

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2010-04502

BETWEEN

IJAH OBA BRATHWAITE

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MR. JUSTICE PETER A. RAJKUMAR

APPEARANCES:

Mr. Gerald Ramdeen instructed by V. Debideen for the Claimant

Mrs. Christie A.M. Modeste instructed by Ms. Kendra Mark, for the Defendant

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JUDGMENT

Background

1. The Claimant alleged that he was assaulted and beaten by prison officers at the Golden Grove Prison on the 16th December 2009. He commenced proceedings against the Attorney General seeking damages for assault and battery.

2. The Claimant's version of events is that on the 16th December 2009 while he was in the airing yard of the Golden Grove Prison Officer T. Deo ordered him to pull up his pants. The Claimant replied "*okay Boss*" and then turned and walked off. He was told to stop and Officer Deo came up to the Claimant and slapped him across the side of his head. A number of Officers thereafter started to assault and beat the Claimant about his body with their batons.

3. After the assault the Claimant was taken to the infirmary where he waited for medical attention.

4. After being examined by the infirmary Officer the Claimant was taken to the Mt. Hope Medical Sciences Complex where he was treated and warded for three (3) days.

5. He was released into the custody of the Prison authorities from the hospital. The Claimant alleges that after being released into the custody of the prison authorities he was not provided with proper medical attention.

6. The injuries that the Claimant alleged he suffered at the hands of the prison officers were as follows:

1. Severe swelling on right side of head
2. Haematomas about the body.
3. Contusions about the body.
4. Tenderness about the entire body.
5. Soft tissue injury about the body.

6. Lacerations to the head.
7. Lacerations to the legs.
8. **Broken ribs.**
9. Contusions and haematomas to the face.
10. Severe swelling about the body.

The Case for the Defendant

7. The Defendant's version of events was that on the 16th December 2011 the Claimant was in the airing yard when Prison Officer Deo spoke to the Claimant about his attire. The Claimant responded to Officer Deo by verbally abusing him and behaving in an aggressive manner.

8. Officer Deo attempted to escort the Claimant to PO II Williams. In attempting so to do the Claimant struck Prison Officer Deo in his face. Prison Officer Deo then proceeded to defend himself by using **reasonable force to subdue** the Claimant, and two other officers came to his assistance.

9. The Claimant was then taken to the prison infirmary by Prison Officer Sebros and Prison Officer Maharaj. **Upon arriving at the infirmary the Claimant attacked Prison Officer Sebros and then officer Maharaj** and those officers used again **reasonable force to subdue** the Claimant.

10. **The Claimant claimed: -**

- a. Damages for assault and battery.
- b. Aggravated and exemplary damages.

Conclusion

11. I find that on a balance of probabilities that something would have had to trigger the violent response of the defendant's agents. I find that triggering incident had to be more than the trivial incident described by the claimant.

12. I find therefore that, on a balance of probabilities, the triggering incident for the assault was more likely to have been of the nature described by the defendant's agents, or at least of a type such that the defendant's agents believed the use of force was necessary for the defence of officer Deo in response to an attack or imminent attack or threat.

13. That belief must be judged on the facts as the defendant's agents honestly believed them to be, whether or not they were mistaken, and, if they made a mistake of fact, it can be relied on only if the mistake was a reasonable one for them to have made. The claimant testified " *I know (the first Officer) he hit me once and the rest ah them run in".* I find that in the heat of the moment a perceived threat apparently led to overreactions by several officers.

14. To find otherwise I would have had to make specific findings and conclusions that:

a. The defendant's agents wilfully and without provocation **initiated** a brutal assault on the claimant that verged on the sadistic, and constituted a gross and obscene abuse of power,

b. That the culture of the prison service enabled and/or encouraged, and in any event protected, officers with such brutal propensities to the extent that they had no inhibition regarding brutal unprovoked attacks on a prisoner in full view and/ or in the presence of several other fellow prison officers and prisoners, and

c. That there existed, and exists, a culture of complicity within the Prison service to the extent that prison officers are prepared to give evidence in support of fellow officers guilty of such behaviour, and perjure themselves on oath.

15. There is no sufficiently clear evidence in this case that findings such as these could be justified on the evidence of the claimant alone. What I have found however is that:

- a. The evidence of the defendant's witnesses was unreliable and in many instances untruthful.
- b. That there was clearly a **use of force disproportionate to any conduct** that has been established on the evidence in relation to the claimant.
- c. That there has been gross exaggeration in relation to the claimant's conduct in an attempt to justify the excessive use of force upon him.
- d. There has been complicity among witnesses for the defendant in exaggerating and fabricating the unbelievable scenario required to justify the force which resulted in the fracture of three of the claimant's ribs.

16. On a balance of probabilities the incident must have been initiated by some conduct of the claimant, or alternatively by the reasonable but mistaken belief by the defendant's agents that there was threatening conduct on the part of the claimant. However, the escalation, and violent response involved disproportionate use of force. To the extent that the force used was disproportionate to that required to subdue the claimant I find the defendant liable in damages for assault.

Disposition and Orders

17. It is ordered that there be judgment for the claimant for damages in the sum of **\$90,000.00 inclusive of aggravated damages.**
18. Interest thereon at the rate of 6% per annum from the date of service of the claim form.
19. It is further ordered that the defendant do pay the claimant's costs on the basis prescribed by the Civil Proceedings Rules for a claim in the amount of \$ 90,000.00.

Analysis and Law

20. The scenarios presented by the Claimant and the Defendant are diametrically opposed, and the testimony of each witness must therefore be carefully assessed.

21. I note and adopt the approach in the case of **Reid v. Charles P.C. Appeal No. 86 from the Court of Appeal of Trinidad and Tobago dated 13th July, 1989 at page 6** where it was stated:

*“.....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 of the particular 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 witnesses.”*

Law - Self-defence

22. **Clerk & Lindsell on Torts, 20th Edition, Paragraphs 30 – 02 to 30 - 03, pages 2017-2018** are set out hereunder.

*It is lawful for one person to use force towards another in the defence of his own person , but **this force must not transgress the reasonable limits of the occasion** , what is reasonable force being a question of fact in each case. But **the law does not require** that a person when laboring under a natural feeling of resentment consequent on gross provocation **should very nicely measure the weight of his blows.***

*In **Ashley v Chief Constable of Sussex Police** ([2008] UKHL 25) the House of Lords clarified two important differences between self-defence in criminal law and self-defence to claims for the tort of trespass to the person. First, in contrast to criminal law, **the***

*burden of proof with regard to self-defence in civil law is on the defendant. Secondly, in criminal law an honest but mistaken belief – even if unreasonable – that it is necessary to defend oneself is a defence to a criminal assault. In contrast, in civil law the defendant must show that, where he is being attacked or in imminent danger of attack, he honestly and reasonably believed that it was necessary to defend himself (as well as that the force used was reasonable in all the circumstances). Indeed, the majority of their Lordship left open whether there is any defence of self defence at all in civil law where the defendant cannot show that there was actually an attack or an imminent danger of attack. In other words, it may be irrelevant that the defendant mistakenly and reasonably believed that there an actual or imminent attack: what may be needed is proof that there was in fact an **attack or imminent attack**.*

23. *In Ashley v Chief Constable of Sussex Police [2008] UKHL 25 the 3 possible tests were set out as follows and analysed in several judgments in particular at paragraphs 3,16,18,20,44,50-55,76, 85,86, 91.*

Issue 1. The self-defence criteria

16. *In para 37 of his judgment the Master of the Rolls identified three possible approaches to the criteria requisite for a successful plea of self-defence, namely, (1) the necessity to take action in response to an attack, or imminent attack, must be judged on the assumption that the facts were as the defendant honestly believed them to be, whether or not he was mistaken and, if he made a mistake of fact, whether or not it was reasonable for him to have done so (solution 1); (2) **the necessity to take action in response to an attack or imminent attack must be judged on the facts as the defendant honestly believed them to be, whether or not he was mistaken, but, if he made a mistake of fact, he can rely on that fact only if the mistake was a reasonable one for him to have made (solution 2);** (3) in order to establish the relevant necessity the defendant must establish **that there was in fact an imminent and real risk of attack (solution 3)**. It was common ground that, in addition, based on whatever belief the defendant is entitled to rely on, **the defendant must, in a civil action, satisfy the court that it was reasonable for him to have taken the action he did.** Of the three solutions the Court of Appeal held*

that solution 2 was the correct one. On this appeal the Chief Constable has contended, as he did below, that solution 1 is the correct one. The respondents have not cross-appealed in order to contend that solution 3 should be preferred.

Though solution 2 was accepted as there was no argument heard on solution 3, some of their lordships clearly preferred solution 3.

