received no injuries from the fight prior to Officer Cummings intervention, especially since the Claimant had testified that the East Indian man was much bigger than him and had started "pelting blows" and he thereafter "defended himself". It also would have been virtually impossible for the Claimant to ascertain who actually inflicted the injury as alleged in his claim. It is highly probable that the injuries sustained by the Claimant to his arms, to wit a fracture of the ulna could have been inflicted by the other party(s) involved in the fight and not necessarily by Officer

Cummings and therefore it is highly likely that the Claimant's injuries were caused during the fight and *before* Officer Cummings intervention.

If yes, whether Officer Cummings in causing those injuries, acted reasonably and used reasonable force in the circumstances?

69. Although I have found that the Claimant failed to prove on a balance of probabilities that Officer Cummings caused his injuries I will still briefly address the aforesaid issue.
70. The undisputed facts show that the Claimant had been in a fight prior to Officer Cummings' intervention. As such Officer Cummings intervention was justified.
71. According to the evidence given by Officer Cummings, his intervention was done to prevent further casualties. Therefore Officer Cummings would have been acting in defence of others in accordance with his duties as a Police Officer. Officer Cummings also admitted that he hit persons about their bodies and he did not aim at anyone's head and in fact he did not recall hitting anyone in their heads. He testified that he used reasonable force in the circumstances to quell the fight and prevent further casualties. Further, he attested to the fact that even before he made use of his baton he yelled "*Police Stop!*" but the fight continued.
72. The Claimant admitted under cross-examination that Officer Cummings could not possibly have seen what started the fight. So that he could not be expected to deal with him in a different manner as the Claimant's alleged attackers at the time of the fight.
73. Having accepted the evidence of both Officer Cummings and Officer Paul that bottles were used during the fight and that the fight involved at least five (5) persons, only

Officer Cummings intervened and that the two (2) other police officers who were on duty at the Lounge, in my opinion the use of a police issued baton by Officer Cummings was warranted and not excessive force in the circumstances.

Costs

74. The costs in this matter is to be determined on the prescribed scale pursuant to Part 67 of the CPR. On the basis of his submissions, the Claimant has valued this claim in the sum of \$140,000.00 general damages plus special damages in the sum of \$32,400.00, representing total damages in the sum of \$172,400.00. Costs on the value of the claim on the prescribed scale therefore amounts to \$34, 860.00.

Order

75. The Claimant's action is dismissed.

76. The Claimant is to pay the Defendant's cost assessed in the sum of \$ 34, 860.00.

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Margaret Y Mohammed
Judge