

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV 2004/0502

BETWEEN:

MICHAEL CHRISTOPHER

Claimant

and

(1) PC 240 JOHN FLAVIEN

(2) THE HONOURABLE ATTORNEY GENERAL
OF SAINT LUCIA

Defendants

CONSOLIDATED WITH

CLAIM NO. SLUHCV 2006/0182

BETWEEN:

TAMARA BARROW

Claimant

and

(1) PC 240 JOHN FLAVIEN

(2) THE HONOURABLE ATTORNEY GENERAL
OF SAINT LUCIA

Defendants

Appearances :

Mr. Shawn Innocent for Mr. Michael Christopher

Mr. Collis Barrow for Ms. Tamara Barrow

Mr. Dwight Lay for Defendants

2007: January 16;
February 19, 20;
March 9;
July 25

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JUDGMENT

INTRODUCTION

- [1] **EDWARDS, J.:** There was gunfire in the dancehall at the “Dub House” night club at Gros Islet, during the Friday night “street jam” of the 19th December 2003. Among the many persons in the “Dub House” were two young women and a man. They got shot. The injured man was Mr. Michael Christopher. The 2 injured women were Ms. Tamara Barrow and Ms. Yasmin Alexander.
- [2] They allege that PC 240 John Flavien on active duty, had a gun pointing it at a man in a white knitted vest near the entrance in the night club immediately before this gun blast. They contend that he fired 2 shots in the dancehall and injured them.

THE PLEADINGS

- [3] By his claim filed on the 16th June 2004 Mr. Christopher claims damages for personal injuries, damages and costs arising from the negligence of PC Flavien in discharging a firearm in the “Dub House”, in a manner contrary to the safety of the general public or the occupants and or visitors, while in the course of his employment as servant and or agent of the Crown. He also claims \$695.23 for loss of earnings, interest, exemplary damages and general damages, costs, and further or other relief. The liability of the Attorney General arises by virtue of Section 4 of the Crown Proceedings Ordinance Chapter 13 of the Revised Laws of Saint Lucia 1957; and section 13, which mandates that civil proceedings against the Crown must be instituted against the Attorney General.
- [4] By her claim filed on the 7th March 2006 Ms. Barrow claims damages for personal injuries, damages and costs arising from the negligence of PC Flavien in discharging a firearm at the “Dub House”, a public dancehall, in a manner contrary

to the safety of the general public or the occupants and/or the visitors, while in the course of his employment as servant and/or agent of the Crown represented by the Attorney General of St. Lucia. She claims \$1,240.15 for special damages, interest, general damages, exemplary damages, costs and further or other relief.

- [5] The Defendants by their defence filed on the 1st December 2004 in Claim No. SLUHCV 0502/04, have pleaded that PC Flavien accompanied by PC 261 Durman, had gone to the "Dub house" after 1:10 am on the 20th December 2003, because of a report from the Gros Islet Police Station, that a fight was taking place at the Dub house. The Defendants have pleaded that PC Flavien and PC Durman came under attack by the crowd when bottles were thrown at them from all directions; and upon hearing 3 loud blasts like gunshots the crowd began to disperse. The Defendants have averred, that while the crowd was dispersing, PC Flavien saw Mr. Christopher in the "Dub house" with a shining object in his hand, which appeared to be a firearm. That Mr. Christopher raised the object and pointed it at him, and he became fearful for his safety and the safety of others in the vicinity; and that PC Flavien discharged his loaded firearm in necessary self defence, in the lawful and bona fide execution of his duties as a police officer, in order to prevent Mr. Christopher's imminent commission of a serious crime.
- [6] The Defendants have denied the alleged negligence, or that Mr. Christopher has suffered the alleged loss or damage and personal injuries; that alternatively, in the event the Defendants be found liable, that Mr. Christopher contributed to the same.
- [7] By their defence filed on the 21st April 2006, in Claim No. SLUHCV 0182/06, the Defendants have pleaded that PC Flavien was performing lawfully the functions of a police officer, in good faith and in accordance with established protocol. They deny the negligence alleged by Ms. Barrow, or that PC Flavien caused injury to Ms. Barrow.

[8] Though the Defendants have not pleaded any special defence resulting from prescription, Learned Counsel Mr. Lay has argued confidently in his closing submissions, that Ms. Barrow's claim is prescribed. Mr. Lay has argued further that his claim cannot be maintained at all against the Defendants, in the absence of a specific pleading alleging, that PC Flavien was at the material time acting in bad faith.

[9] These submissions of Mr. Lay have thrown up 2 preliminary issues which must be decided before dealing with the other central issues. However I shall identify and consider the issues after reviewing the relevant law on negligence, the liability of the Crown, good faith, and prescription.

THE LAW ON NEGLIGENCE

[10] At paragraph 6 of Mr. Christopher's statement of claim he alleged that PC Flavien entered the night club and negligently discharged several rounds of ammunition into the crowded room and thereby caused injury to the Claimant.

[11] The Particulars of Negligence pleaded are:

- “(i) discharging a loaded firearm in a crowded public place to the danger of the visitors and or occupiers thereof;**
- (ii) discharging a firearm in a dark place where visibility and lighting conditions were poor;**
- (iii) failing to exercise due care, diligence and precaution in discharging his firearm;**
- (iv) failing to take the necessary or any proper or reasonable precaution to avoid causing injury to the Claimant;**
- (v) failing to give any or any proper warning of his intention to discharge his firearm;**

(vi) in addition the Claimant will rely on the doctrine of res ipsa loquitur in support of his claim for negligence.”

[12] Ms. Barrow alleged at paragraph 5 of her statement of claim that PC Flavien while on active duty entered the said dancehall and negligently discharged rounds of ammunition into the room which was at that time crowded with persons, causing injury to the Claimant.

[13] The Particulars of Negligence alleged are:

- “(i) Discharging a firearm in a crowded room in a manner that was hazardous to occupants of the room;**
- (ii) Discharging a firearm in a dimly lit room where visibility was poor;**
- (iii) Failing to exercise due care in discharging his firearm;**
- (iv) Failing to take any proper precaution to avoid causing injury to persons.”**

[14] Article 985 of the Civil Code of St. Lucia provides that:

“Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not relievable from obligations thus arising.”

[15] The discharge of the firearm by PC Flavien was a human act which is therefore caught by Article 985. In Northbrock Ltd v Jardine (1992) 44 W.I.R. 160 at 165, Sir Vincent Floissac explained:

“There has never been any doubt that our Article 985 . . . place [s] on the Plaintiff the onus of proving as a precondition of the Defendant’s delictual liability that the damage suffered by the Plaintiff was caused by the Defendant . . . Nor has there ever been

any doubt that where the Plaintiff alleges that the damage was caused by the Defendant . . . or where the Plaintiff relies on our Article 985 . . . the onus is on the Plaintiff to prove as a precondition of the Defendant's delictual liability that the damage was caused by the Defendant's fault. I use the word "fault" in its technical sense to signify the concept which is expressed in the words "act, imprudence, neglect, or want of skill" appearing in our Article 989D (1) as –

"negligence; breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would apart from this article give rise to the defence of contributory negligence."

[16] "We are required by our Articles 917A and 1137 to interpret our Article 985 by reference to the English rules of evidence. This means that where the cause of action is in negligence, the Plaintiff must prove by reference to the English law of negligence and English rules of evidence: (1) that the Defendant owed to the Plaintiff a duty to take care; (2) that the Defendant was negligent, or in breach of that duty; and (3) that the damage suffered by the Plaintiff was caused by that negligence or breach of duty:" (PER Sir Vincent Floissac C.J. in Northrock supra at page 167 paras g-h).