Witnesses

24. The Claimant alone testified in support of his case. The Defendant adduced evidence from three witnesses, Prison Officer Tatchan Deo, Prison Officer Dennis Sebros and Prison Officer Clifford Rampersad.

The Claimant's evidence

The incident and its relation to the injuries claimed

25. The Claimant gave evidence in chief by way of witness statement filed on the 2nd May 2011 and was cross examined on it as follows:-

A: I know (the first Officer) he hit me once and the rest ah them run in

A: Well all ah them was all over me. Ah was brakesing meh head (In other words he was protecting his head with his hands)

Q: So they were surrounding you?

A: Yes

The medical report and records

26. A medical report was exhibited by the Claimant in his witness statement as “IOB1”. It recorded injuries as follows: left sided kidney contusions, fractures to ribs on left side of chest, and left sided chest wall swelling.

27. These are consistent with the injuries asserted by the claimant, save that the report does not record injuries to the head, face or legs. The report is signed on December 23rd – days after the incident.

28. The claimant was asked in cross examination -

Q: The medical report shows injuries only to the left side of your body?

A: Yes

29. It is clear that the line of questioning being pursued by Counsel for the Defendant was aimed at establishing that all the injuries alleged to have been suffered by the Claimant were not actually suffered because they were not stated on the report. However the discharge summary records multiple left sided rib fractures and (?) intra abdominal injury.

30. Also recorded in the notes as at January 6th 2010 is “*discharge from infirmary – septic spot R upper tibia - sepra, flagyl* (antibiotics). This is sufficiently proximate to the date of the incident to justify an inference that this was related to the incident.

31. Officer Sebro noticed that the claimant had a laceration on his forehead. (Paragraphs 4 and 7 of his witness statement).

32. Officer Rampersad states that “*I believe that his right eye may have gotten injured while we were trying to subdue him*” and he observed a cut above the claimant’s right eyebrow. (Paragraphs 5 and 7 of his witness statement).

The Defendants Deo and Sebro in their witness statements attest to the claimant being struck on his arms and legs.

33. Therefore, further to the medical report, the medical notes, and the evidence of the defendant's witnesses themselves, corroborate the further injuries claimed, to the claimant's legs and to his head.

Taken to the infirmary

34. One of the areas probed by Counsel for the Defendant in cross examination of the Claimant was how the Claimant arrived at the infirmary. In his witness statement¹ the Claimant stated,

“I was taken to the infirmary by the officers. **I had to be assisted by the officers because I could not walk**”.

35. In cross examination of the Claimant the following exchange occurred with Counsel.

A: My weight, I was weighing 164

A: Infirmary about 120 feet away

Q: Isn't the Infirmary also up a flight of stairs?

A: No, no stairs. It flat

Q: Mr. Brathwaite I put it to you that you weighed 164 lbs (if you) couldn't walk officers had to carry you up a flight of stairs

A: No there were no stairs

¹ Paragraph 8 of the Witness statement

Location of the infirmary

36. Counsel for the Defendant attempted to refute the allegation of the Claimant, that he was assisted to the infirmary because he could not walk, by putting to the Claimant that he would have had to be carried up a flight of stairs and it would have been impossible for the inmate or Officers to carry him up the flight of stairs because of his weight.

37. The Claimant **responded by indicating twice that there were no stairs** to go to the infirmary. The absence of any stairs was confirmed by Officer Sebro in answer to an inquiry from the Court as follows:-

A: *The Infirmary is east of the entire centre of the prison **located on the ground floor**; its entrance is within a short corridor from about me to you in distance.*

Ct: ***And it's always been on the ground floor?***

A: ***Yes.***

Whether Two Incidents

38. One of the most significant differences in the scenario presented by both parties is that **the Claimant** alleges that there was **only one attack** in which he was assaulted and beaten and **the Defendant** alleges that there were **two attacks** in which **the Claimant attacked the Officers**. Throughout the cross examination of the Claimant he was clear that there was no second incident.

Q: Entire second incident lasted several seconds, did it not, up to a minute?

A: ***Had no second incident***

39. I find that the demeanour of the Claimant in answering questions and the answers given were spontaneous responses which were consistent throughout with his description of the incident.

40. Officer **Sebro** is the one who introduces this aspect of a second incident. His evidence is analysed infra.

Prison Officer Tatchan Deo

41. Prison Officer Tatchan Deo was the Officer who had initially ordered the Claimant to pull up his pants. His brief witness statement is very vague and is set out hereunder in so far as is material.

*On Wednesday the 16th December, 2009, I was posted to work in the Exercise Yard by P.O.II Keith Arjoonsingh. At approximately 1:40pm I noticed that inmate Ijah Braithwaite (“the Claimant”) walking into the airing yard improperly dressed. The waist of his pants was below his buttocks. I told him to pull up his pants. He ignored me and continued walking. I followed him and again told him to pull up his pants. The Claimant responded, the Claimant responded aggressively by using forceful gesticulations. “I come from the f...condemn and I eh going through that, yuh want to pull up meh pants, come and pull it up yourself and see if I eh cuff yuh in your face”. I walked up to the Claimant and, as I was about to put my hand on his shoulder in an attempt to escort him to P.O. II Williams to report his behaviour, the Claimant suddenly pushed away my hand and struck me **a blow to my face**. In self defence, I struck him **on his arm** with my small wooden baton and a struggle ensued for a short time.*

*P.O. I Rampersad subsequently came and rendered assistance to subdue the Claimant **by striking the Claimant with his baton**. I believe that another prison officer came to my assistance as well. The Claimant continued to strike back at us **with his hands**. However, **we were eventually able to subdue him**. The entire incident, from the moment that the Claimant struck me in my face to the moment he was subdued, lasted approximately one minute.*

P.O. II Williams came to the scene of the incident and instructed P.O. I Sebro who was standing in the yard to escort the Claimant to the Infirmary.

I went to the Infirmary as well and was treated by Infirmary Officer Rooplal. I was referred to the Arima Health Facility for treatment of my injuries.

I went to the Arima Facility on the same day. There I was treated and granted 2 days sick leave with effect from 17th December, 2009.

Attempt to report verbal assault to PO II Williams.

42. The evidence of this witness in his witness statement was that the Claimant had verbally abused him .He attempted to report the matter to PO II Williams. In his attempt to escort the Claimant to PO II Williams the Claimant attacked him and struck him in his face. He never followed through and reported the **verbal** assault upon him, (a *breach of the Prison Rules*), at any time after the incident because he thought there was no need. I accept this. Given the condition that the claimant was left in, this would have been overkill.

43. His evidence with respect to reporting the physical assault by the claimant is set out below in so far as material.

Reporting physical assault

A: *I report it to my supervisor.*

A: *I made a written report to the supervisor.*

Q: *You told your lawyers that you made a written report?*

A: *I think I did.*

A: *I did not give the written report I made to supervisor to my lawyers. I didn't think it was my responsibility.*

Q: *And that report contained a statement of what took place on that day?*

A: *yes it would*

Q: *You don't think that that report would assist the Court in finding out what took place on that day seeing that it was made on that day by you?*

A: *I give the report to the supervisor, I have no control over the report or how it leaves the prison*

Q: *That report that you did, the written report that you did to the supervisor, wouldn't that contain a statement of what took place?*

A: *yes*

Q: *Did you ask your supervisor (to produce it)?*

A: *The last thing I know it was sent to the lawyers.*

A: *I did ask lawyers why it wasn't attached to my witness statement.*

Q: *And what was their response?*

A: *I can't remember what was said.*

44. This evidence raises frontally the issue of non disclosure. This witness states that he made a **written** report of the incident that took place on that day. That report was never disclosed by the Defendant notwithstanding that the Claimant indicated that he told his lawyers that he made the report. It is also remarkable that such an important aspect of his evidence, if it ever existed, formed no part of his evidence in chief.

45. This report would have been the most contemporaneous document that would have contained details of what took place on that day. This witness is clear that,

- (i) he made such a report and
- (ii) the report was in writing;
- (iii) he gave it to his supervisor;
- (iv) he gave instructions to his attorneys about the existence of the report,
- (v) the report was not disclosed to the court.
- (vi) neither did it form part of the witness statement of this witness.

46. He understood its significance and queried its omission from his witness statement.

The logical options are:

- a. he made no such report,
- b. he made such report, and told his attorneys, but his attorneys deliberately or negligently failed to disclose it,
- c. he made such report but did not tell his attorneys about it.

47. On a balance of probabilities I consider it more likely than not that after an incident where a prisoner had to be hospitalized, such a report would have been made, whether voluntarily or part of an investigative process. This is also confirmed by the evidence of the other witnesses.

Option a. is therefore ruled out.

Option b. is what the witness wanted the court to accept, namely, that his lawyers were at best negligent or at worst, guilty of professional misconduct in failing to comply with their duty of disclosure.

