

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW & EQUITY DIVISION**

2013/CLE/gen/00397

BETWEEN

BLONEVA FERGUSON

(as administrator of the Estate of Ezra Ferguson, Deceased)

Plaintiff

AND

POLICE CORPORAL 2587 STERLING THOMPSON

First Defendant

AND

COMMISSIONER OF POLICE

Second Defendant

AND

THE ATTORNEY GENERAL

Before: Hon. Madam Justice Donna Newton

Appearances: Mrs. Janet Fountain for the Plaintiff

Mr. Wayne Munroe for the First Defendant

Ms. Hyancith Smith for the Second and Third Defendants

Hearing Date: 23rd January, 2018

JUDGMENT

Newton J

1. The Plaintiff claims as Administrator of her son's estate under the Survival of Action Act/Fatal Accidents Act for negligence for the unreasonable killing of the deceased and for arbitrary, oppressive and/or unconstitutional conduct. She seeks special damages in the sum of \$12,100.00, damages for the dependents listed as the Plaintiff (mother), father and sister. The claim is brought under the Fatal Accidents Act, for damages for the estate of the deceased under the Survival of Actions Act for the alleged negligence and exemplary and/or aggravated damages for the alleged unconstitutional conduct.
2. The Defendants deny liability. The First Defendant asserted that the verdict of the Coroner's Inquest that the killing was lawful conclusively determines that there is no liability in this action. The Second and Third Defendants assert that the First Defendant was reasonably acting in self-defence in response to the actions of the deceased.
3. **HELD: Dismissing the Plaintiff's claims in negligence and unconstitutional conduct and awarding costs to the Defendants to be taxed if not agreed**

Background Facts

4. The Plaintiff ("Mrs. Ferguson") is the mother and administrator of the estate of Ezra Ferguson ("the deceased"). The First Defendant is a police officer ("Corporal Thompson") and was, at the material time, stationed at the Colonel Hill Police Station on Crooked Island.

5. On 17 March, 2012, the Deceased and Corporal Thompson were attending a fair at Seaview Beach, Crooked Island while there Corporal Thompson shot and killed the deceased.
6. A Coroner's Inquest was conducted on 4 March, 2014. The cause of death was determined to be a contact gunshot wound to the neck. The verdict was unanimous, that the killing was lawful.
7. Mrs. Ferguson alleged that Corporal Thompson was not in fear of his life, thereby rendering the killing negligent. The Defendants, however, alleged that Corporal Thompson was not negligent; that he was justified in shooting the deceased.

The Issues

8. The issues to be determined are:
 9. Whether the lawful killing verdict of the Coroner's Inquest can be used as evidence for determining the question of liability in this action; and
10. Whether the First Defendant can rely on self-defence to negate liability for shooting the deceased i.e. whether the First Defendant honestly and reasonably believed that he was in imminent danger when he shot the deceased?

The Defendants' evidence

11. The Parties dispute the facts which led to the shooting. The Plaintiff was the sole witness for her case which although presented first, I find that it is more logical to recount the Defendants' evidence first. The First

Defendant gave evidence on his own behalf and the witnesses for the Second and Third Defendants were Regina Knowles, Inspector Darwin Munnings and Dr. Jullian Bartlett.

12. Corporal Thompson's evidence is that on the day in question the deceased was behaving belligerently and that he (Thompson) was in fear for his life when the deceased tried to take his gun during a struggle. He stated that he (Thompson) had and still holds a firearm training certificate.
13. He said that on that day, he saw the deceased consuming what he believed was alcohol from a cup and that he smelled what he believed was marijuana on the deceased.
14. Corporal Thompson explained that as the fair was coming to an end, he was alerted that there was commotion at the Bar. He said that when he arrived there, the deceased and a gentleman known as O'Brian Bain were arguing and pushing one another. He said both were physically restrained by bystanders.
15. Corporal Thompson stated that after this altercation, the deceased **"bumped"** into one of the speakers at the DJ booth. As the deceased was crossing the street, he (Thompson) approached him and told him to go home. He added that he warned the deceased to go home about three times as well as asking his mother (the Plaintiff) to take the deceased home because he did not want to lock him up.
16. Thereafter, Corporal Thompson stated, the deceased had a physical altercation with Desmond Collie (also deceased) where the deceased snatched his shirt causing it to tear as well as he **"popped"** Collie's chain.