[17] In discharging the onus of proof Mr. Christopher has signaled his intention to rely on the presumption of negligence enshrined in the maxim "res ipsa loquitur." This is a "rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the Defendant are at the outset unknown to the Plaintiff and are or ought to be within the knowledge of the Defendant": (Barkway v South Wales Transport Co. Ltd [1950] 1 All E.R. 392, Per Lord Normand at page 399), referred to by Sir Vincent Floissac C.J. in Northrock supra at page 169).

[18] “Under the doctrine *res ipsa loquitur* a Plaintiff establishes a *prima facie* case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the incident, and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the Defendant or of someone for whom the Defendant is responsible, which act or omission constitutes a failure to take proper care for the Plaintiff’s safety. There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the Defendant . . . , and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the Defendant, that the accident arose from want of care:” (Halsbury’s Laws of England, Vol. 34 (4th Edition) para. 57).

THE CROWN PROCEEDINGS ACT

[19] Section 2 of the Crown Proceedings Act defines “**officer**: in relation to the Crown to include “**any servant of Her Majesty, in right of Her Government of St. Lucia.**”

[20] Section 4 (1) (3) (4) of The Crown Proceedings Act states:

“4 (1) Subject to the provisions of this Act, the Crown shall be subject to all those liabilities in delict or quasi-delict to which, if it were a private person of full age and capacity, it would be subject –

(a) in respect of delicts or quasi-delicts committed by its servants or agents;

However, proceedings shall not lie against the Crown by virtue of paragraph (a) in respect of any act or omission of a servant or agent of the Crown unless the act or omission

would apart from the provisions of this Act have given rise to a cause of action in delict or quasi-delict against that servant or agent or his or her estate.

- (3) Where any functions are conferred or imposed upon an officer of the Crown as such by any enactment having the force of law in Saint Lucia and that officer commits a delict or quasi delict while performing or purporting to perform those functions, the liabilities of the Crown in respect of such delict or quasi-delict shall be such as they would have been if those functions had been conferred or imposed solely by virtue of instructions lawfully given by the Crown.
- (4) Any enactment which negatives or limits the amount of the liability of any Government department or officer of the Crown in respect of any delict or quasi-delict committed by that department or officer shall, in the case of proceedings against the Crown under this section in respect of a delict or quasi delict committed by that department or officer, apply in relation to the Crown as it would have applied in relation to that department or officer if the proceedings against the Crown had been proceedings against that department or officer. (My emphasis).

LAW ON GOOD FAITH AND PRESCRIPTION

- [21] Article 2066 of the Civil Code presumes that the acts of PC Flavien at the material time were done in good faith. It states that "Good faith is always presumed. He who alleges bad faith must prove it."

- [22] Article 2124 states that: "Actions against public officers in respect of acts done by them in good faith and in respect of their public duties are prescribed by six months." Article 2075 states that: "The Crown may avail itself of prescription."
- [23] Article 2047 defines what prescription is. It states: "Prescription is a means of . . . being discharged from an obligation by lapse of time, and subject to conditions established by law . . . Extinctive or negative prescription is a bar to, and in some cases precludes any action for the fulfillment of an obligation or the acknowledgment of a right when the creditor has not preferred his claim within the time fixed by law."
- [24] Article 2122.2 states that actions "for damages resulting from delicts or quasi-delicts, whenever other provisions do not apply;" are prescribed by three years.
- [25] Article 2093 states that: "Prescription runs against all persons, unless they are included in some exception established by this Code, or unless it is absolutely impossible for them in law or in fact to act by themselves or to be represented by others."
- [26] Article 2129 states: "In all the cases mentioned in articles 2111, 2121, 2122, and 2123, 2124, the debt is absolutely extinguish and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them."
- [27] Article 2052 stipulates that "The Court cannot of its own motion supply the defence resulting from prescription, except in cases where a claim is extinguished by law as provided in Article 2129."

THE ISSUES

- [28] A. Whether Ms. Barrow's cause of action has been prescribed by virtue of Article 2124 of the Civil Code?
- B. Can Ms. Barrow sustain her claim against the Defendants based on the pleadings in Claim SLUHCV 2006/0182?
- C. Were the injuries to the Claimants caused by the act of PC Flavien while he was performing or purporting to perform lawful functions at the "Dub House"? If yes -
- D. Was PC Flavien culpably negligent in performing or purporting to perform such lawful functions? If yes -
- E. What amount of damages should be awarded to any successful Claimant against the Defendants?
- [29] I shall now consider the 2 preliminary issues A and B together.

MISS BARROW'S CLAIM

- [30] Counsel Mr. Lay submitted that Ms. Barrow brought her claim late, having filed it on the 7th March 2006, approximately 21 months after the limitation period had expired. He argued that since the alleged negligent acts of PC Flavien, must be presumed to have been done in good faith in the absence of any specific pleading that he acted in bad faith, Ms. Barrow's cause of action cannot succeed. Both her right and remedy have been extinguished because of Articles 2124 and 2129 of the Civil Code, he submitted. Mr. Lay relied on the judicial pronouncements of Peterkin J.A. in Walcott v Serieux, Civil Appeal No. 2 of 1975 (St. Lucia) where

the effect of Article 2129 was explained thus: **“In Article 2129 . . . both the right and remedy are extinguished, and therefore, there is no question of a party being called upon to choose whether he would plead the defence of limitation. As long as the evidence in a case disclosed that the period of limitation has expired, the judge has no discretion in the matter.”**

[31] Learned Counsel Mr. Lay contended further that Ms. Barrow's allegations of negligence on its own cannot amount to allegations of bad faith. He relied on the reasoning of Shanks J. in Peter Clarke v The Attorney General, SLUHCV0242 of 2001 where he opined: **“I do not think that the mere allegations of unlawful assault and false imprisonment by themselves are sufficient to disclose such a case since it is possible to assault someone using excessive force in self-defence in circumstances where there may be no bad faith and it is possible to falsely imprison someone by arresting them without having reasonable grounds for suspecting them, but nevertheless in good faith.”**

[32] Learned Counsel Mr. Barrow has filed no closing submissions concerning these 2 preliminary issues. I hasten to note that prior to the trial, Mason J heard an application filed by the Defendants on the 21st April 2006, to strike out the Statement of Claim, on the ground that the action was prescribed by virtue of Article 2124 of the Civil Code. Learned Counsel Mr. Barrow, in his submissions filed on the 12th May 2006, submitted then, that the Claimant's action against the first Defendant is not barred by prescription under Article 2124 for the following reasons:

- (i) The Claimant's claim can only be extinguished or prescribed by Article 2124 if the first Defendant was acting in good faith.
- (ii) Having regard to Article 2066, the Claimant can succeed despite Article 2124 if she can show that the first Defendant acted in bad faith.
- (iii) The issue of whether or not the first Defendant acted in bad faith is a question of fact that can be determined at trial.

(iv) In the event that the allegation of bad faith is not readily evident on the pleadings an amendment thereto may very well cure any defect that may exist.

[34] Counsel Mr. Barrow referred to the following unreported cases as his authorities: (1) Peter Clarke v The Attorney General and another SLUHCV 0242 of 2001 unreported Judgment of Shanks J. delivered 15th May 2003; (2) Edmund Estaphane v The Attorney General and another SLUHCV 2004/0477 Unreported judgment of Shanks J at paras 24-29, delivered 24th June 2005; (3) Bryan Felix v The Attorney General and another SLUHCV 2005/0941, Unreported judgment of Mason J. delivered 8th March 2006.

