

Reform (Miscellaneous Provisions) Act on behalf of the estate of the said deceased.

[2] The claim against the 2nd Defendant is made under and by virtue of the Crown Proceedings Act and ~~in~~ in the capacity of the employer of the 1st Defendant.+

[3] The Claimant claims that on the 10th day of August, 2009, ~~the~~ the 1st Defendant while acting in the scope of his employment and thereby being the servant and/or agent of the 2nd Defendant negligently and without cause shot and killedō Tyrone Christopher Powellō +

[4] In the Particulars of Claim, the Claimant states ~~on~~ on or about the 10th day of August 2009 the deceased was in the presence of members of the security force, when the 1st Defendant so negligently and without cause shot the said Tyrone Christopher Powell, resulting in his death and causing his dependant and estate to suffer loss and damageō +

[5] In the Particulars of negligence of the 1st Defendant the Claimant states the following:

- i. Deliberately opening fire on am unarmed civilian;*
- ii. Discharging his firearm when it was unsafe to do so;*
- iii. Failing to maintain and/or exercise self control;*
- iv. Failing to exercise due caution when operating his firearm;*
- v. Discharging his firearm in the midst of law abiding citizens;*
- vi. Discharging his firearm without due care and warning;*
- vii. Discharging his firearm absent of any threat or fear of being endangered*

[6] The Claimant also states that on April 26, 2011 the 1st Defendant was found guilty for the murder of the said Tyrone Christopher Powell and was sentenced to fifteen (15) years imprisonment at hard labour.

The Defence

- [7] On July 8, 2013, the 2nd Defendant filed an acknowledgement of service and on November 26, 2013, filed a Defence in which he admits that the material time the 1st Defendant was a Corporal of Police employed to the Jamaica Constabulary Force, denies that he was acting as a servant and/or agent of the Crown and states that at the material time the 1st Defendant was ~~on~~ on a frolic of his own in pursuit of his own misguided personal aims+.
- [8] The 2nd Defendant admits that on the 10th day of August 2009, the 1st Defendant shot and killed the deceased and that on April 26, 2011, the 1st Defendant was found guilty for the murder and was sentenced to fifteen (15) years imprisonment at hard labour. The 2nd Defendant contends that the Claimant is not entitled to the relief claimed or any relief against him.
- [9] There is no indication that the 1st Defendant was ever served with the Claim. The court has taken note of the fact that at the date of the filing of the claim, the 1st Defendant was serving a term of imprisonment for the murder of Tyrone Powell. It is also noted that the conviction was subsequently set aside and a new trial has been ordered. The 1st Defendant has not taken part in these proceedings.

The Trial

- [10] At the trial the following documents were agreed and admitted in evidence:
1. Letters of Administration in the estate of Tyrone Powell dated February 18, 2014
 2. Death Certificate of Tyrone Powell dated May 6, 2010
 3. Receipt from Brite Lite Funeral Services & Supplies dated August 19, 2009 in the sum of \$800,000.00
 4. Birth Certificate of Tyrone Christopher Daniel Wallace, date of birth September 7, 2009 (not as to contents)
 5. Post Mortem Examination Report for Tyrone Powell dated August 27, 2009

- [11] Carlton Powell was sworn and his witness statement dated April 30, 2018 was admitted as his evidence in chief. His evidence is that he is the father of the deceased Tyrone Christopher Powell who was born January 1, 1988. He states that his son was shot on August 10, 2009 at approximately 10 pm and was taken to the Kingston Public Hospital where he died at approximately 12:30 am.
- [12] He states further that at the time of death his son was gainfully employed in the entertainment industry and assisted Baby Cham with his tours, music videos and entertainment contracts. He also states that the deceased is survived by himself, father, Janiel Wallace, spouse; Tyrone Christopher Daniel Wallace, son born 7 September 2009 being less than one year old at the time of death; Verona Moreen White, mother; and siblings Michael Bailey, Carlton Powell Jr., Damali Powell, Ramone Mercott and Kerry-Ann Powell and that the deceased's family was dependent on him for support and by his death we have lost said means of support and have suffered loss and damage.
- [13] His evidence further is that on August 12, 2009, he went to Brown's Funeral Home to identify his son's body and he saw three holes to the back of his head. He states that the bill produced by Brown's Funeral Home for Tyrone's funeral expenses has been settled and that Vincent Edwards was found guilty of the murder of his son, has since appealed and a re-trial has been ordered, but I still wish to proceed to seek compensation and any other remedy in relation to the death of my son Tyrone.
- [14] In amplifying the evidence contained in his witness statement, Mr Powell stated that the deceased was working for Baby Cham and was living with his mother. He also said that he produced a bill from Brite Lite Funeral Services and not from Brown's Funeral Home.
- [15] In cross examination he admitted that he attended the post mortem examination of his son and said that he saw three holes in the back of his son's head and they were caused by gunshot.