17. Subsequently, said Corporal Thompson, the deceased came toward him and was attempting to get to Collie. He pushed him back and told him that he was under arrest. The deceased then, said Corporal Thompson, raised his right hand and struck him on the left side of his forehead which caused him to stagger. He explained that the deceased advanced toward him and continued to strike him on the forehead.
18. Thompson said he then tried to get to the police car, which he says was parked in front of the deceased's father's truck. When he reached mid-way on the side of the truck, the deceased shouted "*I tired of y'all frigging with me I will fucking kill you*" and then the deceased reached for Thompson's firearm which was tucked in the holster of his waistband. As soon as the deceased grabbed the firearm, Thompson said he held onto it, holding the hammer down to prevent it firing. He struggled to regain control of his weapon from the deceased.
19. He said that he started to feel faint after being struck repeatedly and realised that if he fainted, the deceased would have full control and possession of his firearm and would use it to kill him and possibly other persons in the area. He continued that he was in complete fear of his life.
20. Under cross-examination, Corporal Thompson confirmed that he was flown into Inagua the following day where he was seen by Dr. Baro. His evidence was consistent with the medical report which stated that he felt pain in his head and had pain in his finger. He also said that his eyes were blurry.
21. He said that his gun was held on his person by being stuck in the

holster on the left side of his waist. He confirmed that he was left handed. He described his holster in the following way: *“This is an inside holster. There is a little clip on the strap that contains the firearm...The majority of the holster goes inside the pants.”*

22. He described the gun as a .38 revolver, which he said, does not have a safety, explaining that *“You would have to be the one to pull the trigger.”*
23. He conceded that although he told the deceased that he was arrested, he did not advise him of the reason for his arrest. He explained that he did not have a chance to do so. He confirmed that the deceased took the gun out of the holster.
24. He confirmed that he held the hammer down with his thumb while fighting with the deceased. He said that this was his way of stopping the gun from going off when the deceased grabbed for his shirt. He said he snatched the weapon back and the deceased grabbed it again. This all took place under his shirt.
25. He said once he got the gun back completely, he took a step back to raise the gun and he fired one shot in the deceased’s direction. That he was not touching the deceased but that the deceased was still striking him to his head. He conceded that at this time, the deceased had no other weapon. He maintained that he was in fear for his life
26. He said that he was familiar with the deceased; that he grew up with him in the community. He said that the only interaction he had with the deceased in his capacity as a police officer was speaking to him about smoking marijuana on one occasion. He did not arrest him at that time.

27. He denied Ms. Fountain's suggestion that he was not fearful for his life.
28. Corporal Thompson conceded that although there were street lights in the community, the road from the event site to the police station was lit. He said that he suffered blurred vision in his left eye as a result of the fight, but that notwithstanding, he felt he could see well enough to drive. He also conceded that although his wife had a driver's license and drove with him to the police station, he chose to drive with the blurred vision.
29. He stated that he does not drink.

Regina Knowles

30. She stated that at the time of the incident, she was the Acting Principal at Long Cay All Age School situate on Long Cay, which is off Crooked Island. She was at the fair on the day of the incident.
31. Ms. Knowles revealed that the deceased is her second cousin and that she is familiar with Corporal Thompson as they attended the same high school for a short period and he is familiar throughout the small community.
32. Regina Knowles' evidence is that on the day in question the deceased behaved in a disorderly manner prior to the shooting. Her evidence, however, is limited to the events prior to the struggle between the deceased and Corporal Thompson.
33. She confirmed Corporal Thompson's evidence that the deceased had what she called "*a heated argument*" with O'Brian Bain at the Bar.
34. Knowles further stated that the deceased's mother was present during

the argument and encouraged him to leave. She said that Mrs. Ferguson (his mother) was successful at getting the deceased to walk away after about two minutes. As he walked away, she said the deceased said to Bain *“y’all think niggas light. Stay right there watch what happen”*.