[35] In her ruling delivered on the 22nd September 2006, Mason J accepted that the allegations of negligence by themselves **“do not necessarily presuppose lack of good faith or presuppose bad faith which in turn implies intention.”** The Learned judge concluded at paragraph 18 of her decision, that whether the acts of PC Flavien **“were done in good faith and in respect of his public duties as provided by Article 2124, can only be established by a trial of the action wherein evidence when led could be cross examined.”** Her Ladyship Madame Justice Mason referred to the overriding objective, which implies that litigants be given an opportunity to be heard, and concluded that the action was not prescribed.

[36] I am not bound by this interlocutory ruling of my learned sister Mason J. in my opinion, and it is my duty to now seriously consider these submissions of Mr. Lay.

DISCUSSION AND CONCLUSION

[37] It is not in dispute that PC Flavien at the material time was a servant or agent of the Crown in active duty, obviously performing his statutory functions and public

duty under The Police Ordinance No. 30 of 1965 as amended, at the time of the alleged delict.

- [38] The pleadings of Ms. Barrow do not allege that PC Flavien at the time was acting in bad faith, or that he acted maliciously or without reasonable or probable cause, or without lawful justification. Unlike the pleadings in Peter Clarke v the Attorney General supra, no circumstances have been obliquely set out in the statement of case of Ms. Barrow, from which bad faith can be inferred.
- [39] Under the Civil Code, in the case of a delict, an allegation of bad faith in a statement of case against a public officer performing his public duties, serves to take the prescription period beyond the six months stipulated in Article 2124 for bringing the claim, and effectively extend the prescription period to 3 years as stipulated by Article 2122.2. That is my interpretation of Articles 2124 and 2122.2.
- [40] Article 2066 makes it very clear in my view, that a Claimant or Defendant whose case depends on a finding by the Court of bad faith concerning the conduct of the other party, must ALLEGE bad faith and PROVE bad faith. Consequently, you cannot prove what you have not alleged. This mandatory requirement that allegations of bad faith, like dishonesty and fraud, should be pleaded, was considered in Three Rivers District Council v Bank of England (No. 3) [2000] 3 All. E.R. 1 by Lord Hope of Craighead. He said at paragraph 51: **“On the other hand it is clear as a general rule; the more serious the allegation of misconduct, the greater is the need for particulars to be given which explains the basis for the allegations. This is especially so where the allegation being made is of bad faith or dishonesty. The point is well established in the case of fraud.”** Lord Hope continued at paragraph 55: **“We are concerned at this stage with what must be alleged. A party is not entitled to a finding of fraud if the pleader does not allege fraud directly and the facts on which he relies are equivocal. So too with dishonesty [and bad faith]. If there is not specific allegation of dishonesty it is not open to the**

Court to make a finding to that effect if the facts pleaded are consistent with conduct which is not dishonest such as negligence. As Miller L.J. said in Armitage v Nurse [1997] 2 AER p. 705 at 715: "it is not necessary to use the word "fraud" or "dishonesty" [or bad faith if I might add for the purposes of Ms. Barrow's claim] if the facts which make the conduct fraudulent [or which amount to bad faith] are pleaded, but this will not do if language used is equivocal (See Belmont Finance Corporation Ltd v Williams Furniture Limited [1979] 1 AER p118 at 311). In that case it was unclear from the pleadings whether dishonesty was being alleged. As the facts referred to might have inferred dishonesty but were consistent with innocence, the allegation of fraud, dishonesty or bad faith must be supported by particulars. The other party is entitled to notice of the particulars on which the allegation is based. If they are not capable of supporting the allegation, the allegation itself must be struck out." Though Lord Hope's statements were made in relation to the tort of misfeasance in public office, in my view they are eminently applicable to Ms. Barrow's claim.

[41] In the absence of a plea of bad faith in Ms. Barrow's statement of case there is no question of fact to be determined by evidence at the trial, as to whether PC Flavien was acting in bad faith or good faith in my view. It seems to me from Article 2066, that the presumption of good faith can only be rebutted by pleading and then proving bad faith. There is therefore no triable issue of bad faith arising on the pleadings in Ms. Barrow's case. Consequently, I ought not to take into account any evidence adduced at the trial which can establish that PC Flavien at the material time was acting in bad faith for the purposes of validating Ms. Barrow's claim.

[42] Learned Counsel Mr. Barrow in his submissions filed on the 12th May 2006, specifically referred to paragraphs 24 to 29 of Shanks J's judgment in Estaphane supra. There, the learned Judge considered Articles 2124, 2129 and 2066 and the impact these provisions had on a claim that was filed in June 2004 for a cause

of action accrued in August 2003, against the Minister of Education, who is a public officer. It was argued by the Defendants that the claim could not be maintained by virtue of Article 2124. Shanks J. adverted to the fact that Counsel for the Attorney General had indicated at the case management conference that the Article 2124 defence was not being pursued, he reasoned that on the face of it, this must operate as a waiver or estoppel against the Attorney General, preventing him for raising the point at the trial.

[43] It appears from paragraph 28 of the judgment that Counsel for the Attorney General persisted in raising the point. Shanks J stated:

“Ms. Portland made the point that Article 2124, unlike the English limitation provisions, removes the right as well as the remedy and that a party is not obliged to choose whether to plead the defence (See *Walcott v Serieux* Court of Appeal of the Eastern Caribbean 20.10.75). However, in my view, just because a defence relates to a Claimant’s right rather than his remedy and the Defendant does not have to plead it to rely on it, does not mean that it cannot be waived. Indeed, it appears from Articles 2048 and 2049 that the Code expressly contemplates the “tacit renunciation of prescription”: it seems to me that this is a case in which the prescription has been tacitly (or perhaps expressly) renounced. Ms. Portland also reminded me that want of jurisdiction in a Court cannot be cured by consent. It does not seem to me that the Article 2124 defence goes to jurisdiction. It may introduce additional factual issues into certain claims if the Claimant is to establish his right (e.g.) is the Defendant a public officer? Was the act complained of done in bad faith? Was it done in respect of his public duties?) . . . I therefore conclude that the Article 2124 defence was waived at the case management conference.”

[44] In considering whether the Minister of Education ought to have been joined as a Defendant in light of Section 13 (2) of The Crown Proceedings Act, Shanks J. continued at para 29:

“ . . . Ms. Portland rightly pointed out that the claim ought not to have been brought against the Minister of Education at all. The Claimant was employed by the Crown (in the sense of the Government or the executive) not the Minister himself and there was no evidence that the Minister personally had any part in the termination of his employment. Proceedings against the Crown must be instituted against the Attorney General (See Section 13 (2) of the Crown Proceedings Ordinance) and the Attorney General was therefore rightly named as a Defendant. Article 2124 gives a measure of protection to “public officers” who are sued “in respect of acts done by them . . . in respect of their public duties.” It is clear that the Crown itself cannot be a “public officer” (It is significant that the Code expressly refers to the Crown in the context of prescription at Article 2075). It is also clear that the Attorney General is not being sued in respect of any act done by him at all but as a representative of the Crown. Article 2124 therefore has no application in this case. It is designed in my view to protect individual public servants from being sued after six months in respect of their acts as public servants, the paradigm case being a policeman executing an arrest which, though arguably wrongful, was carried out in good faith. It is not designed to give additional protection to the Crown in respect of claims for breach of contract against it. I therefore reject the defence based on Article 2124.”