[16] He also indicated that he could say with certainty that Tyrone Christopher Wallace was the biological child of the deceased, and that a DNA test was done in New York but he was not there when it was done and he could not remember the date on which it was done.

[17] On being recalled, Carlton Powell gave further evidence that he knew Ophelia Beckett and Marsha Thomas, that Thomas was a witness in the criminal trial and she migrated and Beckett was supposed to come and be a witness but they didn't call her.

[18] The following statements were admitted in evidence (as hearsay) in support of the Claimant's case:

1. Statement of Ophelia Beckett dated August 11, 2009
2. Statement of Marsha Thomas dated August 13, 2009
3. Statement of Pete Gayle dated August 13, 2009

[19] Sergeant Wayne Smith gave evidence on behalf of the 2nd Defendant. His witness statement dated June 13, 2018 was admitted as his examination in chief. His evidence is that he has been attached to Area 5 Headquarters since April 2008 and that in November 2014 he became the Operations Clerk and as such he collate information in relation to all the operational activities of the police stations that comprise Area 5.

[20] He states that this information is logged by way of file storage via hard and soft copies of the files. He adds that before the merger of the Island Special Constabulary Force (ISCF) and the Jamaica Constabulary Force, information in relation to the personal details of a member of the ISCF was stored at Harman Barracks and when a member of the ISCF was deployed to a particular police divisional area, the information in relation to the operations this member would be involved in would be stored at the Area to which he was deployed.

[21] He indicates that the 1st Defendant was deployed to Area 5 HQ in August 2009 in the Operation Support Unit while he was a member of that unit, and that he knew him to be a Special Corporal of the ISCF and they worked on a

few operations together. He adds that the 1st Defendant was tasked to carry out policing activities within the St Catherine North, St Catherine South, St Andrew North and St Thomas divisions which comprise Area 5 and that Cooreville Gardens is not included in any of those divisions.

[22] Sgt Smith outlines that the duties of the members of the Operations Support Unit involved hotspot patrols, snap raids, targeted raids and cordon and search activities. He states that as Operations Clerk he carried out extensive search of the operation records at Area 5 HQ where the 1st Defendant had been stationed in 2009 with a view to locating any register which could provide a record that the 1st defendant was on duty on August 10, 2009 and was unable to find any such document or record.

[23] In cross examination, he stated that police officers can perform duties outside the areas to which they are attached.

The Submissions

[24] At the close of the trial, Counsels were ordered to file written submissions on or before July 17, 2018, which they did.

[25] Counsel for the Claimant after setting out the background to the claim submitted that the only issues for the court to determine were whether the 2nd Defendant is vicariously liable for the fatal shooting of Tyrone Powell and, if so, what quantum of damages the claimant would be entitled to, and, if the 2nd Defendant is not found to be vicariously liable, whether the case is an appropriate one for a recommendation of an *ex gratia* award. This he indicated is based on the fact that from the initiation of proceedings the 2nd defendant has not contested the issue that the 1st Defendant shot and killed the deceased and that the defence has not been amended since the criminal case against the 1st defendant has been remitted to the Circuit Court for re-trial.

[26] Counsel asked the court to consider the uncontested statement of Pete Gayle and he placed reliance on the Post Mortem Examination Report in his

submission that there is sufficient evidence for the court to find that the 1st Defendant fatally shot the deceased, without lawful excuse.

[27] He submitted that the court should not consider the questions in cross examination of Mr Carlton Powell in relation to the post mortem report as the questions were geared at ventilating whether the deceased was fatally shot without lawful excuse and this is not a live issue and had the 2nd defendant intended for such issue to be considered it would have been prudent to indicate to the court and give notice to the Claimant.

[28] Counsel also submitted that the correct approach to determine whether the Crown is liable for a shooting committed by an employee is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort and to ask whether it is just and reasonable to hold the employer vicariously liable (**Bernard v The Attorney General of Jamaica** (2004) 65 WIR 245).

[29] Pointing to the evidence given by Sgt Wayne Smith in cross examination, Counsel said it is not conclusive evidence and it is well accepted that a Constable may exercise his powers outside the assigned hours of duty which was the case in **Bernard**.