Option c. would mean that the witness tried to mislead the court and possibly his own attorneys.

I consider option c. most likely.

48. His answer when asked what explanation did his attorneys have and he, perceptively, allegedly asked them why the report was not included in his witness statement, was telling. He stated “*I can’t remember what was said*”. I consider it more likely than not that the reason that he can’t remember what was said, is that they never said anything for him to remember, and that the reason that they didn’t is that he never asked them.

49. The non disclosure of this report was material. The law on this matter is clear. **Where a party has failed to provide proper disclosure it is open to the Court to draw adverse inferences at the trial in relation to the absence of those documents.**

50. In the case of **H.C.A No. 434 of 2001 Shairoon Abdool v B&L Insurance Company Limited** – delivered 25th November, 2002, the Honourable Justice Mendonca (as he then was) at page 14 cited Cross on Evidence (9th edition) at P. 37 where the following passage from the judgment of Newton & Norris JJ in the case of O’Donnell v Reichard (1975) VR 916, 929 is referred to:

“[Where] a party without explanation fails to call a witness a person whom he might reasonably be expected to call, if that person’s evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that person would have said if he had been called as a witness, nevertheless, it is open to the jury to infer that that person’s evidence would not have helped the party’s case; if the jury draw that inference, then they may properly take it into account against the party in question for two purposes, namely (a) in deciding whether to accept any

particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and (b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again with respect to matters to which the person not called as the witness could have spoken ”

He stated:

“The same in my view can be said of the failure of a party to produce documents which he might reasonably be expected to produce. In such a case the Court may infer that had the documents been produced it would not have helped the party and the Court is entitled to take that into account against the party in question for the purposes referred to in the passage just cited from the judgment of Norris & Newton JJ.”

51. In **Wisniewski v Central Manchester Health Authority** (1998) 7 PIQR 323 the Court of Appeal held that in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a **witness** who might be expected to have material evidence to give on an issue in an action. At P.340 of the Wisniewski case Brooke LJ stated that:

- (a) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness **who might be expected to have material evidence to give on an issue in an action.***
- (b) If a court is willing to draw such inferences they **may go to strengthen the evidence adduced on that issue by the other party or weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.***
- (c) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference; in other words, **there must be a case to answer on that issue.***
- (d) If the reason for the witness’s absence or silence satisfies the court then no such adverse inference may be drawn. **If, on the other hand, there is some credible***

explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

52. I consider the passage equally relevant in relation to documents not disclosed. The Court is entitled to draw adverse inferences against this witness having regard to the admitted fact that the report existed, was allegedly brought to the attention of Attorneys at law for the Prison and for the State, and it was not disclosed to the Claimant. This report would have been the most contemporaneous document produced as to what occurred.

53. The inference can reasonably be drawn that the non disclosure was due to the fact that the report would have contained material that was adverse to the case of the Defendant. (The alternative inference, that it never existed and the witness lied about its existence, has been rejected, although this option too would go directly toward his credibility).

54. The demeanour of this witness in giving his evidence was *evasive in relation to the questions about his disclosure of the documents to the Court*. It was clear that this witness was attempting to cast the blame for the non disclosure on everyone else but himself; the legal department of the prison, his own Attorneys, and the Prison Supervisor all allegedly had responsibility to disclose the document but he, as the witness coming to give evidence did not insist on the report being put in the witness statement, though there was no reference to any report in his witness statement, and he had allegedly noted this.

55. The demeanour of this witness was curious and is illustrated by some of the cross examination.

Response to the Claimant's injuries

Q: *You saw the medical reports?*

A: *Yes*

Q: You saw they showed three (3) fractured ribs?

A: Yes

I knew that he had to be treated at Mt. Hope for three (3) days.

I don't know how his ribs were broken

Q: When you saw the medical reports (evidencing those injuries) were you surprised?

A: I wasn't surprised.

Q: You wasn't surprised?

A: No.

Q: Why were you not surprised when you saw that he suffered broken ribs, and contusions to his kidneys?

*A: Because **my life was at risk.***

*Knew what he capable of doing, **whatever force needed to be used.***

Q: Good, Mr. Deo you don't think those injuries are serious?

*A: **How true are those?***

Fact remains when officer attacked officer life comes first.

56. This witness indicated that he was not surprised when he learnt of the injuries suffered by the Claimant. When pressed as to whether he considered that the injuries were serious he initially

questioned the authenticity of the medical reports. Remarkably while this officer was being questioned on an incident where the issue was whether reasonable force had been used on the claimant, his demeanour, especially on this issue, was belligerent.

Credibility

57. This witness stated to the Court that the medical reports that he would have received from the Arima Health Centre described the injuries that he allegedly received as soft tissue injuries. He indicated to the Court that he had the prescription that he got from the Arima Health Centre. When asked what was prescribed he stated *panadol*.

Court: And the medical reports that you say you got from the Arima Health Centre - you remember what injuries were described.

A: Soft tissue damage, what I **have there** though is the prescription I got from the Arima Health Facility.

Court: *You have that?*

A: *Yes I have that*

Court: *What prescription you got?*

A: *I got panadol.*

Court: *And do you remember what the medical report said?*

A: *Soft tissue damage to my forehead.*

Court: *To your forehead?*

A: *Yes.*

Court: **Which part of your forehead?**

A: **On the right side.**

Court: *You got any stitches?*

A: *Nah no stitches.*

Court: ***Did you need any, did you have any cuts?***

A: ***No it was swollen.***

58. In further cross examination arising from the court's questions the witness testifies as follows:-

Q: In answer to my lord, in answer to the questions of the court you said that you didn't get any cut, my lord just asked you if you get any cuts you said no

A: No, no cuts

Q: Go to paragraph six (6) of your witness statement, read the first line for me.

A: By cut (probably) meant abrasions.

*Q: Just now when the court asked you which side (injury to your head) you said right side, you were touching **the right side**.*

A: "I had injuries to my forehead meaning anywhere in my forehead – left side – right side.

59. It was submitted that this exchange revealed and demonstrated that this witness was dishonest, making up and embellishing his evidence as he went along. I am constrained to agree. The willingness to be untruthful about what had been told to the court just moments before, speaks volumes as to the nature of the testimony of this witness.

60. The evidence is necessarily set out at length to illustrate the inconsistencies, and untruths that ground this court's conviction that the evidence of this witness cannot be relied upon, and was not a true account of what took place on that day.

61. The failure to produce the medical report from Arima health facility, by which he was given 2 days sick leave in respect of an injury allegedly inflicted by the claimant, and the failure to even mention that he had prepared a written report for his supervisor, cast significant doubt on the evidence of this witness.

62. What is apparent from his testimony is that the exaggeration of his own injury, if in fact he sustained one at all, (being unable to recall on which side of the forehead it was supposedly sustained), for which he was prescribed "Panadol," was justification for the infliction of severe injuries on the claimant. This incident, lasting about a minute, would not be sufficient to account for inter alia 3 broken ribs being inflicted in subduing the claimant.

63. A second incident, with a further attack by the claimant, requiring him to be once again “subdued “with force, is necessary to account for the severity of the injuries. Officer Sebros describes such an incident.

Prison Officer Sebros

64. This was the witness that the Defendant presented to support its case that there were two separate incidents. His witness statement in so far as material is as follows:-

1. *On Wednesday the 16th December, 2009, I was posted to work in the Exercise Yard by P.O.II Keith Arjoonsingh. At approximately 1:41pm I was standing in the airing yard when P.O. II Williams instructed me to escort the inmate Ijah Braithwaite (“Claimant”) to the Infirmary. He also relayed to me that the Claimant assaulted P.O. Tatchan Deo and had to be subdued.*
2. *P.O. I Maharaj accompanied the Claimant and I to the infirmary. I noticed that the Claimant had **a laceration on his forehead**. However, he was able to walk to the Infirmary on his own **without limping**.*
3. *While escorting the Claimant to the Infirmary, he began using profanities and threatening remarks. At one point he said, “An officer have to dead here for doing me this! I eh fraid to dead – I make big jail in Port of Spain Condemn Division”.*
4. *Upon reaching the Infirmary, I noticed that it was locked. Therefore, we instructed the Claimant to sit on a bench outside the Infirmary door. P.O. Maharaj and I stood nearby and supervised him. At this time the Claimant was still behaving in an agitated manner.*
5. *The Claimant’s behaviour started to get worse. He started to threaten me and said, “I will kill f...you and I know real people I could get to kill you.” P.O. Maharaj and I told him to calm down and **he would be treated for the laceration on his forehead**.*

6. *The Claimant stood up and I told him to sit down. Suddenly, **the Claimant put his hand on my throat and pushed me against the wall opposite the Infirmary door.** I tried to shove him off but he was taller than me and a struggle ensued. P.O. Maharaj came to my assistance and **kicked the Claimant's ribcage once.***
7. *The Claimant **then released me** and advanced toward P.O. Maharaj. I immediately **switched on the alarm** which was located on the wall opposite the Infirmary door and went to aid P.O. I Maharaj. At that time the Claimant was trying to hit him. P.O. Maharaj used his regulation baton to strike the Claimant's **legs and arms.** I also used my regulation baton to strike the Claimant **on his arms.** The Claimant did not scream or show he was in pain during the struggle.*
8. *After about 30 seconds or less, P.O. I Maharaj was able to put the Claimant in an armlock and then place him to sit on the edge of the Infirmary bench. Approximately one minute elapsed between the time that the Claimant attacked me and the time he was placed on the bench by P.O. I Maharaj.*
9. *Two minutes after the Claimant was placed on the bench, Infirmary Officer Rooplal arrived. **We handed over the Claimant to Officer Rooplal so that he could be treated for his injuries.** At that time **I did not notice any visible injuries.***

65. It became clear upon cross examination of this witness that the suggestion that there were two incidents where the Claimant attacked the Prison Officers was manufactured and contrived in an attempt to justify the excessive force used in subduing the Claimant.