[45] The reasoning and approach of Shanks J in Estaphane supra which rendered Article 2124 inapplicable, ought not to be applied in the instant case in my view, because: (1) the circumstances are distinctively different; and (2) Shanks J

apparently did not consider the effect of Articles 2047 and 2052 of the Civil Code, and Section 4 (4) of The Crown Proceedings Act, where a Defendant raises the Article 2124 prescription defence.

[46] Articles 2047, 2052 and Section 4 (4) are reproduced at paragraphs 23, 27 and 19 above respectively. Learned Counsel Mr. Lay specifically referred to Section 4 (4) in his submissions, he maintains that Section 4 (4) of The Crown Proceedings Act enables the Attorney General to rely on the provisions of both Articles 2124 and 2129. I agree with his submission.

[47] In the instant case, the public officers PC Flavien to whom Article 2124 attaches is a party to the claim; and by virtue of Section 4 (4) of The Crown Proceedings Act, Article 2124, which effectively in my view negatives or limits the liability of PC Flavien in respect of the alleged delict committed by him, applies in relation to the Crown represented by the Attorney General.

[48] Also, Article 2047 places prescription in categories and explains that “**Extinctive prescription**” (which obviously envisages the prescription referred to in Article 2129), is a bar to and precludes any action for the fulfillment of an obligation or the acknowledgment of a right when the Claimant has not preferred her claim within the time fixed by law.

[49] Further, although Articles 2048, 2049, and 2051 recognise that prescription can be renounced in certain cases, in my view the Article 2124 prescription is not one of those cases. Article 2052 in my view, seems to state in substance and effect by exception, that the Court can of its own motion supply the defence resulting from Article 2124, since it is one of the cases mentioned in Article 2129, where the debt is extinguished by law and no action can be maintained.

[50] I am therefore firmly of the view, that Article 2052 buttresses the reasoning of Peterkin J.A. in Walcott v Serieux supra where he stated that: “**As long as the**

evidence in a case disclosed that the period of limitation has expired, the judge has no discretion in the matter.”

[51] I must therefore uphold the submissions of Counsel Mr. Lay which in my view reflect a proper appreciation of the law on prescription Ms. Barrow's cause of action has been prescribed by virtue of Articles 2124, since the claim was filed more than 6 months after her cause of action accrued.

[52] Since she has not alleged that PC Flavien was acting in bad faith at the material time, or that PC Flavien was acting outside of the scope of his employment, her cause of action has not enjoyed the 3 year prescription period under Article 2122.2. She cannot therefore sustain her claim against the Defendants, or against PC Flavien in his personal capacity.

[53] I turn now to consider Issue C at paragraph 27 above.

HOW WAS MR. CHRISTOPHER INJURED

[54] Mr. Christopher has testified and adduced evidence from Tamara Barrow, Yasmine Alexander, Shauna Andrew, and Sharmain Weekes, to support his claim. There are several discrepancies in the testimony of these witnesses concerning the conduct of PC Flavien immediately before he discharged his firearm in the “Dub House,” and the crowd behaviour then.

[55] PC Flavien, PC Marlon Durman who was also on duty with PC Flavien at the “**Dub House,**” Cpl. Luke DeFreitas and WPC Agatha Faucher who had assigned PC Flavien to investigate a reported fight at the “**Dub House,**” and investigating officer Woman Sgt. Sebastiana Charles, all testified for the Defendants.

[56] The Forensic Firearms of the C.I.D, Barbados Police Force S/Sgt Graham Husbands also gave evidence as an Expert witness for the Defendants.

THE EVIDENCE

- [57] Mr. Christopher's testimony in substance was that he and his friends left the Gros Islet Friday night street party and went into a nearby dancehall called "**Twelve Tribes Dub House**" at about 10:45 p.m. where the lighting condition was very dim. He and his friends drank from a bottle of Campari, placing the bottle on the floor in the corner. He observed the scene in the dancehall which was not filled to capacity. According to him there were a good bit of people there with people coming in and out regularly.
- [58] His evidence was that he saw 2 police officers properly dressed in uniform enter the dancehall, went to the back and went back out, at a time when there was no disturbance in the dancehall. The same 2 police officers returned to the dancehall about 20 minutes later while he was dancing with a girl name Charmaine. There were other persons dancing next to him, he said, and one of these police officers attempted to dance with one of the girls dancing next to him and Charmaine, and this girl pushed the officer away.
- [59] Mr. Christopher testified that he next saw the 2 police officers arrest a guy wearing a white knitted vest, and take him to the back of the dancehall, where 1 of the police officers was holding a gun, waiving it from side to side in the arrested man's face. He said that he stopped dancing and was talking with a girlfriend. He saw the police officers escorting this man to the front door, and people started spreading apart and running frantically and panicking. He said that he next heard screams inside the dancehall and so he decided to leave. Apparently on his way out, according to him, "**I put myself between the 2 girls to see what was happening . . . I made myself to see what was happening.**" He then heard one gun blast and immediately felt a sharp pain in his right knee and pain in his right foot. He limped out of the dancehall, saw blood coming from his right knee, and discovered that he had been shot. While sitting on a wall outside the dancehall he

said he saw the same officer who was holding the gun inside the dancehall, holding the same gun and pointing it from person to person on the street.

[60] Mr. Christopher stated that he tried to get this police officer's attention, and the police officer whom he subsequently identified as PC 240 John Flavien pointed his gun also at him, and then ran off towards the direction of the street party.

[61] Mr. Christopher said that he was subsequently picked up by 2 guys who helped him to the taxi stand. On his way to the police station, he said: **"I saw the same police officer on the road his shirt was out of his pants, he was looking like he did not know where to go – he seemed confused and bewildered . . . As we passed him I noticed that his uniform bore the numbers 240."**

[62] Apparently, Mr. Christopher gave a girl whom he saw 2 men carrying a lift in the taxi to the Gros Islet Police Station. He said that he was put to rest near the counter of the station, lying on the floor, while his friend 'Jinggers' was holding up his leg. The girl was put near the entrance of the station by the door. He said that the police officers present at the station took no statement from him. An ambulance subsequently arrived, the girl was placed on a wheel stretcher and he was placed on a flat stretcher and they were taken to the Victoria Hospital.

[63] The girl who was being carried by the 2 men, is Ms. Tamara Barrow. She testified that at about 11:40 p.m. that Friday night, she arrived at the **"Dub House"** next to the street jam, met 6 friends including her boyfriend Dwane Mc Loren, and they entered the dancehall where they began dancing and enjoying themselves.

[64] She said that there was no disturbance in the dancehall until after 2 policemen including PC Flavien 240, dressed in uniform arrived. PC Flavien had an untidy appearance as his shirt was outside his pants she said, while the other police officer was dressed appropriately. These 2 police officers went to the back of the dancehall, and then about 5 minutes later while she and Dwane were dancing, she

saw them return to the front of the dancehall with a man walking in front of them wearing a white knitted vest. She said that the police officers stopped with the man close to the entrance of the dancehall.

[65] In her own words, she deposed in her witness statement: "5. Suddenly the crowd opened up and withdrew from them . . . At that time my boyfriend and I stood to a stand still. 6. I tried to see what was happening between the two officers and the man. I saw the man on the floor of the dance hall and Constable 240 was kicking him. I do not know the man. The other policeman pulled Constable 240 away from the man. Suddenly Constable 240 drew something from his waistband. I did not see what it was but I saw the other police officer running to the entrance. 7. At that point I heard gunshots and screams coming from the crowd. My boyfriend and I as well as many other persons ran to the back door. 8. While running towards the back door, I felt a slight burning behind me. As we got to the back door . . . my foot became heavy to a point where I was unable to move it . . . I saw . . . blood gushing from my right leg. I then realized that one of the gunshots. I heard entered my right leg Constable 240 was the person responsible for firing the gun."