[30] Counsel quoted Section 13 of the **Constabulary Force Act**, and placing emphasis on "to keep watch by day and night", stated that there is a prima facie presumption that members of the police force at all times act in their capacity as agents of the state, unless this can be otherwise proven by evidence.

[31] Counsel asked the court to consider the fact that Cpl Edwards used a service revolver to shoot the deceased and while admitting that that alone would not suffice to establish a close connection, Counsel said it may contribute to the overall circumstances.

[32] With reference to the statements of Ophelia Beckett and Marsha Thomas, he stated that they gave descriptions of the incident and that as soon as the incident occurred it was deemed to be police business. He suggested that

is a reasonable conclusion that the Constables in question did not only deem the matter to be police business after the incident but acted as police officers throughout. He also suggested that ~~the~~ approaching the matter in a broad way as urged by the House of Lords in **Lister v Hesley Hall Ltd.** [2001] UKHL 22, this may be viewed as retrospectant evidence.+

[33] He then submitted that without clear evidence to the contrary, the actions of the corporal ought to be seen as continuous ~~police business~~. He expressed the view that there is an unrebutted presumption that the 1st Defendant acted as an agent of the state on the grounds that he is a police officer, that a police officer is tasked to keep watch night and day which suggests that in the true sense a police officer is never strictly off duty and that a service weapon issued by the police force was used to shoot and kill the deceased. He added that it is admitted that a police officer may exercise his lawful powers outside the area which he is assigned.

[34] It was submitted further that while the employer need not be at fault for the act of the employee, where the employer has contributed by creating the risk through negligence, this should be a relevant consideration. He cited the case of **Maga v The Trustees of the Birmingham Archdiocese of the Roman Catholic Church** [2010] EWCA Civ 256, indicating that it introduced a status-based risk test. He noted that the ~~core~~ of that case is that where you elevate the status of another such that it materially increases the risk of the commission of a tort, you are vicariously liable for that tort, ~~at~~ least where the person whose status is elevated is your employee.+

[35] Counsel pointed out that Cpl Edwards was last issued a firearm on May 25, 2008, and that the risk created by the Force when weapons are issued to its officers cannot be ignored although he admitted that the use of a service revolver is not sufficient to establish a case of vicarious liability.

Submissions on behalf of the 2nd Defendant

[36] Counsel for the 2nd Defendant pointed out that the Claimant must prove that the shooting of the deceased was negligent and that at the time of the

shooting, the 2nd defendant was acting or purporting to act as a servant or agent of the Crown.

[37] She submitted that there is no evidence adduced by the claimant which shows that the shooting was negligent or without cause and that the statements which were admitted as hearsay evidence should be viewed with caution and not be relied on as proof of any primary facts in relation to how the incident occurred.

[38] Counsel indicated that the post mortem report is the only objective evidence in relation to how the shooting took place and that it only establishes that shots fired made contact with the body of the deceased in the region of the right ear as well as his right foot. She submitted that the evidence established by the report should be preferred over the evidence of Mr Carlton Powell, who was not at the scene, but insisted that he saw three holes at the back of the head of the deceased and they were caused by gunshot.

[39] On the issue of whether the 1st defendant was acting or purporting to act as a servant or agent of the Crown, Counsel submitted that the Claimant was required to prove that at the time of the incident, the 1st Defendant was acting in his capacity as a constable or member of the Force. She cited the case of the **Attorney General of Jamaica v Kenya Tulloch** [2014] JMCA Civ 13 in which Mangatal JA. Ag., at paragraph [36] noted that although the issue of which party bears the burden of proving vicarious liability was not directly discussed in the case of **Bernard**, but that in **Weir v Chief Constable of Merseyside Police** [2003] EWCA Civ 111, which was referred to in **Bernard**, Sir Dennis Henry stated, *inter alia*,:

“To establish liability the claimant has to show more than the mere fact that the tortfeasor was a police officer. He has to show that the tort he alleges was committed at a time when the police officer was apparently acting in his capacity as a constable...”

[40] Counsel pointed out that there was no evidence adduced by the Claimant to establish that the 1st Defendant was on duty at the time and even if the court were to rely on the statements of Pete Gayle, Ophelia Beckett and Marsha

Thomas, they do not indicate that the 1st defendant was on duty and none of the persons indicate that they saw him in uniform at the time.