66. The allegation that a second incident took place was an attempt to try to create a scenario which could provide some justification for the injuries suffered by the Claimant.

Q: you witness Prison Officer Maharaj kick Ijah Oba Braithwaite in his chest on that day?

A: *I can't say exactly what happened in the struggle but ah was there.*

Q: *Did you witness Prison Officer Maharaj kick Ijah Oba Braithwaite in his chest on that day?*

A: **My answer is no.**

*I hit Ijah Oba Braithwaite with baton **about twice** with my baton.*

Q: *How many times did you witness Maharaj, hit him with baton?*

A: *About six (6) times*

67. This witness clearly indicated that he did not see Officer Maharaj kick the Claimant on the 16th December 2009. This answer is given against a clear and unambiguous statement by this witness in his witness statement that,

*“PO I Maharaj came to my assistance and **kicked the Claimant’s ribcage once**”².*

In the light of this the Court was constrained to make inquiries of this witness as follows:

Q: *Did you see Officer Maharaj ever kick Mr. Braithwaite?*

A: *No.*

Q: *Do you have your witness statement?*

² Paragraph 8 of the witness statement of this witness

A: *Yes sir.*

Q: *Could you look at paragraph eight (8)*

A: ***Prison Officer I Maharaj came to my assistance and kicked the Claimant's rib cage once***

Q: *Ok, so that's not true?*

A: *Well sorry but my recollection of the incident is very, very vague.*

Ct: *Is it true or not true. Officer Maharaj did kick the claimant's ribcage once?*

A: ***Yes sir.*** *I would have a better recollection then than I do today.*

Q: *.... then he left you **after** he was kicked in the ribs and went towards Maharaj?*

A: *Yes sir, **not after he was kicked in the ribs** sir.*

Q: ***When was he kicked in the ribs?***

A: *When he launched to me and then he launched to Officer Maharaj that was when the struggle between the two ah them.*

Q: *So he was kicked in the ribs during the struggle?*

A: ***During the struggle.***

Q: That was the **only** time he was kicked in the ribs?

A: **During the struggle that is the only time they could have a physical contact.**

Q: So he was kicked in the ribs how many times?

A: Jogging my memory now **I think once.**

Q: All right so jogging your memory now you think he was kicked in the ribs **once**, and that was **during** the struggle. And during that struggle ...that's the same struggle with the six (6) batons?

A: Yes.

Q: And in that struggle, six (6)(approximate), batons, two (2) of them were jabs to the centre.

A: Yes.

Q: So in paragraph eight (8) when you say --- you're talking about him struggling with you right?

A: Yes.

Q: I tried to shove him off but he was taller than me and a struggle ensued ? and then you say Officer Maharaj came to your assistance and **he kicked the Claimant's rib cage once?**

A: Yes.

Q: Then paragraph nine (9). The Claimant then released me and advanced towards Officer Maharaj,. Read paragraph nine (9) for me.

A: (reads paragraph nine aloud)

*Q: So doesn't that suggest that it was at that time, when the Claimant had released you ,and the Claimant started going towards Maharaj, that it was **at that time** that the Claimant was trying to hit him? And at that time Maharaj used his baton to strike the Claimant's legs and arms, and that's the struggle you are talking about?*

A: Yes.

Q: So it was in that struggle that the Claimant's rib cage was kicked?

A: Yes.

Q: So why did the Claimant release you then?

*A: **He was kicked once and he released me.** He came totally off of me.*

Q: And after he released you what did he do?

A: After he released me he went to Officer Maharaj.

Q: And when he went to Officer Maharaj what happened?

A: They had ah am struggle.

Q: And in that struggle was he kicked or not kicked?

*A: In the struggle no. **He was kicked before the struggle to release me.***

68. It is clear that this witness was only prepared to attest to one kick. He says that this kick **caused** the claimant to release him, when he was allegedly being attacked **during** the second incident. But he also says that the claimant was kicked in the course of the subsequent struggle with Maharaj who came to defend him.

69. If there were one kick, and it was in the course of the struggle with Maharaj after the claimant had released Sebros, then it could not have **caused** the claimant to have released him. Therefore paragraph 8 of his witness statement cannot be true.

70. I have no doubt that there was more than one kick. I have no doubt that one kick, with a boot that was not steel tipped, was not sufficient to break three ribs. I have no doubt that paragraph 8 of the witness statement could not be true, if the evidence of this witness in cross examination is also true. They were both under oath. One is clearly not the truth.

71. The use of force by the officers was described by Officer Sebros as follows:-

Q:you witnessed him hit Brathwaite about six (6).?

A: Yes

Q: Where he hit him?

*A: I can't say exactly, hit him **on his hand**, hit him **on leg** ...?*

Q: Waist?

A: (pauses) trying to remember, **I think he got jabs**. Jabs would have been in centre.

About two (2)...it didn't last long.

72. This evidence on the admitted force used by the officers against the inmate was that there were around 6 baton strikes by Maharaj, (including two jabs to the abdomen), two by Sebro, and one kick by Maharaj to the ribcage. This is after the claimant had already allegedly been subdued after the alleged first incident. It is difficult to understand, even if I were to believe that this was the only force used on the claimant, how this level of force was reasonable or was in self defence.

73. In fact given the contradictions in the evidence of this witness I find that the level of force that he reluctantly admitted to was in fact a minimum. For example, I have no doubt whatsoever that there was more than one kick administered to the claimant.

74. In his evidence in chief officer Sebro stated,

"The Claimant did not scream or show he was in pain during the struggle".

In cross examination his evidence was as follows:

Q: ***what was his reaction?***

A: *going down to the last two lash he was getting loud.*

not scream- but he would bawl in ah kinda way .

Q: ***Like if he in pain?***

A: ***yeah like if he was in pain, was baton. (Chuckles)***

Q: Look at paragraph nine (9) (of your witness statement.)

Q: What you say about that?

A: I still defending this. He didn't scream.

Q: Oh is a bawl?

A: Is a kind of noise he make.

Q: Like if he was in pain?

A: Or if he was in fear.

Q: So that noise he was making - why he was making that noise?

A: Because we have other situations ... this is how they does react.

75. This evidence, apart from being disturbing, is reflective of a witness who is tailoring his evidence in the witness box to iron out inconsistencies revealed in cross examination. It was obvious that the sounds made by the claimant which Sebros was attesting to, were sounds of pain. He admitted this. Yet when confronted with his witness statement where he said otherwise, he then tried to say these were not sounds indicative of pain, but rather of fear, in the hope that this technicality would remove any inconsistency between his evidence in the witness statement and in the witness box.

76. It demonstrates why the court could not repose any confidence in the evidence of this witness. Officer Sebros also gave the impression that he was recounting a story, complete with embellishments, and that he was manufacturing details of that story as he went along. Unfortunately, those details were often inconsistent with the sworn testimony in his witness statement.

Prison Officer Clifford Rampersad

77. His witness statement in so far as material is as follows:-

On or around Wednesday the 16th December, 2009, I was posted to work in the Exercise Yard by P.O.II Keith Arjoonsingh. At approximately 1:40pm I was stationed at the control booth to supervise the inmates' airing at the Upper North Wing Division. From there I noticed inmate Ijah Braithwaite ("the Claimant") strike P.O. I Tatchan Deo in his head. I was approximately fifteen feet away from them and had a clear view.

I saw the Claimant continue to pummel P.O. I Tatchan Deo. The Claimant was about four inches taller than P.O. Tatchan Deo and appeared to weigh more. I shouted at the Claimant to stop but he continued his attack.