[66] She said under cross examination that she ran while the shots were firing to the back and then she felt the burning. She said that before she ran she was about 2 feet from Yasmin Alexander, not directly behind her, but to the side. She said that she saw Michael Christopher in the dance that night, and she never saw him involved in any trouble in the dancehall that night.

[67] She said that she saw Mr. Christopher by the Bar and while running she did not look to see where he was. She placed herself as being about 6 ft away from the Speaker which was about 9 feet away from the Bar, and she said she was also about 9 feet away from PC Flavien.

- [68] She positioned PC Flavien as being about 5 feet away from the exit door on the left, and said that while he was in that position she saw him pull out a gun and she saw fire and heard gunshots.
- [69] Ms. Yasmin Alexander's evidence was that while she was in the 'Dub House' that night, she saw 2 police officers enter the dancehall, and go to a dark portion of the dancehall. She next saw the crowd in the dancehall open up, allowing her to see one of the police officers escorting a man in a white vest towards the entrance to the dancehall. While this police officer was holding the man by his shirt, she saw him pull out a gun from his waistside, which he pointed at a short Rasta man who was standing by the bar. The Rasta man said something to the officer and the officer began brandishing the gun all over while still holding on to the man in the white vest. The music stopped and everyone separated, leaving the policeman and the man in the white vest in the center. The policeman then moved towards the door with this man and on reaching the door, the man began struggling, removed the vest which he was wearing and ran to the back of the dancehall.
- [70] The policeman who still had the gun in his hand while the man was struggling, pointed it at the running man, and she said she then heard two gunshots fired simultaneously. She said she was watching at the policeman and she saw red and yellow sparks coming out of the barrel of the policeman's gun. She felt a burning sensation on her left thigh and something warm trickling down her leg. She got shot in her inner left thigh.
- [71] She left the dancehall and before she reached outside she said she heard a third gunshot coming from the outside. Her evidence was that when she got outside she saw people flat on the road face down.
- [72] While she was in the dancehall she did not see any other person with a firearm except the policeman, she said; and she did not recall any incident taking place in the dancehall before the police officer entered.

[73] Mr. Shauna Andrew, who is a friend of Mr. Christopher, accompanied him to the Gros Islet street jam that Friday night at about 9:45 p.m. He had noticed 2 police officers standing across the road opposite the **"Dub House"** talking to some guys on motor cycles. Both police officers were drinking piton beers, and both of them had their caps tucked under their arms he said.

[74] After he had gone on the Dub House where music was playing and people were dancing, he said that the same 2 police officers entered the **"Dub House"**, walked around, and he noticed that the taller of the 2 police officers had his shirt out of his pants. They left the dance hall and returned a second time with beers in their hand. **"They stood up in the center part of the "Dub House", drank the beers, put the bottles on the bar inside . . . Then they went to the back of the "Dub House" and came out and went out of the "Dub House"**.

[75] Mr. Andrew stated that the 2 police officers returned less than an hour later, stopped in the center where a girl named Allison was dancing, and the tall officer tried to dance with her and after she used her toot to push him away, he laughed and then went with the other police officer to the back of the dancehall. Thereafter, they came back with a young boy wearing a white mesh vest, pulling him out while this boy was saying: **"Officers, I didn't do anything, you all search me already, you all did not find anything, let me go."**

[76] Mr. Andrew deposed in his verified witness summary as follows:

"8. The short officer hit the young guy twice. The tall officer had a gun in his hand placed it on the young man's head and was saying something to the young man. The young man was speaking at the top of his voice, arguing with the officer to let him go.

9. The people in the dance began protesting. The officer removed the gun from the fellar's head and held it

downwards. Some people threw drinks on the officers and the officer with the gun said, "I shooting somebody tonight." Then they let the man go. He walked out of the house very fast.

10. The crowd continued giving the officers chat. He was standing close to the officers about four feet away at the time. He saw the officers walk towards the entrance of the Dub House. The tall officers turned around when he got to the entrance and . . . point the gun and he heard two shots. The short officer had gone out already. People started running in all directions." Mr. Andrew subsequently discovered that "Jappa" who is Mr. Christopher had been shot as well as another female and Yasmine.

[77] Ms. Sharmain Weekes testified that while in the Dub House that night she saw the 2 police officers who she had seen earlier on that night leaving the Dub House, entering the Dub House. One of them tried to whine on Allison her friend while Allison was dancing. Allison brushed him off, saying "**officer you drunk or what, you smelling of rum, cool out.**" Both officers went to the back of the "**Dub House.**" She next saw one of them escorting a fellow in white knitted vest towards the door. She saw one of the police with a gun passing it on the fellow's face and neck while threatening him. She said the crowd opened wide a few minutes later, and the police stood by the door with the gun swinging it from side to side with his shirt coming out of his pants. She spoke to Mr. Christopher, heard him saying "**my leg, my leg,**" saw blood on his leg and all over her white pants and saw Mr. Christopher limping towards the door of the "**Dub House.**" She heard screams, saw Yasmine screaming that she got shot while holding her thigh. She said she saw no one else with gun in the "**Dub House**" other than the police that night.

THE DEFENDANTS CASE

- [78] PC Flavien signed the Firearms Register at the Gros Islet Police Station on the 19th December 2003 at 8:30 p.m. indicating that he had received a .45 calibre firearm serial number 2450113 with 7 rounds of ammunition for patrol duty. According to this Register, he returned the said firearm at 1:10 a.m. on the 20th December 2003 with 6 rounds of ammunition.
- [79] According to PC Flavien, at about 8:45 p.m. he was detailed to perform duties at the Gros Islet Friday night activities together with PC 261 Durman, and was issued with a .45 pistol serial number 2450113 and 7 rounds of ammunition in a magazine by Cpl. 123 DeFreitas. He testified that while on duty with PC Durman, he received a cell phone call from WPC Faucher the station orderly that there was a fight in progress at the Dub House at approximately 1:10 a.m. on Saturday 20th December 2003. He went to the 'Dub House' to investigate the matter, and upon entering the 'Dub House' where people were dancing on the dance floor he walked through the crowd towards the back area, surveyed the Dub House, found no fight in progress, and decided to leave.
- [80] He said that while walking towards the exit PC Durman came to him accompanied by a young man who he was holding. PC Durman told him that this young man had assaulted him with a bottle, and he advised PC Durman that if this man was arrested they would have to take him to the Police Station. He deposed in his witness statement that as a result, PC Durman led the way out while holding this man and he PC Flavien followed. According to him **"Whilst walking towards the exit, I felt a blow to the back of my head. I stopped immediately and turned around . . . I saw a man standing behind me . . . I enquired from him whether . . . he was the one who let me. He said he was not the one. I continued moving towards the exit . . . by walking backwards and at the same time facing the crowd inside. There were two light bulbs in the ceiling directly over the dance floor and one near the D.J. booth. All three lights were**

turned on and as a result I was able to clearly see and identify the persons who were inside the premises while I was leaving. I was also able to see the bottles that were being thrown at me from all directions some of which landed across my face and chest . . . Just as I got near the exit I then heard three loud blasts, which sounded like gunshots. The sounds of the blasts were louder than the sound of the . . . music which was being played inside . . . Immediately after loud blasts people started screaming and most of them move towards the back area of the building. At that point bottles were still being thrown at me from all directions. I then saw a young man standing about 15 feet away from me near the corner of the bar counter with a shining object in his hand, which appeared to be a firearm. The shining object . . . appeared to be chrome/silver in colour and about six inches long. I then noticed the man raise his hand and pointed the shining object at me holding the object with a firm grip. At that point I became fearful for my life and the lives of other persons in the Dub House and realized that I had no other option but to discharge one round of ammunition from my service pistol in an attempt to disarm this man. Having done so, I was able to run out of the building through the exit. During the commotion inside the dance hall I lost sight of PC 261 Durman.