- [41] Counsel submitted that the reasonable conclusion to be drawn from the evidence of the 2nd defendant that no record was located to indicate that the 1st Defendant had been on duty and that he was not assigned to work in the area where the incident occurred, is that he was not on duty. She noted further that there was no evidence adduced which indicated that the 1st defendant was purporting to act as a policeman and unlike the Bernard case, none of the three persons, whose statements were admitted in evidence, stated hearing announcement from the 1st Defendant immediately before the incident that he was a policeman.
- [42] It was further submitted that the alleged comment "police business" would not suffice to establish that the 1st Defendant was purporting to act as a member of the Force as it was not said by the 1st Defendant, was not said to the deceased and was made after the incident.
- [43] Counsel also pointed out that there was no evidence adduced in relation to the ownership of the firearm that was used by the 1st Defendant and submitted that it cannot be presumed that it was his service firearm and even if there were such evidence, it is significant that in Bernard, the Board noted that "it does not follow that the using of a service revolver by a policeman without more make[s] the police authority vicariously liable. That would be going too far". She expressed the view that it was the cumulative facts demonstrating that the policeman had been purporting to assert his authority as a police by his assertion immediately before the incident that led their lordships board in Bernard primarily to conclude that he was acting as a constable.
- [44] Counsel concluded that based on the authorities, the Claimant has failed to prove the facts necessary to establish liability on the part of the 2nd Defendant and as such the claim should be dismissed with costs to the 2nd Defendant. She noted that having failed to establish liability there is no basis on which damages could be awarded by the court.

The Issues

[45] I find that the issues which fall to be determined are whether the shooting of the deceased was negligent and without cause and whether at the time of the shooting the 1st Defendant was acting or purporting to act as a servant or agent of the Crown.

The Law and Application

[46] Section 3(1) of the **Crown Proceedings Act** provides as follows:

Liability of the Crown in Tort

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

(a) in respect of torts committed by its servants or agents;

(b) ...

(c)

Provided that no proceedings shall 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 tort against that servant or agent or his estate.+

[47] It is trite law that the Claimant has a duty to prove on a balance of probabilities that at the time of the incident giving rise to the claim the deceased was shot and killed by the 1st defendant and the 1st defendant was acting in his capacity as a police officer, being a servant or agent of the Crown in order for the 2nd Defendant to be found vicariously liable.

[48] In **Lister v Hesley Hall Limited**, supra, Lord Millett, referring to the law relating to vicarious liability, stated as follows:

“It is not premised on any culpable act or omission on the part of the employer; an employer who is not personally at fault is made legally answerable for the fault of his employee. It is best understood as a loss distribution device...”

[49] Lord Steyn in delivering the judgment of the Board in **Bernard v The Attorney General of Jamaica**, supra, said at paragraph [21]:

“Vicarious liability is a principle of strict liability. It is a liability for a tort committed by an employee not based on any fault of the employer. There may, of course, be cases...where employers were at fault. But it is not a requirement...”

[50] Further, at paragraphs [26] and [27], his lordship said:

%[26] Approaching the matter in the broad way required by Lister, the constable’s consequent act in arresting the plaintiff in the hospital is explicable on the basis that the constable alleged that the plaintiff had interfered with the execution of his duties as a policeman. It is retrospectant evidence which suggests that the constable had purported to act as a policeman immediately before he shot the plaintiff.

[27] Moreover, one must consider the relevance of the risk created by the fact that the police authorities routinely permitted constables... to take loaded service revolvers home, and to carry them while off duty...but the state certainly created risks of the kind to which Bingham JA made reference. It does not follow that the using of a service revolver by a policeman would, without more, make the police authority vicariously liable. That would be going too far. But taking into account the dominant feature of the case, viz that the constable at all material times purported to act as a policeman, the risks created by the police authorities reinforce the conclusion that vicarious liability is established...”

[51] Police officers are servants of the Crown and the 2nd Defendant has admitted that at the material time the 1st Defendant was a Corporal of Police employed to the Jamaica Constabulary Force. To carry out his duties, the 1st Defendant as a police officer is entrusted with a firearm. The circumstances under which a police officer carries out his duties therefore provide the opportunity for the commission of the tort. However, before the principle of vicarious liability can apply, the 1st Defendant must be found to be at fault.

[52] I cannot agree with the submission of Counsel for the Claimant that there is an unrebutted presumption that the 1st Defendant acted as an agent of the state on the grounds that [he] is a police officer. The Claimant has not shown on the evidence that the 1st defendant, at the material time, purported to act as a police officer or that a service weapon issued by the police force was used to shoot and kill the deceased.

[53] I have viewed with caution the statements of Pete Gayle, Marsha Thomas and Ophelia Beckett which were admitted in evidence as hearsay. I have also considered the evidence of Carlton Powell, who was not present at the time of the incident, as well as the evidence of Sgt Wayne Smith.