*I ran to the assistance of P.O. I Tatchan Deo. P.O. I Miguel Gonzales also came to his assistance. We used our small wooden regulation batons to hit the Claimant about his **upper shoulders and upper arms**. I did not cuff or kick the Claimant in his head or ribcage. I believe his right eye may have gotten injured while we were trying to subdue him. The whole incident, from the time that the Claimant first attacked P.O. I Tatchan Deo, to when he was subdued **lasted about a minute**.*

After the Claimant was subdued, P.O. II Williams instructed P.O. I Sebro and P.O. I Maharaj to escort the Claimant to the Infirmary. I returned to my post at the control booth.

*I observed that the Claimant had a **cut above his right eyebrow** but he walked to the Infirmary unaided.*

The witness responded that he could not recall several critical matters.

Some examples include -

Q: How much blows you hit him on that day?

A: *I can't recall.*

A: *Can't recall the time.*

Q: *You can't recall whether there were any other Officers in the booth with you?*

A: *No sir.*

Q: *How many times did you see Braithwaite hit Deo?*

A: *A lot of time. I don't think Deo hit him. He get lash and was going backwards.*

Q: *How many times did Gonzales hit him?*

A: *I don't know*

Q: *Where did you hit him?*

A: *(pauses) that I can't say.*

While struggle going on can't say whether officers came to (his) assistance.

I can't say if Deo or Gonzales were beating him.

78. This officer gave the impression that he was in the uncomfortable position of trying not to incriminate himself, trying to be loyal to his fellow officers, and portray Officer Deo as the victim of an assault of even greater severity than Deo himself attested to. For this reason I do not accept his evidence in this regard.

Conclusion

79. The Claimant had a duty to discharge the legal burden of proving that he was assaulted and battered and that he suffered the injuries pleaded in his Statement of Case. The Defendant had to discharge the burden placed upon it to show that the force used was in self defence and that it was reasonable.

80. I find that, on a balance of probabilities, the Claimant discharged the burden placed upon him. I find that the injuries he claimed were clearly established on the evidence.

81. While it was admitted that the Claimant did suffer injuries at the hands of officers, the issue of whether those injuries were justified in the circumstances needed to be determined by an analysis of the evidence of the claimant and that of the defendant's witnesses.

82. It was submitted that the evidence of all three witnesses for the Defendant, namely Prison Officer Tatchan Deo, Prison Officer Dennis Sebro and Prison Officer Clifford Rampersad, was consistent in one crucial respect; that is, the Claimant erupted into violent and disruptive behaviour on two occasions on the day in question. In both instances the Claimant allegedly physically attacked a prison officer with a clear intention to inflict bodily harm.

83. If I had found that there were in fact two incidents, and that they involved the violent attacks accompanied by serious threats, as described by the officers involved, then the question of reasonable force would be easily resolved in their favour.

84. Unfortunately I am unable to accept the evidence of the officers that there were in fact two incidents, or even that the incidents took place in the manner they described. Their evidence was replete with contradictions.

85. I find their evidence to have been contrived, incredible, and inconsistent when carefully analysed. Repetition did not render this aspect any more believable, especially when considered together with their demeanour under cross examination.

86. Officer Deo couldn't recall whether it was the right or the left side of his head that received the alleged injury from the claimant. This is important as it was the alleged trigger for the first alleged incident.

87. Officer Deo claims that he was given sick leave and prescribed Panadol for that alleged injury.

88. He claimed to have passed the medical report from the Arima Health Centre onto his attorneys, who, incredibly and in breach of their duty of disclosure to the court, did not produce it or reveal its existence on discovery. Neither did he ensure disclosure of his written report to his Supervisor.

89. Officer Sebro's evidence of two incidents is rejected. It is inherently improbable that the claimant, with a laceration to the head, after having been subdued as a result of the first incident, would launch a second violent attack against two prison officers armed with batons. The scenario he described could not account with any consistency for the one kick that he claimed was administered to the claimant's ribs.

90. Officer Rampersad's claim to have seen the claimant hit officer Deo several times is rejected. Even officer Deo himself does not say this.

91. I accept Officer Sebro's evidence that the infirmary was on the ground floor. Therefore the attempt to suggest that the claimant, at 164 pounds, could not be carried up the stairs to the infirmary, and therefore must have been able to reach it unaided, failed. In fact this demonstrated that the defendant's witnesses were prepared to mislead their attorneys, as well as blame them conveniently for any non disclosures that were revealed in cross examination.

92. I am satisfied that the defendant's witnesses were not forthcoming with the whole truth of the incident, that there was only one incident, and that during that single incident a level of force was

administered to the claimant that was entirely disproportionate to any action by him, and far in excess of a level required to subdue him.

The Evidence of the Claimant

Alleged Improbabilities and Inconsistencies

93. (1) It was submitted that the injuries documented in the medical report are more consistent with the version of events as described by the Defendant's witnesses, in that the Claimant **sustained the bulk of his injuries when he attacked Prison Officer Sebro while waiting outside of the infirmary** thereby forcing him and prison officer Maharaj to apply force to the left side of his body. The fact that the injuries appeared on the medical report to be all on the left side was allegedly suspicious and inconsistent with the claimant's version of events.

However, if the claimant were curled up on the ground as he described, fending off blows from the staves of several officers, I find that there would be nothing incredible or unbelievable about his sustaining the majority of blows to one side of his body- the side that was exposed. The fact that he described the blows as falling all over his body is not inconsistent with that scenario. Although "all over" in that context would not include the area that was not exposed, this is too fine a distinction upon which to make a finding of lack of credibility. It must be borne in mind that this incident was taking place in circumstances that were sudden, violent, and traumatic. Head injuries were also involved and the claimant claims that he even lost consciousness.

(2) It was also submitted that in his witness statement, at paragraph 8, the Claimant alleges that he had to be carried to the prison infirmary by the **prison officers** because he could not walk. However, under cross-examination he admitted that they did not carry him and sought to claim instead that **another prisoner** in fact helped him to the infirmary.

I find that there would be no point to fabricating this. It would be just as easy to assert that the prison officers assisted him as to assert that he was assisted by another prisoner. The defendant was contending that the claimant was sufficiently fit, despite having been subdued, to launch a second

vicious assault on the prison officers accompanying him to the infirmary. The claimant was contending that he was so incapacitated after being subdued that he was barely capable of moving without assistance, and in no condition in any event to launch the second alleged attack. The fact that he had to be assisted to the infirmary **at all** was what was disputed by the defendant, whether by the prison officers or by an inmate was not material.

(3) It was alleged that the most improbable aspect of the Claimant's testimony is his claim that the prison officers involved in this claim all attacked him for no particular reason. It was submitted that it was more likely that the Claimant responded to Officer Deo's instruction in an unusually aggressive and hostile manner.

94. I accept the evidence of the claimant in most respects, save that on a balance of probabilities I consider that it is more likely than not that there must have been some incident that provoked the initial attack by the officers. I do not necessarily accept however that it is the incident described by the defendant's witnesses.

95. I come to this conclusion reluctantly, but would have harboured far fewer reservations on this aspect if it had not been for my findings that the officers involved did not tell the truth about there being two incidents.

96. I definitely do not accept that there were two incidents as described by the officers. The second alleged incident was clearly a fabrication designed to justify the use of excessive force on the claimant **after** he had been subdued in relation to whatever incident initially occurred.

97. I find that on a balance of probabilities that something would have had to trigger the violent response of the defendant's agents. I find that that triggering event had to be more than the trivial incident described by the claimant. The claimant's evidence that " *I know (the first Officer) he hit me once and the rest ah them run in*" perhaps provides the best explanation for what happened. The other officers responded to what they perceived to have been a threat, even if they all had not witnessed it.

98. I find that on a balance of probabilities the triggering event for the assault was more likely to have been of the nature described by the defendant's agents. To find otherwise I would have had to make specific findings and conclude that:

- a. The defendant's agents willfully and without provocation **initiated** a brutal assault on the claimant that verged on the sadistic and constituted a gross and obscene abuse of power,
- b. That the culture of the prison service enabled and/ or encouraged and in any event protected officers with such brutal propensities to the extent that they had no inhibition regarding brutal unprovoked attacks on a prisoner in full view and/ or in the presence of several other fellow prison officers and prisoners, and
- c. That there existed and exists a culture of complicity within the prison service to the extent that prison officers are prepared to give evidence in support of fellow officers guilty of such behaviour and perjure themselves on oath.

98. There is not sufficiently clear evidence in this case that findings such as these could be justified on the evidence of the claimant alone. What I have found however is that:

- a. The evidence of the defendant's witnesses was unreliable and in many instances untruthful.
- b. That there has been gross exaggeration in relation to the claimant's conduct in an attempt to justify the excessive use of force upon him.
- c. That there was clearly a use of force disproportionate to any conduct that has been established on the evidence in relation to the claimant.
- d. There has been complicity among witnesses for the defendant in exaggerating and fabricating the unbelievable scenario required to justify the force which resulted in the fracture of three of the claimant's ribs.