- [81] It appears from his evidence that even after he retreated and got outside he was still under attack with stones and bottles being thrown at him. He said that he moved from the area of the “**Dub House**” for cover with bottles and stones still being pelted at him from different directions. He then proceeded to the Gros Islet Police Station where he made a report of the incident at the “**Dub House.**” While at the station he recognized Mr. Christopher as the same man who pointed the shining object at him. He said that as a result he informed Mr. Christopher of his arrest.
- [82] Mr. Christopher has denied that he was ever arrested by PC Flavien or informed that he was being arrested for any offence committed against PC Flavien or anyone at the Dub House that night.

- [83] PC Durman's evidence was that at about 1:00 a.m. on Saturday 20th December 2003 while he was on duty at Gros Islet Friday night activities, PC Flavien informed him of the report from WPC Faucher, and he accompanied him to the Dub House to investigate the matter. While inside he was splashed with liquid smelling like alcohol on his back. While following PC Flavien through the crowd towards the back area in the "Dub House," he felt a hard blow to the back of his head, heard the sound of glass shattering to the floor behind him, felt a splash of liquid smelling like beer thrown into his face, lost sight of PC Flavien, and realized he was alone and being attacked. Though he was scared for his life, he said that he moved through the crowd, saw a young man facing him holding a bottle over his head, grabbed the bottle in his hand and disarmed him, and told this young man that he was arresting him for assaulting him.
- [84] He said that he continued through the crowd with this young man, eventually caught up with PC Flavien. His testimony was that "PC#240 Flavien and I then proceeded to escort the arrested man out of the premises through the exit. Whilst moving through the crowd I felt two blows to my back, which was followed with what appeared to be the sound of bottles breaking unto the floor directly around me. At that point I realized that we were being attacked by the crowd. Then suddenly I heard three consecutive blasts, which sounded like gunshots and immediately afterwards people at the "Dub House" started screaming as they ran towards the exit."
- [85] According to PC Durman, both PC Flavien and himself dodged missiles from the opposite end of the club, and at this point his prisoner escaped from him. He ran after him in order to arrest him, but lost sight of him on Notre Dame Street In Gros Islet. He then realized that PC Flavien was not with him. He thereafter went to the Police Station and reported the incident.
- [86] WPC Faucher was the Station Diarist from 5:00 p.m. on the 19th December to 1:00 a.m. on the 20th December 2003. Her entries in the Station Diary for the period

1:00 a.m. to 1:17 a.m. on the 20th December 2003 were tendered in evidence. Although her diarist duties ended at 1:00 a.m. when she handed over to PC #155 Edgar, she continued to make entries in the diary because one of her supervisors Cpl. Charlemagne asked her to do this, she said. The entries she made in the diary are confusing to say the least. At 1:02 a.m. she made an entry that she was informed of a report made in person by Shanana Hyacinth against one Tamica and one Mederika and she informed PC#240 Flavien of a fight which was in progress at the Gros Islet night street jam. The Entry she next made at 1:05 a.m. was: **“Action: Report was referred to PC#240 Flavien via VH set.”**

- [87] At 1:08 a.m. she made the following Entry: **“Assault: PC #261 Durman reported a young man known to him by features for unlawfully assaulting him with a bottle whilst responding to a report at the dub house on Marie-Therese Street, Gros Islet about 12:45 a.m. on the 20.12.03.”**

Then at 1:12 a.m. she entered the following: **“Assault: Constable 240 Flavien reported Michael Christopher of Water Works Road, Castries and several persons known to him by features for unlawfully assaulting him with bottles whilst responding to a report at the Dub House on Marie Therese Street in Gros Islet about 12:45 a.m. on the 20.12.03.”**

- [88] At 1:15 a.m. WPC Faucher wrote: **“Action: Constable #240 Flavien reported having arrested and escorted to station Michael Christopher and Cpl. #123 DeFreitas is investigating.”** Then at 1:17 a.m. she made this Entry: **“Transfer of prisoners: At 1:00 a.m. on 20.12.03 Michael Christopher along with Tamara Barrow of Entrepot, Castries were transferred to the Victoria Hospital having received injuries during the arrest of Michael Christopher.”**

- [89] WPC Faucher admitted under cross examination that Tamara Barrow and Michael Christopher had arrived at the station before PC Flavien. She said that Tamara Barrow stated they were shot by a Police Officer.

[90] Cpl. #123 Luke DeFreitas who was the supervising officer on duty at the Gros Islet Police Station on the 20th December 2003 deposed in his witness statement that it was upon his instructions that PC Flavien and PC Durman were assigned to investigate a fight in progress at the Dub House. His evidence was that he was later informed by PC Durman that bottles were thrown at them, and a number of persons in the Dub House had surrounded him and poured beer and other alcoholic drinks over him, and he was hit by a bottle to the back of his head. Cpl. DeFreitas said that he observed that P.C. Durman's uniform shirt was wet and stained with a yellow looking substance. It was he who called the Gros Islet Fire Station for the ambulance after observing the arrival of Michael Christopher and Tamara Barrow in a white motor car into the police station yard. He said that they were carried into the police station, and he noticed that Mr. Christopher was bleeding from a wound below his right knee while Ms. Barrow was bleeding from a wound to her right leg. Later, he was informed by PC Flavien that he had discharged one round of ammunition from his service pistol in defence of himself and PC Durman. He retrieved the firearm number 2450113 from PC Flavien along with 6 rounds of ammunition.

[91] W/Sgt Charles began her investigations into the incident on the 24th December 2003. On the 29th December she recovered a casing from Annick Fessal one of the owners of the Dub House. She also recovered a piece of lead from Dr. St. Rose which had been removed from Ms. Barrow's injured leg. On the 29th December 2003 she recovered the firearm number 2450113 from the Gros Islet Police Station.

[92] She received medical reports of Mr. Christopher, Mr. Yasmine Alexander and Ms. Barrow. She also returned to the Dub House with these persons near to May 2004 and got them to point out where they were at the time of the incident. She said that they were standing in close proximity to each other. She prepared a diagram representing the Dub House which was not drawn to scale. In this diagram she positioned Mr. Christopher, Ms. Alexander and Ms. Barrow according to where

they told her they were standing at the relevant time. PC Flavien was not present when the scene was reconstructed by these persons. PC Flavien did not have the opportunity to show her where he was standing when he fired the shot, and the diagram W/Sgt. Charles prepared did not show where PC Flavien was standing in relation to Mr. Christopher, Ms. Alexander and Ms. Barrow. These persons did not point out to Sgt Charles where they were standing before they got shot. On the 7th April 2004 W/Sgt Charles went to Barbados and there handed over to S/Sgt Graham Husbands the piece of lead removed from Ms. Barrow's leg, the spent shell casing recovered from one of the owners of the Dub House, the firearm serial number 2450113, and the diagram representing the reconstructed scene at the Dub House.

[93] Sgt. Husbands carried out examination and tests on the items and concluded in his Report dated 9th March 2006 the following:

1. The .45 auto caliber pistol is a firearm as defined by the Firearms Act of St. Lucia.
2. The .45 auto caliber cartridge case was fired in the submitted .45 auto caliber pistol.
3. The .45 auto caliber bullet was fired from the submitted .45 auto caliber pistol.

