

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

2015/CLE/gen/00245

BETWEEN:

CLAUDIA EDWARDS BETHEL

Plaintiff

AND

THE ATTORNEY GENERAL OF THE BAHAMAS

First Defendant

MINISTER OF IMMIGRATION

Second Defendant

DIRECTOR OF IMMIGRATION

Third Defendant

COMMISSIONER OF POLICE

Fourth Defendant

IMMIGRATION OFFICER NORMAN BASTIAN

Fifth Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Mr. Frederick Smith KC with him Mr. Crispin Hall and Ms. Kandice Maycock of Callenders & Co. for the Plaintiff
Mrs. Kayla Green-Smith with Ms. Ashley Sturup and Mr. Rashied Edgecombe of the Attorney General's Chambers for the First through Fourth Defendants
Mr. Wayne Munroe KC and Mr. Alexander Morley (Initially) and later on, Mr. Donovan Gibson of Munroe & Associates for the Fifth Defendant

Hearing Dates: 27 May 2019, 28 May 2019, 29 May 2019, 30 May 2019, 17 June 2019, 18 June 2019, 19 June 2019, 16 July 2019, 17 July 2019, 18

July 2019, 23 June 2020, 24 June 2020, 25 June 2020, 27 November 2020, 22 February 2021, 29 April 2021, 4 May 2021, 17 August 2021, 7 December 2021, 15 January 2022, 4 March 2022

Unlawful arrest – Unlawful imprisonment – Assault and battery – Breach of constitutional rights – Whether the action survives the death of the Plaintiff – Whether the Plaintiff has to be substituted due to her death before the end of trial and findings of fact – Survival of Action Act, Ch. 79 – Exemplary damages

The Plaintiff, a Jamaican national and holder of a spousal permit, was detained by police at a police station and subsequently at the Carmichael Road Detention Centre on the basis that she was not here legally.

The Plaintiff commenced this action against the Defendants, asserting that her detention by police and immigration officers was unlawful, as they had no valid basis to detain her. She also asserted unlawful imprisonment as against the Fifth Defendant who kept her in his car and subsequently held her at his house. The Plaintiff further contended breach of her Article 15, 17 and 19 rights of the Constitution. The Plaintiff also averred assault and battery, which she particularized as the Fifth Defendant raping her and forcing himself upon her sexually otherwise.

The Plaintiff claims damages, aggravated damages, exemplary damages for false and imprisonment and breach of constitutional rights as against each Defendant and also for assault and battery as against the First, Second, Third and Fifth Defendants.

The Defendants denied liability for all of the causes of action by the Plaintiff. With respect to the averments of constitutional breaches, the First through Fourth Defendants allege that it is an abuse of process and in violation of the Article 28(2) proviso because the Plaintiff has alternative means of redress. With respect to the alleged unlawful imprisonment by the First through Fourth Defendants, they contended that the imprisonment was for the purposes of determining whether an immigration or other offence had been committed pursuant to section 9 of the Immigration Act. The Fifth Defendant denied unlawfully imprisoning and raping the Plaintiff and put her to strict proof thereof.

Before the end of the trial, the Plaintiff tragically died. As such, a preliminary issue arose: the survivability of the action given her death.

HELD: Finding that the action still survives notwithstanding the death of the Plaintiff. However, her estate shall not be entitled to recover exemplary damages: section 2(2)(a) and (b) of the Survival of Action Act, Ch. 79. Finding also that (i) the Plaintiff's arrest was lawful but her imprisonment by the First through Fourth Defendants was unlawful; she is entitled to damages for 48.55 hours and (ii) there was no breach of her Article 17 right. Finding further that the Plaintiff was unlawfully imprisoned, assaulted and battered by the Fifth Defendant and, as a result, she is entitled to damages against him personally since the First through Fourth Defendants are not vicariously liable for his actions.

1. The mischief that gave rise to Order 31 Rule 6 is causes of action being lost as a result of the death of a party. Although the Plaintiff had already given her evidence at the time of her death, the section is clear that the death of a party only ceases to affect the ability to give judgment where findings of fact have been made.