99. On a balance of probabilities though the incident must have been initiated by some conduct of the claimant, the escalation, and violent response involved disproportionate use of force. The

fracturing of three ribs of the claimant was out of proportion to anything that I find that the claimant did. I am completely satisfied that there was no second incident where, incredibly, the claimant launched a second attack, shortly after having been allegedly forcefully subdued.

100. To the extent that the force used was disproportionate to that required to subdue the claimant I find the defendant liable in damages for assault.

Damages

Compensatory/General Damages

101. The factors which are to be taken into account by a Court in the assessment of general damages for personal injuries were set out by the Honourable Wooding CJ in the **Cornilliac v St. Louis** (1965) 7 W.I.R. 491 as follows:-

- (i) The nature and extent of the injuries sustained.
- (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.
- (v) The extent to which, consequentially, the (claimant's) pecuniary prospects have been materially affected.

The nature and extent of the injuries suffered

102. The Claimant described how his injuries were being sustained as follows -

1. *...When I was hit by the officers I asked the officer why he hit me and this was followed by a number of other officers then approaching me and starting to beat me about my body.*

2. *The Officers were armed with their riot staves and they beat me all over my body especially to the side of my head and the left side of my body. I begged the officers to stop beating me but they would not listen. ... when I would hold on to one part of my body to try and prevent them from hitting me there, the officers would just beat me in another part of my body. Some of the offices would hold their riot stave and ram it sideways into my side and this was most painful.*

3. *One of the officers hit me a lash to my head and when I got this lash I fell to the ground. When I was on the ground I tried to roll in every different direction to prevent the officers from hitting me but the officer began to attack me worse than when I was standing. While on the ground the officers all began to kick me while I was on the ground. When I tried to get up from the ground the officers who were armed with their baton began to beat me all over my body and push me back on the ground. While the officers were doing this they were all using obscene language toward me. I was hit a number of times on my head and during the attack I was cut in my head a few places. Blood began to run down to my face from my head. I was terrified and afraid when this happened. I thought that the officers were going to kill me with licks.*

4. *When I fell back to the ground the officer began to kick me all over my body. The officers especially attacked me on the left side of my body. The officers kicked me over and over on my left side. Each kick that the officers hit me felt more painful then before. I could not stop the attack and after the officers were beating me with their baton and kicking me I began to feel real weak. I lay on the ground and the officers just continued beating me none stop. When one of the officers hit me a kick in my chest I felt a sharp pain and I felt like something break inside me. I was sure that one of my ribs was broken. I shouted out to the officer and tell him stop, I can't take any more. One of the officers then came up to me and hit me another kick in almost the same place that the officer had kicked me before. I bawled out when I got this lash and I felt like another bone was broken in my body.*

5. *I could feel like my inside was swelling after this and I was trying to hold on to the place where the officers had hit me the kick to prevent them from hitting me there again. When I did this the officers focused their attack on the hands where I was holding on. The officers were telling me to let go and using obscene language toward me while they were beating me. I could feel the other parts of my body swelling while the officers were beating me. I felt like my whole head was swelling during the attack and my belly and chest was swelling in different places. There was blood all over the ground during this attack by the officers.*

6. *One of the officers came up to me while I was lying on the ground and took his baton and hit me a lash in my belly and when I got this lash I spit out blood on the ground. I felt like something burst inside me and I bawled out when the officer hit me this lash. When the officer hit me this lash I blanked out. I did not know myself I must have been rendered unconscious. When I revived the officers had stopped beating me but when I opened my eyes and tried to get up they started to beat me again. I could not believe that the officers were beating me again and even though I begged the officers to stop they would not stop.*

My whole body was swollen and I could not move. I was in extreme pain. I felt like I was going to die in pain. I did not have the strength to defend myself from the attack of the officers a second time. I decided to lie on the ground lifeless and at this time, when I did this, the officers stopped the beating.

He was taken to the Eric Williams Medical Sciences Complex. He describes his stay there as follows:-

7. *I was in extreme pain throughout my stay in the hospital and I could see the marks on my body from the attack of the officers. My entire body had become blue black after the first day and I could hardly move any part of my body. I had to be assisted to urinate by a nurse and this was extremely painful and embarrassing. .*

8. *Each time that the doctors would make their rounds I would be given pain killers for the pain. This was done through injections. I remain warded in the hospital until the 18th December 2009. During the time that I was on the ward I could not sleep because of the pain I was experiencing and every time that I tried to move any part of my body I would have to call out to the nurses for assistance. ...I also could not eat any solids due to the internal injuries that I had suffered. When I was discharged from the hospital on the 18th December 2009 I was still in a lot of pain -to date I have not been taken from the prison to the hospital since my discharge.*

I was taken back to the prison upon being discharged and placed in a cell. I was not provided with any medication by the prison authorities upon being brought back to the prison. I started experiencing breathing problem at the prison upon my return and still experience those problems up to today's date. When the temperature drops or rain falls I have extreme pain in my ribs and stomach. I did not experience this before this incident. I have complained to the prison authorities about this condition but to date I have not received any treatment by the prison authorities for this.

103. In his Statement of Case the Claimant identifies the injuries suffered from the incident as follows:-

1. Severe swelling on right side of head
2. Haematomas about the Claimant's body.
3. Contusions about the Claimant's body.
4. Tenderness about the Claimant's entire body.
5. Soft tissue injury about the body.
6. Lacerations to the head.
7. Lacerations to the Claimant's legs.
8. **Broken ribs.**
9. Contusions and haematomas to the Claimant's face.
10. Severe swelling about the Claimant's body.

104. The medical report of the prison service which is signed by the prison doctor states that the claimant was suffering from:-

- i. left side chest wall swelling and pain.
- ii. fractures of ribs 7 to 9 on the left side of the chest.
- iii. left side kidney contusions.

Further on the medical report the doctor certifies that the probable cause of the injuries was blunt trauma.

105. The evidence adduced by the Claimant in his witness statement as to the manner of the assault and battery carried out upon him by the officers demonstrates that it was extremely fortunate that the injuries sustained were not of significantly greater severity. The manner in which the injuries were inflicted on the Claimant by the officers involved clearly had the potential to cause, and did in fact cause serious physical injury. I find that he attacks by these officers were apparently inflicted without restraint.

106. In view of my findings on the nature of the injuries sustained by the Claimant, based on the medical reports and documentation, and the evidence of the defendant's witnesses themselves, I decline to take this view that the claimant's description of the assault was exaggerated. The records of injuries are consistent with the attack described.

107. The medical reports and records describe the injuries as set out above. The Claimant sustained three broken ribs in addition to kidney contusions, which illustrates the severity of the injuries.

Pain and suffering

108. I accept that the level of pain and suffering of the claimant must have been intense. In fact he continued to complain of pain when the temperature drops up to the date of his witness statement May 2011.

109. The Claimant would have suffered the most serious pain immediately after the incident. He was taken to the infirmary and then the hospital.

Judicial trends

110. In **Kenton Sylvester v The Attorney General et al, H.C.A. No. 4025 of 2002** delivered July 31st, 2002 the Honourable Justice Christopher Hamel Smith (as he then was) was called upon to assess damages to the Plaintiff in circumstances where the Plaintiff had undergone a vicious attack at the hands of several police officers, who apparently were under the impression that he was a bandit, rather than the victim of bandits.

The Plaintiff suffered serious personal injuries as result of the attack – including a fractured radius and ulna, 8 fractured ribs, broken upper humerus, punctured lung, contused liver, loss of consciousness, and multiple abrasions. Surprisingly, he made an almost complete recovery. The Plaintiff was awarded the sum of **\$200,000.00** general damages. It included an element for aggravated damages.

The injuries suffered by the Claimant were not as serious as those suffered by Sylvester. However the pain and suffering may have been comparable. I consider that the pain and suffering that the Claimant would have experienced would have been significant, as is evidenced from his witness statement.

In **Sylvester** immediately after the attack the ambulance came to the scene and he was taken to the hospital very close by. He was hospitalized for 12 days including 8 days in the intensive care unit.

111. **Martin Reid v The Attorney General, C.V. 2006-02496** delivered **June 6 2007** per the Honourable Justice Jones.

Reid sustained injury after an assault at the hands of several prison officers. The injuries received by the Claimant Reid were less severe than the injuries of the instant Claimant.

They included a broken finger, cuts to the back of his head and bruises. In the case of Reid he was left unattended for more than 2 days before being taken to hospital, though he had been taken to the infirmary officer right after the attack. His wounds continued to bleed. When he was taken to the hospital he was hospitalized for 5 days. He suffered **post concussion syndrome** from the blunt head trauma and he still suffered blackouts, pain and headaches at the time of assessment. The Court awarded the Claimant Reid the sum of **\$65,000.00** as general damages for the injuries suffered and \$45,000.00 as exemplary damages

112. **Michael Bullock v The Attorney General C.V. 2007-01766** - Master Durity.