35. She confirmed that while walking away from the Bar he hit the speaker at the DJ booth which caused the laptop which was sitting on top of the speaker to fall.
36. She also confirmed that the deceased then walked into the street with his mother followed by other persons who were calling for the police.
37. She said Corporal Thompson responded and he, along with Mrs. Ferguson and another person Annafaye Ferguson-Knowles unsuccessfully attempted to calm him down. According to her, a struggle ensued where four people were trying to calm him down after which Corporal Thompson advised the deceased that he was under arrest.
38. Ms. Knowles said Corporal Thompson and the deceased were struggling as they moved toward the front of the deceased’s father’s truck. At this point, she said, they were out of her view. She could not see anything else once they moved to the front of the truck, but she could hear struggling.
39. Thereafter, Knowles said she left to walk toward the building. As she was walking she heard what sounded like a gunshot.
40. She said that she could not say whether Officer Thompson had consumed alcohol that day. She also said that she had seen the

deceased with a cup during the day at the event.

41. Under cross-examination, Knowles said that the road from the event site to the police station is dark, but she believed that there was a street light in the particular area where the struggling and shooting occurred. She agreed that someone with vision issues would find it challenging to drive from the event site to the police station.

Inspector Darwin Munnings

42. Inspector Munnings was the Officer in Charge of Crooked Island and Long Cay, stationed at Colonel Hill Police Station on Crooked Island.
43. In his evidence he said that he received a phone call from Corporal Thompson after which he immediately left his home and arrived at the event site. Upon arrival, he said, a large crowd was shouting insults at Corporal Thompson. He said he spoke to Corporal Thompson, who, at the time, appeared to be in a daze, yet calm.
44. Munnings said Corporal Thompson pointed him to where the deceased was lying. He further testified that the deceased was transported to Landrail Point Clinic where he pronounced dead.
45. He said that he met Corporal Thompson and his wife at Colonel Hill Police Station and that Corporal Thompson was visibly distressed and upset. He disarmed him of his service revolver which had five live rounds and one spent round all which he secured.
46. He confirmed Corporal Thompson's evidence regarding the gun that *"it doesn't have a safety, it has a safety mechanism...With the revolver,*

once you pull the trigger it automatically goes off but if you cock the hammer that could act as a safety.” He then agreed that the safety mechanism on the gun is cocking the hammer.

47. He said that there is no standard holster issued for police officers and that it is therefore possible that different police officers have different holsters. The only requirement is that it is capable of locking.

48. Under further cross-examination by Ms. Smith, Inspector Munnings said that holding the thumb on the hammer as a safety assists in preventing the gun from going off, but that it is certainly not a “fool proof” method.

Dr. Jullian Bartlett

49. Dr. Jullian Bartlett, Acting Medical Staff Coordinator, evidence was made from information derived from reviewing notes of Dr. Raquel Baro, the doctor who examined Corporal Thompson in Inagua on the morning after the incident.

50. She noted that at the time of the examination, Corporal Thompson complained of pain on the left side of his head, headache, dizziness and pain in left eye, left arm (elbow) and right finger. That his history noted a head injury dating back to when he was 15 years old.

51. He said that Dr. Baro’s assessment found that Thompson had multiple traumas, there were swelling to the head and eyebrows, numbness to the left eye, left limb painful to arm and elbow area and no swelling. He was prescribed medication for the pain and injuries.

52. He said that based on review of Dr. Baro's notes, it was his medical opinion that the injuries presented by Corporal Thompson were consistent with his evidence that he was hit in the head and about the body by another person.
53. Under cross-examination, Dr. Bartlett agreed that the injuries were not serious.
54. No evidence was presented that Corp Thompson had been consuming alcohol or drugs.
55. Under re-examination, Dr. Bartlett agreed that the notes do not indicate that the doctor sought consent for drug screening from the patient or from a magistrate, both of which were available.

The Plaintiff's Evidence

56. Mrs. Ferguson was the sole witness for the Plaintiff. In summary, she testified that the deceased was not behaving disorderly, that Corporal Thompson arrested him for no reason and that there was no physical struggle which led to the shooting.
57. She said that she was at the fair when the incident occurred and that she was made aware that the deceased had taken a bottle of alcohol from the Bar without permission; that she asked him to put it back and he eventually did.
58. She further testified that Corporal Thompson started walking toward her and the deceased as they were crossing the street. She said that Corporal Thompson then arrested the deceased without giving reasons for doing so.