[94] Sometime in March 2006 Sgt Husbands accompanied by W/Sgt Charles visited the Dub House armed with the diagram of the reconstructed scene. According to the Expert Forensic Examiner, Sgt Charles pointed out to him at the Dub House where PC Flavien was at the time of the shooting, and where Ms. Christopher, Ms. Alexander and Ms. Barrow had positioned themselves according to the diagram.

[95] On the premise that PC Flavien fired only one shot from the service pistol #2450113 at the material time, Sgt Husbands concluded that if the victims were standing in the positions reflected in the sketch, and PC Flavien had fired from the area where he said he was, there is no way the single bullet fired from this area

could have caused the injuries to Mr. Christopher or Yasmine Alexander. Sgt Husbands opined that they received their injuries from one or more bullets fired from the area of the D.J. booth. He explained why he had this opinion based on the learning in Firearms, The Law and Forensic Ballistics 2nd edition by Tom Warlow, at pages 177 to 183. His conclusions were also based on information he obtained from Sgt Charles, Witness Statements and his observations at the Dub House in 2006.

SUBMISSIONS

- [96] Learned Counsel Mr. Innocent has relied on Sections 66 and 114 of The Evidence Act No. 5 of 2002 in urging the Court to reject the opinion evidence of Sgt Husbands as unreliable and lacking the requisite scientific rigour. Mr. Innocent submitted that Sgt Husbands had relied on primary facts which were themselves unreliable. He focused on the sketch drawn by Sgt. Charles which contained no measurements and was not drawn to scale; the fact that the evidence given by the 3 witnesses who were injured, concerning how they were standing in relation to each other at the time they were shot, was different from their positions in Sgt. Charles' diagram; and Sgt Husbands' inability to determine the angle of the entry of the projectile so as to place PC Flavien's exact position when he fired his service pistol.
- [97] Mr. Innocent also referred to the second of three reports that Sgt. Husbands wrote, in which he stated that in order to arrive at a logical conclusion as to whether the 3 victims could have been shot by PC Flavien, he would require medical evidence on the file to indicate the angle of entry and exit wounds of Mr. Christopher and Ms. Alexander, as well as evidence indicating the angle of entry compared with where the bullet was lodged in Ms. Barrow's foot.
- [98] Mr. Innocent therefore questioned the ability of Sgt Husbands to arrive at the conclusions he arrived at in the face of Sgt Charles' admission that Sgt Husbands

was never given the medical reports of the victims. He also analysed the evidence of the Witnesses, and the impact of the Station Diary Entries and the Firearms Register entries on the credibility of the witnesses.

[99] Mr. Innocent pointed to Sgt Charles admission that the firearm in question was issued to another police officer on the 22nd December 2003. She also said that any number of persons at the station could have access to the Firearms Register, and that she was not aware of any inventory being taken of the ammunition at the station, though it would have been prudent to conduct such an inventory to verify the statements in the Firearms Register. He concluded that this evidence along with the contradictory entries in the Station Diary create the presumption of the likelihood of a cover up of the true nature of the unfolding events at the Station, on the night in question, and severely affect the credibility of the testimony that only one shot was fired.

[100] Learned Counsel Mr. Lay submitted that the Firearms Register and Cpl DeFreitas' testimony corroborate PC Flavien's testimony that he fired only 1 shot that night. He argued that since the evidence of Mr. Christopher and his witnesses suggest that several other shots were discharged at the "**Dub House**" during the incident, and the 1 bullet that PC Flavien admits firing was removed from Ms. Barrow's shin, the Court should conclude that it was not a bullet from PC Flavien's pistol which injured Mr. Christopher, having regard to the positions that Ms. Alexander and Mr. Christopher admitted they were in in relation to Ms. Barrow, and the evidence of the expert witness Sgt Husbands.

[101] Mr. Lay relied heavily on Sgt Husbands testimony: that the ammunition discharged by PC Flavien was a heavy bullet, and with gravity and wind force and the slow speed at which such bullet travels, it would not have sufficient power to strike, enter and exit the muscle of one person; then strike enter and exit the knee of another, and then lodge into the shin of a third person.

[102] He reminded the Court that Sgt Husbands also stated clearly that a bullet of that kind could have injured 3 persons only if the injuries were superficial, and the injuries each of the 3 victims sustained were by no means superficial.

[103] Mr. Lay concluded that taking Mr. Christopher's case at its highest, it appears clearly that there is considerable doubt that his injuries occurred as a result of the actions of PC Flavien. He urged the Court to find that Mr. Christopher had failed to prove on a balance of probabilities that his injuries were caused by PC Flavien.

FINDINGS

[104] A critical analysis of the evidence must be carried out to arrive at what is the more probable of the several versions, bearing in mind that Mr. Christopher's burden of proof is on a balance of probabilities. Having so analysed the conflicting evidence of Mr. Christopher and his witnesses, and the Defendants' witnesses, and considered all of the relevant submissions of Counsel, I make the following findings of fact.

[105] A significant feature of the evidence is the entries that were made in the Station Diary by WPC Faucher between 1:00 a.m. and 1:17 a.m. on the 20th December 2003. No where in these entries is it mentioned that there was a shooting incident at the "**Dub House**" that night involving PC Flavien and Michael Christopher. Nowhere is it mentioned that P.C. Flavien reported that he fired 1 shot from his service pistol at Michael Christopher in the "**Dub House**" while he was pointing a shining object at him, and while other persons in the "**Dub House**" were throwing bottles at him and PC Durman. Nowhere in these entries is there any mention that the police officers had to hastily retreat from the "**Dub House**" under a hail of missiles which continued outside. There is no record in the station diary entries about the 3 loud blasts that the 2 police officers allegedly heard while they were in the "**Dub House**" immediately before Mr. Christopher allegedly pointed the shining

object at PC Flavien. It is not unreasonable to expect that this would have been recorded in the station diary that night had these things really occurred.

- [106] Although PC Flavien testified that some of the bottles thrown at him in the Dub House from all directions landed across his face and chest, there is no report in the Station Diary or any evidence otherwise, that his face was cut, or bruised, or swollen, or that he had any injuries from these missiles. The mere fact that Mr. Christopher was never arrested or charged in connection with the **“Dub House”** incident, renders PC Flavien’s testimony incredible in the absence of any satisfactory explanation.
- [107] The shooting incident probably occurred before 1:00 a.m. on the 20th December 2003. Mr. Christopher and Ms. Barrow also probably arrived at the Station before 1:00 a.m. This is borne out by the entry in the station diary at 1:17 a.m., stating that at 1:00 a.m. Mr. Christopher and Ms. Barrow were transferred to the Victoria Hospital. This leads me to logically conclude that the relevant Station Diary entries were probably made after Mr. Christopher and Ms. Barrow had left in the Ambulance for the hospital.
- [108] The station diary entries reflect a concocted account of what took place at the **“Dub House”** that night. WPC Faucher made false entries that Mr. Christopher and Ms. Barrow were injured during the arrest of Mr. Christopher, and that Mr. Christopher had been escorted to the Police Station by PC Flavien. This doctored account directly puts the credibility of PC Flavien in issue; and begs the question: Why was he lying that night as to what took place at the **“Dub House.”**
- [109] I do not believe that PC Flavien would have given an account of the incident at the **“Dub House”** as it was recorded in the station diary, had the incident occurred as he stated in his testimony. He then had 10 years experience as a police officer, and must be taken to have been familiar with his Police Standing Order No. 46 concerning the use of his service pistol in permissible circumstances. Justifiable

self defence should therefore have been on his mind before 1:17 a.m. on the 20/12/03, according to his testimony.