2. Section 2(2)(a) of the Survival of Action Act saves the Plaintiff's cause of action. However, her estate shall not be entitled to exemplary damages.
3. The First through Fourth Defendants' suggestion that detaining the Plaintiff was the only way to secure her presence is an attractive argument but it does not follow from a failure to utilize the section 8 power to summon and investigate that the standard required of section 9 has not been met. A more reasonable approach could have been utilized, especially having regard to the facts that the Plaintiff claimed to have a spousal permit (even if she did not have it on her) and the Jamaican Consul, a man of high repute, agreed to see to it that the Plaintiff appeared on Monday morning at the Immigration Department and that it was an arrangement that was allowed sometimes. However, I think this is mitigated by the fact that the police report of her stolen spousal permit had not yet reached her file since it was not ready.
4. The Plaintiff's arrest was lawful. It was clear from the circumstances that she was being arrested for "immigration purposes" as she was asked to produce proof of status before being arrested.
5. It is well-established that an arrest is unlawful if the person being arrested is not told of the reason for the arrest upon being arrested or as soon as practicable. It is clear from the Plaintiff's evidence that once they arrived at the police station, she was aware that she was being detained in relation to her immigration status. She told the officers that she had a spousal permit upon being arrested and while she was being detained which cogently suggests that she knew of the reason for her arrest: **Kevin Collie v AG** 2017/CLE/gen/00916 and **Christie v Leachinsky** [1947] AC 573 applied.
6. The Plaintiff's profile document created at the police station stated that she had a copy of a valid spousal permit until February 2015. This is strong evidence that she ought not to be detained and, at the very least, be released to the Jamaican Consul rather than being sent to the Detention Centre pending verification. As such, her detention was unlawful from 3:00 p.m. on Saturday, 13 December 2014 to 3:55 p.m. on Monday, 15 December 2014 (the time of her release from the Detention Centre) into the custody of the Fifth Defendant pending verification of her correct address.
7. Much was made of the fact that the Plaintiff's marriage may have been a 'sham' marriage in an effort to show that she was not lawfully in The Bahamas and therefore she could be detained. This was not proven by the First through Fourth Defendants. The suspicion as to the genuineness of her marriage was not a plausible reason for detaining her because the spousal permit was conclusive. In determining whether the Plaintiff was lawfully imprisoned is a question of whether she had the correct documentation to be in The Bahamas and what was apparent at that time to justify detaining her. The genuineness of the relationship was not in issue at that time. The main question is whether she had a copy of the permit when she was arrested. What were the facts as they appeared at the time of arrest is what is relevant. There is no evidence that the marriage was suspected to be fraudulent at that time. The Immigration Department was not prevented from investigating the genuineness of her marriage and/or putting the suspicion to her upon her application for renewal of the spousal permit. However, it could not be used as a reason to detain her.
8. It is true that the Plaintiff was detained for over 48 hours, albeit not for a substantial amount of time thereafter. She was arrested on Saturday 13 December 2014 at 1.30 a.m. and was released from the Detention Centre on Monday 15 December 2014 at 3:55 p.m. when she

should have released at 1:30 a.m. on Monday 15 December 2014 latest or, as this Court found, from 3:30 p.m. on Saturday 13 December 2014 when her spousal permit was presented to the police.

9. It is well-established that the tort of false imprisonment can be committed without the use of physical force; the use of authority is enough. What is relevant is what the Plaintiff understood.
10. The tort of assault and battery comprise of the act of making contact with the plaintiff. It must be a direct and intentional act. The plaintiff must not have consented to the act: **Wilson v Pringle** [1986] EWCA Civ 6 (26 March 1986) applied; Halsbury's Laws of England 3rd Ed Vol 10 considered.
11. It is well-established that an employer is only vicariously liable for his servant's tort if the tort was committed during the course of his employment. A tort comes within the course of a servant's employment if: (i) it is expressly or impliedly authorized by his master, (ii) it is an authorized manner of doing authorized by his master, or (iii) it is necessarily incidental to something which the servant is employed to do. Whether a servant's actions are within the course of his employment is a question of fact: **United Africa Co Ltd v Owoade** [1957] 3 All ER 216 applied.
12. A tort is now deemed to be in the course of employment if it is so closely connected with the employment that it would be fair and just to hold the employer vicariously liable. In the circumstance, the Court has to consider two matters namely:
 1. What are the functions or "field of activities" entrusted by the employer to the employee, or, in everyday language, what was the nature of his job? and
 2. Is there a sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice?: **Mohamud v WM Morrison Supermarket** [2016] AC 677; **Cox v Ministry of Justice** [2016] UKSC 10 and **Armes v Nottinghamshire CC** [2017] UKSC considered.
13. Each case will turn on its own peculiar facts and circumstances. In the present case, the Fifth Defendant was on a frolic of his own when, he deceived the Acting Director of Immigration that he was taking the Plaintiff to verify her correct address and he was accompanied by a female, knowing full well that the female was his friend and not an employee. His unauthorized acts of sexually assaulting and battering the Plaintiff was not within the course of his employment and/or sufficiently close to make it right and just for the employer to be held liable under the principle of natural justice: **Mohamud, Clinton Bernard v Attorney General of Jamaica** [2004] UKPC 47, **Lister v Hesley Hall Ltd** [2002] 1 AC 215 and **Attorney General for the British Virgin Islands v Craig Hartwell** [2004] UKPC 12 relied upon.