59. Subsequently, Mrs. Ferguson said, Corporal Thompson then walked around the deceased's father's truck toward the passenger side; that "*all of a sudden*", she heard a noise that sounded like a gunshot and saw the deceased fall to the ground.
60. She said that Corporal Thompson did not respond when she asked him why he shot her son; that he did not assist the deceased and did not allow anyone else to assist the deceased. She said that Inspector Darwin Munnings and Nurse Carroll then came to the scene and the deceased was taken away on the back of a truck.
61. Under cross-examination, Mrs. Ferguson maintained that she did not see the deceased drinking. She denied that the deceased was disorderly in any way. She also denied that he shouted profanities at the Bar or that there was an altercation between him and O'Brian Bain. She later clarified that she could not say that the deceased was not arguing with Bain at the Bar, as she was not there at the time.
62. Mrs. Ferguson maintained that she never saw anyone trying to calm down the deceased and denied that the deceased hit the speaker at the DJ booth. Her recollection was entirely different - that the wire was out and that it got caught in his foot while he was walking. She said that the deceased did nothing to warrant Corporal Thompson approaching him when he was crossing the street with her.
63. She also insisted that the deceased did not touch Corporal Thompson and that she never saw him putting up a fight with anyone. Mrs. Ferguson stated that there was no struggle before the shooting.

Factual findings

64. Having observed the demeanor of the witnesses and analyzing all of the evidence including the documentary evidence, I prefer the evidence of the Defendants' witnesses as to the events that occurred to that of the Plaintiff. I find the Plaintiff was an incredible witness, her bias as the deceased's mother was clear during cross-examination. I also find that Corporal Thompson, Dr. Bartlett and Inspector Munnings were credible witnesses.
65. I find Knowles to be an impartial witness. Notwithstanding that the deceased is her second cousin, her evidence was contrary to that of the Plaintiff - that the deceased was grossly misbehaving and had altercations with several persons.
66. I accept that the deceased had consumed alcohol and that he had gotten into an argument with Bain at the Bar for removing a bottle of alcohol without permission; that he was intoxicated and was behaving disorderly and had a physical altercation with Desmond Collie. I also accept Corporal Thompson and Knowles' evidence that the Plaintiff along with other persons were trying to calm the deceased. I also accept Corporal Thompson's evidence that he warned the deceased to go home prior to arresting him.
67. As stated, I prefer the Defendants' evidence to that of the Plaintiff. I accept that the deceased continued to behave belligerently and that a struggle did in fact occur between Thompson and the deceased before the gun was fired.
68. I am satisfied that during the struggle, the deceased was striking Thompson about his head and his body and that he reached for Thompson's gun but was prevented from doing so. Further that

Corporal Thompson engaged the safety mechanism to prevent it going off by holding on to the hammer with his thumb. Which explains the medical report that he complained of a painful finger.

69. I accept that the deceased took the gun out of the holster. Although the deceased never fully gained control of it. I also accept that Corporal Thompson believed that the gun was in danger of being taken by the deceased. . No evidence was presented that Thompson consumed alcohol.
70. In addition to the credibility of Corporal Thompson as a witness, his account is generally consistent with the medical report.
71. I accept the medical opinion of Dr. Bartlett that the injuries presented by Corporal Thompson at the time of examination are consistent with his account that he was hit in the head and about the body by another person. I believe that that person was the deceased.
72. The fact that Thompson's gun was recovered with five live rounds and one spent, which I accept, is of particular importance to determining whether the use of force was proportionate, which is a major consideration for self-defence.
73. Overall, I accept that the deceased was behaving in a disorderly manner and that there was a struggle between the deceased and Corporal Thompson during which the deceased aggressively sought to take Corporal Thompson's gun as he struck him repeatedly which resulted in Corporal Thompson sustaining minor injuries and feeling faint. I am satisfied that he honestly believed his life was in danger. No evidence

was produced that Corporal Thompson consumed alcohol or drugs so I made no findings as to that.