[54] On the evidence presented to the court, I find that at the material time, the 1st Defendant was employed to the Jamaica Constabulary Force as a Corporal of Police. However, there is no evidence that he was on duty at the material time or that he had the service firearm which was said to have been issued to him in May 2008.

[55] I find as a fact that there was a shooting incident on August 10, 2009 in the Cooreville community resulting in the death of Tyrone Powell. The Claimant has alleged that the 1st Defendant negligently and without cause shot and killed + and the Claimant's witness was not present so is unable to say what actually occurred.

[56] Although the untested evidence of two of the witnesses contained in their statements indicate that the 1st defendant was at the scene, there is no clear evidence that he was there prior to the shooting or if he fired any weapon or that he shot the deceased. Marsha Thomas states, inter alia, that + I saw Vince + with his gun in his hand, he was holding the gun towards the ground + I cannot say how many shots were fired + and also cannot say who fired the shots + Ophelia Beckett states + the said man I saw talking on the cellular phone + was also the said man I saw firing shots at the Rav 4 and although at one point he was shouting to one Vince to pop some shots, I did not see the man he was referring to + Pete Gayle's statement + + + + +

[57] I do not find that I can treat as +retrospectant+the evidence that the words + police business now+ was used, as I understand Counsel for the Claimant to be suggesting. The mere reference of someone to + police business+ is not sufficient to substantiate a claim of vicarious liability especially in view of the fact that there is no evidence that it was said to the deceased or before the shooting took place and I bear in mind that the evidence in relation to this

issue was not tested. I therefore find no basis on which I can treat the use of the words %police business+as retrospectant evidence.

[58] There has to be more than mere knowledge that the 1st defendant is a police officer. The comment of %police business now+as referred to by Beckett and Thomas cannot suffice to establish that the 1st Defendant was acting as or purporting to act as a police officer. No evidence has been led that the 1st defendant was present at the scene prior to and during the shooting or that he at the material time held himself out to be a police officer..

[59] There is no evidence from which I can find on a balance of probabilities that the 1st defendant fired shots which led to the death of Tyrone Powell and that the shooting was negligent or without probable cause or that at the time of the incident he was on duty and acting in the capacity of servant or agent of the Crown. There is also no evidence adduced in relation to the ownership of the firearm which was said to be used by the 1st Defendant.

[60] The reliance by Counsel for the Claimant on Section 13 of the Constabulary Force Act, in seeking to establish a %close connection+ between the 1st defendant and the 2nd Defendant by indicating that the 1st Defendant used his service revolver to shoot the deceased is ill-founded as there was no clear evidence adduced from which the court could find on a balance of probabilities that the 1st defendant shot and killed the deceased when armed with his service revolver.

[61] I agree with Counsel for the 2nd Defendant that the Post Mortem report is the only objective evidence that a shooting took place. I find however, that it only establishes that there were gunshot wounds to the right lateral aspect of the malleoli, the left parietal scalp and the right parietal scalp of the deceased, as described by Dr Dinesh Rao, but there was no evidence to say these were from a firearm issued to, or fired by the 1st Defendant at the material time.

[62] I note that the 2nd defendant in the defence dated 25th November, 2013, admits that the 1st defendant shot and killed the deceased on August 10, 2009 and at the time of the shooting he was not acting in the capacity of servant and/or agent of the Crown but was on a frolic of his own, but I bear in mind

that at the time of the filing of the claim and the defence thereto, the 1st defendant had been convicted of the offence and was serving a term of imprisonment.

[63] On the evidence led before this court, the Claimant has failed to establish on a balance of probabilities that the deceased was shot and killed by the 1st Defendant and that at the time of the shooting he was armed with a firearm issued to him by his employer and was acting in the capacity as a police officer.

[64] The Claimant has not presented one iota of evidence to substantiate the particulars of negligence itemised in the Particulars of Claim

Conclusion

[65] In my view the Claimant has failed to establish on a balance of probabilities that the 1st Defendant shot and killed the deceased, that the shooting was negligent or without cause or that the 1st Defendant was acting or purportedly acting as a servant or agent of the Crown. Further, the Claimant has not provided any evidential basis on which this court could conclude that the 1st Defendant committed a tort and that there was such a close connection between the nature of the 1st Defendant's employment and the tort committed that as a matter of law it would be just and reasonable to hold the 2nd Defendant vicariously liable.

Disposition

[66] There will therefore be judgment for the 2nd Defendant with costs to be taxed, if not agreed.

[67] In view of all the circumstances, the court finds that this case is not one in which it would be appropriate to consider making a recommendation that an *ex gratia* payment be made.