The Claimant in Bullock suffered injuries which were severe - **a broken jaw and the loss of several teeth**, as a result of an attack by several prison officers triggered by his initial refusal to hand over his glasses. He had to be given a liquid diet by the authorities and had many other superficial injuries all about the body. The Master awarded Bullock the sum of **\$130,000.00** as general damages which included an element of aggravated damages.

Further the Master awarded the Claimant the sum of **\$50,000.00** as exemplary damages. The continuing effects of the resultant injuries in Bullock appear more severe than in the case of the Claimant.

113. **Thaddeus Bernard v Nixon Quashie, Civil Appeal No. 159 of 1992** - delivered October 21 1998 per the Honourable Chief Justice De La Bastide.

In **Bernard** the Respondent was beaten by the Appellant who was an estate constable at the Tobago Airport. The Respondent was assaulted at the Tobago Airport by the Appellant initially holding on to the collar of the Respondent. Another officer then held down the Respondent's hands behind his back at which time the Appellant struck the Respondent a few times in his face. As a result the Respondent suffered lacerations to the face. The lacerations bled quite profusely. He was taken to the hospital for treatment.

The trial judge awarded the Respondent the sum of \$78,000.00 in compensatory damages and \$12,000.00 in exemplary damages. On appeal to the Court of Appeal the general damages were reduced to \$40,000.00, as \$78,000.00 was held to be a wholly erroneous estimate of the damage, in view of the then existing range of awards of that type (up to \$37,000.00) and the award of exemplary damages upheld.

The injuries suffered by the Respondent in **Bernard** were much less severe than the injuries suffered by the Claimant. The injuries of the Respondent in **Bernard**, the nature of the assault upon him, in terms of its viciousness and duration, and the circumstances of humiliation are less serious when compared to the situation of the Claimant herein.

114. **Lester Pitman v The Attorney General C.V. 2009-00638** dated 18th December 2009 per the Honourable Justice Jones.

In the case of **Pitman** the Claimant was beaten in the condemned division of the Port-of-Spain by prison officers, two using closed fists and one using his riot staff. The injuries suffered by **Pitman** as a result of the attack consisted mainly of soft tissue injuries and did not consist of any broken bones, unlike the injuries suffered by the Claimant. The Honourable Justice Jones awarded **Pitman** the sum of **\$90,000.00** general damages and \$30,000.00 exemplary damages.

115. **Morris Kenny v The Attorney General H.C.A. T-62 of 1997** – delivered March 11 2002 per the Honourable Justice Tam.

The Plaintiff in this case was beaten in a prison setting with a cable about his body and suffered severe back pains. The Plaintiff also suffered many abrasions about the body and had welt marks as a result of the beating.

The Court awarded **Kenny** the sum of **\$50,000.00** general damages to take into account aggravating factors. Exemplary damages were awarded in the sum of **\$60,000.00**.

116. In the case of **Alphie Subiah v The Attorney General, Privy Council Appeal 39 of 2007** the Privy Council in effect upheld an award of vindictory damages in the amount of \$35,000.00 when it accepted the compensatory damages in that case set by the Court of Appeal in the amount of \$45,000.00, but declined to interfere with a total award by the Master in the amount of \$80,000.00 - that sum including a further sum by way of what would have been vindictory damages.

The physical injuries suffered by the Appellant in Subiah, in an unprovoked and malicious assault by a police officer, were not as severe as those of the Claimant. In the present case the facts of the Claimant demonstrate a far greater degree of pain and suffering as well as aggravation.

117. In the case of **David Abraham v The Attorney General CV 2009 – 00635** an order was granted by consent by the Honourable Madam Justice Dean Armor.

The Claimant in this matter was assaulted and beaten at the Golden Grove Prison. Abraham suffered soft tissue injuries though he was beaten into a state of unconsciousness. He sustained minor lacerations to the shin and head. He was taken by the authorities to the Mt. Hope Medical Sciences Complex for treatment and he was discharged the same night.

On July 22nd 2010 the Honourable Madam Justice Dean Armorcer awarded the Claimant in these circumstances **by consent** the sum of **\$90,000.00 general damages**, \$30,000.00 aggravated damages and \$50,000.00 exemplary damages.

118. **Lincoln Marshall v The Attorney General, CV 2009- 03274** - delivered **October 1 2010** the Honourable Madam Justice Rajnauth-Lee.

On or about the 22nd April 2007 a Prison Officer used obscene language towards the Claimant. The Claimant responded to the officer in like manner. The officer left and returned to the cell of the Claimant with two other officers. In the presence of the Claimant the three officers searched the cell. The Claimant was ordered back into the cell. The three officers followed the Claimant back into the cell. As the Claimant was entering the cell he was pushed into the cell by one of the officers and he fell to the ground. The Claimant was assaulted and beaten by the three officers. The injuries that were suffered by Marshall were as follows:-

- (i) The Claimant lost two teeth and had four of his other teeth broken.
- (ii) Welt marks about his body.
- (iii) Tender swelling about his entire body.
- (iv) Tender haematomas about the Claimants body.
- (v) Intense swelling of the face and jaw area.
- (vi) Inability to eat food and difficulty in talking.
- (vii) Bleeding from the jaw area.
- (viii) Soft tissue injury about the body.

On October 1 2010 Madam Justice Rajnauth Lee awarded the Claimant the sum of \$100,000.00 in general damages, including aggravated damages, and \$50,000.00 in exemplary damages.

119. **Sean Wallace v The Attorney General C.V. 2008-04009** delivered on the 2nd October 2009 by the Honourable des Vignes J. The injuries suffered by Wallace were more serious than those in the case of the Claimant. This incident took place on March 17th 2008. The incident in

the instant matter took place on 15th December 2009. This is after the judgment in the **Wallace** matter.

The fact that the claim in the **Wallace** matter was filed, in relation to brutal assault and battery of a prisoner at the prison had absolutely no deterrent effect on a repetition of similar conduct. His Lordship in **Wallace** awarded the Claimant the sum of **\$160,000.00** general damages.

In so doing he repeated pronouncements by various courts of this country in relation to the behaviour of prison (and police) officers that had attracted awards of exemplary damages, and expressed concern at their apparent ineffectiveness, as set out hereunder at paragraph 47.

*The second important observation that I feel compelled to make is that over the past eleven years, the number of matters where either police officers or prison officers have abused their power in the most abominable fashion has reached alarming proportions. In most, if not all, of the judgments, the Courts have expressed in the strongest possible language their abhorrence for the conduct of these officers and **have even taken steps to bring the abuses to the attention of the relevant authorities. Yet, the abuse of power continues and the State continues to pay out substantial awards for compensatory and exemplary damages. I set out hereunder a small sampling of the opinions expressed by the Courts over the years...***

*(b) “.... The misconduct of the 1st, 2nd, 3rd, and 4th defendants towards the plaintiff clearly amounts to oppressive, arbitrary and unconstitutional action by servants of the State and it is the duty of this Court to express its disapproval of such misconduct by an award of exemplary damages that are meant to punish and **deter similar misconduct** in the future. While it is appreciated that the job of a prison officer is no doubt one of extreme danger, where life, limb and health are constantly at risk, nevertheless it is a risk that has been undertaken freely and the message must be made clear to all those charged with the responsibility for the guarding and safeguarding of prisoners that their charges are not without rights..... wanton or any form of brutality and **unrestrained violence must play no part in the system of punishment and/or rehabilitation of convicted***

offenders.....The Court also directs that the Registrar of the Supreme Court send a copy of this judgment to the Commissioner of Prisons..... and to the Director of Public Prosecutions for such investigation and further actions they may find warranted.” (Judgment of Tam J. (11th March 2002) in *Morris Kenny v. The Attorney General & Ors.*, H.C.A. No. T-62 of 1997 at pp. 14-15.)