Self Defence

Negligence

74. The House of Lords in **Ashley v Chief Constable of Sussex Police** [2008] 3 All ER 573 decided that the test for self-defence in civil actions is whether the person both honestly and reasonably believed that they were in imminent danger at paragraph 24:

“In a civil case the belief must at least be reasonably held and, it may be, even that would not suffice to establish the defence”

75. Lord Bingham explained that the function of the civil law of tort is

“.....different from the criminal law. Its main function is to identify and protect the rights that every person is entitled to assert against, and require to be respected by, others. The rights of one person, however, often run counter to the rights of others and the civil law, in particular the law of tort, must then strike a balance between the conflicting rights. The right not to be physically harmed by the actions of another may conflict with the rights of other people to engage in activities involving the possibility of accidentally causing harm. The balance between these conflicting rights must be struck by the rules and principles of the tort of negligence.”

76. Nicol J in **Davis v Commissioner of Police** [2016] EWHC 38 (QB) restated the principles of standard of proof, burden of proof and the

threshold for self-defence from **Ashley v Chief Constable of Sussex Police** on self-defence in civil cases. At paragraph 30 of the judgment, the Court relied on the House of Lords' position in Ashley with respect to the test for self-defence in civil cases.

“Another difference between tort and crime is relevant where the defendant is mistaken about the threat which he faced. In the criminal courts, if the defendant did (or may have had) an honest belief that the threat was real (and makes no more than a proportionate response), it is immaterial that the mistake was unreasonable. For the purposes of a civil claim, the position is different. There will only be a defence if the defendant honestly *and reasonably* believed he was in imminent danger. This, too, was established in *Ashley*.”

77. At paragraph 9, Nicol J explained that

“In both contexts it is necessary that the act of the defendant was reasonably proportionate to the violence against which he believed he was defending himself. These two matters are relevant in both contexts, but the burden and standard of proof is different. In a criminal court, it is for the prosecution to prove that the force used was unlawful. Once the issue of self defence is properly raised, it is therefore for the prosecution to show that the defendant did *not* act in self defence. As with all elements of the offence, the prosecution must establish this to the criminal standard i.e. so that the jury (or magistrate) must be sure that the prosecution has proved its case. For the purposes of the law of tort, it is for the defendant to show that the defence of self-defence is made out.... The standard of proof is that common in all civil cases, namely the

balance of probabilities.”

Whether the shooting was negligent

78. Counsel for the First Defendant, submitted that the lawful killing verdict of the Coroner’s Inquest is a conclusion of lawful killing for all purposes, criminal and civil. In support of this, he relied on sections 120 and 121 of the Evidence Act which states:

82. “Every judgment is conclusive proof in all subsequent proceedings between the same parties or their privies, of facts directly in issue in the case actually decided by the court, but not of facts which are only collaterally or incidentally in issue, even though the decision of such facts was necessary to the decision of the case.”

79. She supported her position by excerpts from the publication Jervis on the Office and Duties of Coroners, 2002 and Halsbury’s Laws of England 4th Edition Volume 9(2).

80. She submitted that it is not the function of the inquiry to determine any question of civil or criminal liability but rather whether a killing was lawful or unlawful

81. The question, therefore, is whether the verdict of the Coroner’s Inquest is conclusive or any evidence at all toward determining liability in this action. I agree with Ms. Fountain that the lawful killing verdict of the Coroner’s Inquest is entirely inapplicable to the determination of civil liability in this action. I therefore do not consider the verdict of the Coroner’s Inquest.

Whether Corporal Thompson was acting in self-defence

82. Counsel for the Second and Third Defendants submitted that the First Defendant was acting in self-defence; that he honestly and reasonably believed that he was in imminent danger, thereby rendering his use of force reasonable in the circumstances.
83. Counsel for the Plaintiff urged the Court to find that the actions taken by Thompson were unreasonable and that the force used in responding was excessive and unreasonable, particularly since the deceased was unarmed.
84. If the killing was in self-defence, then it was reasonable and therefore not negligent. The question to be determined is whether Corporal Thompson was in fact acting in self-defence when he shot the deceased.
85. The parties cite the same law but their applications differ. They agree on the law for the most part save for the Plaintiff's application of the Penal Code to the facts. She asserted that to successfully rely on self-defence, the Defendants must prove that Thompson was subjected to dangerous or grievous bodily harm pursuant to section 107 of the Penal Code. Section 107 provides:
- 86. "For the prevention of, or the defence of himself or any other person against, any of the following crimes, a person may justify any necessary force or harm extending in the case of extreme necessity, even to killing, namely:**
- (k) Dangerous or grievous bodily harm"**