JUDGMENT

Charles Snr. J:

Introduction

[1] This case has a long and checkered history. It commenced on 27 May 2019 and came to an end nearly three years later. A few unfortunate events marred the slow progress of this matter. First, Mr. Fred Smith KC, lead Counsel for the Plaintiff (“Mrs. Bethel”) suffered a near fatal crash while paragliding in the Italian Alps which led to his hospitalization and rehabilitation for nearly a year. Second, the Covid-19 pandemic temporarily shut down the world although the trial resumed virtually on 23 June 2020 (in the midst of the pandemic) after Mr. Smith’s semi-recovery. Last but not least, Mrs. Bethel tragically died of Covid-19 at the Princess Margaret Hospital on 25 May 2021, a mere few days after giving birth. The Court once again extends its condolences to Mrs. Bethel’s family.

[2] By Specially Indorsed Writ of Summons filed on 26 February 2015, Mrs. Bethel claimed (i) as against the Attorney General (“the First Defendant”), Minister of Immigration (“the Second Defendant”) and Director of Immigration (“the Third Defendant”), damages, aggravated damages and exemplary damages for battery, assault, false imprisonment and breach of her constitutional rights; (ii) as against the Commissioner of Police (“the Fourth Defendant”), damages, aggravated damages and exemplary damages for false imprisonment and breach of her constitutional rights; and (iii) as against the Fifth Defendant, Norman Bastian, a senior Immigration Officer (“Mr. Bastian”) damages, aggravated damages and exemplary damages for battery, assault, false imprisonment and breach of her constitutional rights. She also claimed interest and costs. For ease, I shall refer to the First through Fourth Defendants as “the Government” and the First through Third Defendants as “the Immigration Authorities.”

[3] Mrs. Bethel alleged that the Immigration Authorities are vicariously liable for the assault and battery which was committed upon her by Mr. Bastian because he was acting in the course of his employment. She particularized the batteries and assaults in paragraph 41 and paragraph 44 of her Statement of Claim. She next

alleged that she was falsely imprisoned by unknown police officers and unknown immigration officers over the course of 13 to 15 December 2014 and, as a result, the Government is vicariously liable for each false imprisonment committed against her. Mrs. Bethel also alleged that on 15 and 16 December 2014, she was falsely imprisoned by Mr. Bastian. She particularized the allegations of false imprisonment in paragraphs 50 to 52 of her Statement of Claim indorsed in her Writ of Summons.

[4] Mrs. Bethel also alleged breaches of her constitutional rights under Articles 15(a), 17(1) and 19(1) of the Constitution of The Bahamas (“the Constitution”). She alleged that her constitutional right not to be arbitrarily arrested and detained was breached. She next alleged that as the conditions of detention were poor and her constitutional right under Article 17 not to be subjected to inhuman and degrading treatment was breached. She also asserted that her Article 15 and 19 rights were breached. These alleged breaches against the Government are particularized in paragraphs 53 to 54 of the Statement of Claim. Mrs. Bethel alleged that the Government is vicariously liable for each constitutional right violation committed against her.

[5] The Government denied that Mrs. Bethel’s imprisonment was unlawful, as she, along with the other females who were arrested, were suspected of being in breach of immigration laws and that Mrs. Bethel did not have in her possession the spousal permit which she alleged, gave her legal status. They denied that her constitutional rights were breached. They also denied that she was treated in a cruel and inhumane manner in police or immigration custody. They asserted that they are not vicariously liable for any claim of assault and battery as Mr. Bastian was not acting in the course of his employment but was on a frolic of his own.