The State will be deterred in two ways. First, in my view, it will be more astute and alive to a more meticulous and rigorous selection procedure for police officers. Secondly, the payment out of such exemplary damages from the public purse, if persistent, will inevitably attract the attention of opposing politicians, the press, pressure groups and the taxpayer himself. This should lead in the long run to a system which is more efficient and accountable” (Judgment of Sharma C.J (21st March 2003). in *Ramanoop v. The Attorney General*, Civil Appeal No. 52 of 2001)

(e) “.... In my view this is an appropriate case for exemplary damages..... The prison officers involved, whoever they may be, conducted a vicious and unbridled attack on the Claimant, a person placed in their custody by the State. Further, the failure of the prison authorities to ensure that the Claimant received proper medical attention immediately after the assault to be deplored..... That it is the taxpayer’s dollars that fund the State in a case like this is an unfortunate fact of life. **Perhaps, the time has come for the State to take stock of the sums of money paid out of the public purse as compensation for these and similar acts of its servants and agents and devise some means by which such persons can be made accountable for their tortuous acts. This is a matter for the State and not the Court.**” (Judgment of Jones J. (6th June 2007) in *Martin Reid v. The Attorney General & Ors.*, CV 2006-02496 at pp.4-5) at paragraph 48

..... It is not surprising, therefore, to find that the abuses continue unabated because **apparently the sharp criticisms of the several Courts have fallen on deaf ears.** This Court wishes to add its voice to the chorus of Judges who have clamoured against such barbaric behaviour as occurred in this matter and for action to be taken against the

offending officers to discipline them for their vicious and unwarranted brutalization of the Claimant.- Per Des Vignes J.

120. A listing in tabular form of the awards in recent times made by the courts in respect of assaults by prison officers is set out hereunder.

No	Parties	Court	Quantum of Damages- including exemplary damages	Date of judgment
1	Abraham v AG	Dean Armorer J	\$180,000.00	22 nd July 2010
2	Marshall v AG	Rajnauth Lee J	\$150,000.00	1 st October 2010
3	Lester Pitman v AG	Jones J	\$127,000.00	18 th December 2009
4	Sean Wallace v AG	Des Vignes J	\$230,000.00	2 nd October 2009
5	Bullock v AG	Master Durity	\$180,000.00	9 th February 2009
6	Martin Reid v AG	Jones J	\$110,000.00	6 th June 2007
7.	Goring v AG	Rajkumar J	\$100,000.00 inclusive of aggravated damages. \$100,000.00 exemplary damages	August 3 rd 2011

The quantum of the awards has clearly not proven to be a deterrent to the actions of some prison officers.

Aggravated Damages

121. Under this head of damages the Claimant is entitled to recover damages for mental suffering inflicted on the claimant as opposed to the physical injuries he may have received. Under this head are included such matters as the affront to the person's dignity, the humiliation he has suffered, the damage to his reputation and the standing in the eyes of others – **per Chief Justice de La Bastide in Thaddeus Bernard v Nixon Quashie at page 4.**

122. These are matters which may be affected by the manner in which the assault was carried out by the officers.

123. The Claimant made specific reference to the following as matters in aggravation which should be reflected in a component for aggravated damages in an award:-

The assertion that the assault and battery was unprovoked. (I do not find this to be proved. In the alternative I find that the defendant's agents may have fallen within solution 2 of the Ashley case supra- *[(2) the necessity to take action in response to an attack or imminent attack must be judged on the facts as the defendant honestly believed them to be, whether or not he was mistaken, but, if he made a mistake of fact, he can rely on that fact only if the mistake was a reasonable one for him to have made (solution 2).*

124. In addition there are the following additional matters that this court considers must be relevant:-

1. The mental torment that the Claimant would have experienced throughout the entire ordeal, and in particular the anguish, helplessness, despair, and fear that he may not have survived the rapidly degenerating ordeal.
2. The humiliation of being beaten while in the presence of the other officers who did nothing while the entire incident was ongoing.
3. The apparent condonation of the use of excessive force upon him by those in authority.

Exemplary Damages

125. The House of Lords in **Rookes v Bernard** [1964] AC 1129 recognized two categories of cases in which an award of exemplary damages would be appropriate at common law, including where there is evidence of “oppressive, arbitrary or unconstitutional action by the servants of the Government.”

126. In **Bernard v Quashie** (*supra*) the Honourable de la Bastide CJ stated “*the function of exemplary damages is not to compensate but to punish and deter.*”

127. In **Takitota v AG of the Bahamas, Privy Council Appeal 71 of 2007** delivered March 18 2009 it was stated:

[12] The award of exemplary damages is a common law head of damages, the object of which is to punish the Defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary or unconstitutional action by the servants of the government, the ground relied upon by the Court of Appeal in the present case. It serves, as Lord Devlin said in Rookes v Barnard [1964] AC 1129 at 1223, [1964] 1 All ER 367, [1964] 2 WLR 269, to restrain such improper use of executive power.

128. Given my finding that it has not been proven on a balance of probabilities that the excessive use of force was unprovoked, but that more likely than not that there was a triggering incident, or, in the alternative, that the officers probably had reasonable, even if mistaken, grounds to believe in the imminence of an attack by the claimant, I do not consider that an award of exemplary damages is appropriate in this case.

129. This assault was unlike that in **Goring** (*supra*), for example, where it was not explicable by self defence or excessive force being used in the heat of the moment. In **Goring** the assault was characterized by brutality, verging on the sadistic, directed at a prisoner in circumstances where he was helpless and outnumbered. In the instant situation I find that it

was a case of excessive force being used in the heat of the moment. It appears necessary to repeat what was stated by this court in **Goring v AG (CV2010-03643 delivered August 3rd 2011)**

The courts are not unmindful of the fact that prison officers have to face dangers in a real environment under conditions that do not even approximate those in the outside world. The recognition and enforcement of protection of prisoners' rights is not based on any artificial view of those conditions, or tainted by any form of sentimentality. It is, as it must be, based on the duty of the courts to ensure that those conditions do not degenerate to the point where prisoners can be subject to arbitrary and excessive brutality, amounting in effect to torture at the whim of those entrusted with their care.

Failure to condemn such behavior in the strongest possible terms amounts to countenancing and condoning it. This is incompatible with the duty of courts in a civilized country which subscribes to the recognition, protection and enforcement of basic standards of treatment of its citizens, including those incarcerated in its prisons.

*Further the level of brutality described does not appear to be abated in any way by the vigorous pronouncements of courts in this country over a period of several years including those set out above, which were identified and repeated by the Honourable Justice Des Vignes in **Wallace** (supra).*

Further the decision in that case to bring to the attention of the Commissioner of Prisons and the Director of Public Prosecutions the matters that emerged in that case appear not to have prevented complaints of brutality such as the instant one...

Administration of Justice

130. In *Morris Kenny v. The Attorney General* and in *Wallace* the judgments were referred to the Registrar for onward transmission to the Commissioner of Prisons.

131. In **Martin Reid** the Honourable Justice Jones recommended that, rather than the taxpayer being required to pay awards in such matters that in certain cases the officers involved in like incidents should be made to personally pay the damages awarded.

132. In a series of recent cases several different courts have awarded exemplary damages ranging up to \$100,000.00, in an effort to send a signal that complaints of incidents of brutal violence at prisons are occurring with alarming frequency. Yet matters based on allegations of excessive use of force in Prisons continue unabated. One of the real dangers of using disproportionate force without restraint is that at some point the death of an inmate becomes a possibility.

133. The time for accountability in relation to such incidents has long passed. There are many incidents like this one where findings have been made that excessive force has been used against inmates of prisons. The courts award damages. In some cases the courts award aggravated or exemplary damages. Presumably the damages are paid. But the incidents do not cease. Remarks made by the courts in several such matters appear to have been ignored, and there is every indication, from the repetition of like incidents, that the perpetrators face no consequences.

134. It is recognized that the prison environment poses dangers to prison officers. They may have to use force to defend themselves. However in the circumstances of this case nothing in law permitted the use of excessive force to the point where an unarmed inmate sustained inter alia, three 3 broken ribs and contusions to the kidney.

135. Failure to act upon findings of a court that servants or agents of the state are acting in an unlawful manner has implications for every citizen of this country. If servants of the State are permitted to act unlawfully, with impunity and without consequences, then it should come as no surprise when unlawful actions are repeated.

136. Accountability is a critical and fundamental feature of democracy. The office of the Attorney General has a role to play in ensuring that accountability, a duty that continues after the delivery of judgment.

137. The delivery of judgment in matters like these cannot be seen as a merely academic exercise. Though the Attorney General is the nominal defendant in matters like these, that office has a duty when decisions and findings are made in relation to officers, including prison officers, to convey the findings and decisions of the courts, including any recommendation made therein.

138. Its duty does not stop at the delivery of judgment. It must communicate to the necessary named officials and their supervisors the findings of the courts, whether at this level or on appeal, so that remedial action can be taken and persons held accountable.

Conclusion

139. It is ordered that Damages are assessed as follows:-

1. The sum of **\$90,000** is awarded to the Claimant inclusive of Aggravated Damages.
2. Costs to be paid by the Defendant to the Claimant on the basis prescribed by the Civil Proceedings Rules 1998, for a claim in the sum of **\$90,000.00.**¹

Dated this 22nd day of March 2012

Peter Rajkumar

Judge

¹ The Court would like to record its appreciation to judicial research assistant Ms. E. Ali for her contribution to this judgment.