[110] Despite the discrepancies in the evidence of the Claimant's witnesses, I was impressed with the testimony of Mr. Christopher, Mr. Shauna Andrew and a substantial portion of Ms. Sharmain Weeks' account. From their evidence I am satisfied that PC Flavien was imbibing beers that night and attempting to dance with Allison before he discharged his pistol in the "**Dub House**." I accept their evidence concerning the apprehension of the man in the white knitted vest. I accept Mr. Andrew's testimony that the manner in which the 2 Police Officers were struggling with, hitting and treating this man, lead some persons to protest; and that some persons even threw drinks on the officers. I accept that PC Flavien said "**I shooting somebody tonight**" after removing his brandished service pistol from the apprehended man's head.

[111] I find that after the 2 officers let go this man he left the "**Dub House**" with PC Durman following after him. I find that there was no one else in the "**Dub House**" that night with a firearm apart from PC Flavien. I do not believe PC Flavien's testimony that Mr. Christopher was 15 feet away from him near the corner of the bar with any shining object pointing at him. I am satisfied that at the time when PC Flavien discharged his service pistol Mr. Christopher was on his way trying to leave the "**Dub House**" and was standing between Ms. Alexander and Ms. Barrow in the manner demonstrated by these witnesses in Court. I reject PC Flavien's testimony that he fired his pistol to disarm Mr. Christopher. It is more probable that he fired more than 1 shot before leaving the dancehall, into the dancehall where people were because the alcohol he imbibed probably made him intemperate, and the people in the dancehall were "**still giving him chat**." It is incredible that persons in the dancehall facing PC Flavien who had a gun pointing towards them, would hurl bottles at him as he exited the dancehall back ways, hitting him in his face, and he did not suffer any injuries.

- [112] I find that PC Flavien's subsequent handing over of 6 rounds of ammunition is inconclusive as to what occurred in the "**Dub House.**"
- [113] I accept therefore that it was one of the shots fired by PC Flavien that struck Mr. Christopher on his right knee, causing the injuries that he suffered. The opinion of Sgt Husbands was therefore premised on casuistry.
- [114] Moving on now to the fourth issue. I have to consider whether PC Flavien was acting negligently.

WAS HE NEGLIGENT

- [115] A loaded firearm is dangerous in itself and PC Flavien must be expected to know the serious potential for harm that existed by discharging shots from this loaded service pistol in the dimly lit "**Dub House**" where several patrons were. The legal test is whether there was a relationship existing between PC Flavien and the patrons in the "**Dub House,**" who were so closely and directly affected by his act, that he ought reasonably to have had them in contemplation as being so affected at the time he discharged the firearm: (Lord Atkin in **Donoghue v Stevenson** [1932] A.C. 562 H.L. at p. 580). I have concluded that PC Flavien obviously owed to Mr. Christopher a duty to take reasonable care or precaution to prevent injury to him in these circumstances on the application of this test.
- [116] Before firing a gun, care should be taken to see that anyone whose presence is known or might reasonably be anticipated is not within the line of fire. In **Smith v L & S.W. Railway** (1870) L.R. 6 C.P. 14 at p. 22, Blackburn J said: "**If a man fires a gun across a road where he may reasonably anticipate that persons will be passing, and hits someone, he is guilty of negligence and liable for the injury caused; . . .**"

- [117] The pleaded defence that PC Flavien was acting in necessary self defence using no more force than was reasonably necessary, cannot now avail the Defendants, having regard to my findings of fact in my judgment. I have previously found that he was never apprehending Mr. Christopher and/or repelling force by reasonable force.
- [118] Neither can the Defendants pleading of “**maxim ex turpi causa haud oritur actio**” apply, since implicit in my findings of fact is a rejection of any allegation that Mr. Christopher had provoked the acts complained of by unlawfully assaulting PC Flavien.
- [119] My findings of fact have also left no room for success of the Defendants’ pleading in the alternative, that Mr. Christopher contributed to the damage he suffered.
- [120] Both Counsel Mr. Lay and Mr. Innocent made extensive submissions concerning these pleaded defences which are no longer material in light of my findings.
- [121] On the authority of Smith supra, by parity of reasoning, since PC Flavien fired his service pistol in the “**Dub House**,” where he knew that persons including Mr. Christopher were congregated, without lawful justification, he is guilty of a remarkable degree of negligence in my view, and is therefore liable for the injuries caused to Mr. Christopher.
- [122] Looking at the Claimant’s pleaded Particulars of Negligence, it is obvious that Mr. Christopher has discharged his burden of proof relating to Particulars (i) to (iv). In such a case the plea of res ipsa loquitur is redundant.

THE LIABILITY OF THE CROWN

- [123] At paragraph 5 of the Defence filed on the 1st December 2004, PC Flavien denied that at all material times he was the servant or agent of the Attorney General of St.

Lucia. He pleaded that he was employed as a member of the Royal St. Lucia Police Force by the Government of St. Lucia and was acting in the course of his duties and in good faith. At paragraph 7 of this Defence, it was admitted that the Attorney General can be made a party to the action by virtue of Section 4 of the Crown Proceedings Act, while denying that the liability of the Attorney General arises by virtue of Section 4 of the said Act.

[124] I refer to Section 4 of the said Act the relevant portions of which have been reproduced at paragraph 20 above). By virtue of Section 4 (1) and (3) of the Act, I hold that PC Flavien was at the material time a servant or agent of the Crown, in light of the pleadings and evidence.

[125] Having regard to the evidence of the Defendants' witnesses, it is clear that PC Flavien was in the execution of his public duty as a police officer. The breadth of Section 4 (3) of the Act appears to trap and make the Crown liable for any delict committed by a police officer while he is acting within the scope of his employment and he is performing a public duty. This section seems to make the Crown liable for any such delict even where that police officer in pursuance of his statutory authority commits the delict outside statutory or other legal justification.

[126] I therefore conclude that the Crown, represented by The Attorney General, is liable for this delict committed by PC Flavien.

DAMAGES

[127] Mr. Christopher has peripherally addressed the proof of his damages in his witness statement, particularly the proof of his earnings allegedly lost and his expenditure as a result of his injuries. He has tendered no documentary exhibits in relation to his income, N.I.S. payments, medical bills or other expenses. I see where his Counsel in closing submissions has proceeded as if such damages

have been proven. On the other hand, Counsel Mr. Lay has quite rightly requested that the Court deal with damages on another occasion.

[128] I must express my displeasure at how this aspect of the Claimant's case has been dealt with, having regard to the overriding objective expressed in CPR 1.1 (2) (e) (b) and 1.3. In dealing with cases justly, the Court should allot to this case an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases. Having to adjourn the matter for assessment of damages after this full blown trial for several days certainly does not save expenses as CPR 1.1 (2) (b) contemplates. Counsel for the parties should always bear in mind CPR 1.3 which stipulates that they and their clients have a duty to help the Court to further the overriding objective. In the absence of a case management directive ordering that only liability should be determined at the trial, Counsel must place themselves in a position to prove damages also at the trial in personal injuries cases and other similar claims for damages.

[129] I am required by CPR 1.1. (1) to deal with cases justly. Having regard to the prejudice that Mr. Christopher will experience if the assessment of damages is not postponed, I will adjourn the matter for a date to be fixed by the Registrar, when the Court can set a date for the assessment of damages and give further directions.

Dated this 12th day of July, 2007

OLA MAE EDWARDS
HIGH COURT JUDGE