87. This argument is unsustainable for two reasons. The Penal Code does not apply to the determination of liability in civil cases. Its application is exclusive to criminal law. Secondly, Counsel's interpretation of the section is incorrect. The section does not, as she suggests, require persons relying on self-defence to prove that the threat posed by the other person was that of the standard of dangerous or grievous bodily harm. Conversely it requires that in cases where a person is accused of dangerous or grievous bodily harm, he must justify necessary harm extending in the case of extreme necessity, even to killing.
88. As this is a civil case, the Defendants who raised self-defence bear the burden of proving. This burden must be discharged at the civil standard, on a balance of probabilities.
89. As stated, I believe that the deceased was behaving disorderly. This, however, is of limited use for determining whether the acts of the deceased rose to the level of putting Corporal Thompson in fear for his life. At best, it gives credence to the contention that he behaved aggressively toward Corporal Thompson and that it was likely that he fought with him.
90. With respect to self-defence, the question to be determined is whether the circumstances rose to such a level that Corporal Thompson reasonably believed that he was in imminent danger? As it is not enough that the person relying on self-defence subjectively believed he was in imminent danger, the question is an objective question of fact based on reasonableness. The evidence of the Plaintiff and the Defendants' witnesses are strikingly conflicting.
91. I note that the deceased did not have his own weapon at the time of the

struggle and when he was shot. That notwithstanding, I believe that it was reasonable for Corporal Thompson to believe that he was in imminent danger. The medical report is probative evidence for the conclusion that Thompson was injured in the struggle. This reasonable belief would have been exacerbated by the faint feeling described by Corporal Thompson. As stated, I accepted that Corporal Thompson honestly believed that he would have fainted and feared that had that occurred the deceased would have seriously injured him or someone nearby. That belief, I think is reasonably held for the purpose of self-defence.

92. Counsel for the Plaintiff submitted that Thompson did not fear his life because he had only one previous encounter with the deceased as a police officer prior to the incident. I do not agree with this contention as the evidence suggest that the deceased was behaving disorderly and was attempting to seize Corporal Thompson's gun during the struggle.
93. Counsel for the Plaintiff also suggested that Corporal Thompson did not have serious injury to his eyes as he was able to drive on the dark road instead of allowing his wife who was capable. No evidence was tendered that suggested that his injuries were serious to the extent that he was incapable of driving, only that the injuries were consistent with his account.
94. The use of force used by Corporal Thompson was, in my judgment, proportionate. Corporal Thompson shot only once, which suggests that he was not trying to excessively injure the deceased, but merely, as he claims, prevent him from harming him (Thompson) or anyone else. Accordingly, this gives credence to Thompson's evidence that he was acting in self-defence as opposed to maliciously.

95. For the reasons above, Corporal Thompson's belief that he was in imminent danger was both honestly and reasonably held at the time he shot the deceased. Taken all those circumstances into consideration I am satisfied that the Defendant has discharged his burden of self defence to the required civil standard.

96. It follows that the shooting was not negligent.

Whether the shooting was arbitrary, oppressive and /or unconstitutional

97. The Plaintiff pleaded that the shooting of the deceased was arbitrary, oppressive and/or unconstitutional and therefore claims exemplary damages for same.

98. Counsel for the Second and Third Defendants argued that the Plaintiff failed to establish fundamental Constitutional rights. Alternatively, she argued on their behalf that Constitutional relief should be the last resort and the Court is reluctant to allow such claims when adequate alternative remedies exist.

99. However, the Plaintiff's argument on this point hinges on the assertion of negligence, which I have dismissed. As I have concluded that the shooting was not negligent, the Plaintiff's assertion that it is unconstitutional falls away. A finding that the Defendant was not negligent and an assertion of unconstitutional conduct are mutually exclusive.

Conclusion

100. The lawful killing verdict of the Coroner's Inquest cannot be used as evidence in this matter. The Second and Third Defendants, however, have successfully proven that the First Defendant was acting in self-defence

when he shot the deceased. Accordingly, the Plaintiff's claim in negligence is negated.

101. Having found that the shooting was not negligent on the part of the First Defendant, the Plaintiff's assertion that it was unconstitutional inextricably falls away.

102. Costs are awarded to the Defendants to be taxed if not agreed.

DONNA NEWTON

Justice