[6] With respect to Mr. Bastian, Mrs. Bethel claimed unlawful imprisonment for keeping her in his vehicle and his private residence. She also claimed damages for being sexually assaulted and battered. Mr. Bastian denied assaulting and/or battering Mrs. Bethel. He contended that she willingly went with him to his home and she willingly consented to sex.

Background facts

- [7] The facts as I found them are as follows: Mrs. Bethel is a Jamaican national, married to a Bahamian since 2010. Since then, she has been residing in The Bahamas until her untimely passing. At all material times, she was in possession of a spousal permit permitting her to remain in The Bahamas. The original of her spousal permit had been lost prior to 12 December 2014. She reported its loss to the Grove Police Station. On the night of 12/13 December 2014, Mrs. Bethel had a copy of her spousal permit which was issued by the Immigration Department.
- [8] Mrs. Bethel was employed at Twilight Bar located on Robinson Road (“the bar”) as a bartender. Sometime around 1:00 a.m. on 13 December 2014, police officers raided the bar. She showed the police a copy of her spousal permit giving her legal permission to remain in The Bahamas. The police insisted that she board a police bus which was outside. She along with several other foreign females were transported to the Central Police Station then to the Central Detective Unit (“the CDU”). The arresting officer was Superintendent Adrian Curry. He told her the reason for her arrest being “Immigration purposes” which was also on the Detention Record.
- [9] On Saturday, 13 December 2014 at about 3:00 p.m., Inspector Altida Bowles interviewed Mrs. Bethel at the CDU. Inspector Bowles’ duties include investigating all trafficking and missing persons’ reports as well as screening individuals who may be potential victims of trafficking of persons. She did not consider Mrs. Bethel to be a potential victim of a person that had been trafficked. Inspector Bowles noted that Mrs. Bethel is the spouse of a Bahamian and she saw a copy of her spousal permit. Inspector Bowles informed Superintendent Shanta Knowles that Mrs. Bethel had a copy of her spousal permit. Sometime after 3:00 p.m., both Inspector Bowles and Superintendent Knowles were aware that Mrs. Bethel had a copy of her spousal permit.
- [10] That same day, the police at the CDU called Mr. Patrick Hanlan, the Jamaican Honorary Consul, to the CDU because they had detained about 10 Jamaican

nationals. Mr. Hanlan spoke to each detainee including Mrs. Bethel separately. Mrs. Bethel was distraught and uncomfortable. The police did not charge her with any offence but turned her over to the Immigration Authorities. Mr. Hanlan tried to assist to secure her release but Mr. Bastian said that he was instructed to detain all of them. Mrs. Bethel and the other detainees were taken to the Carmichael Road Detention Centre (“the Detention Centre”).

- [11] By around 8:00 to 9:00 p.m. on Saturday, 13 December 2014, the Director of Immigration had been made aware that Mr. Bastian had seen a copy of Mrs. Bethel’s spousal permit.
- [12] Mrs. Bethel was committed to the Detention Centre pending verification of her spousal permit.
- [13] At about 10:00 a.m. on Sunday, 14 December 2014, Mr. Bastian asked Ms. Thea Moss, a Grade II Immigration Officer, to report to the Detention Centre because there was a need for a female officer to be present during the interviews of the female detainees. Ms. Moss interviewed Mrs. Bethel. The details of the interview recounted by Ms. Moss were generally consistent with the evidence of Mrs. Bethel.
- [14] After the interview, Mr. Bastian called Assistant Director of Immigration, Mr. Dwight Beneby requesting to follow up on Mrs. Bethel to check out the information given to him during the interview as to her address. Mr. Bastian told Mr. Beneby that a female will be accompanying him. He deceived Mr. Beneby by not informing him that the female was a friend and not an employee. Mr. Beneby “*gave permission to SIO Bastian to conduct his inquiries within lawful parameters*” and gave permission for Mrs. Bethel to be released into his custody for this purpose. Around 3:55 p.m., Mrs. Bethel was “*signed out with Senior Immigration Officer Norman Bastian as instructed by Assistant Director Mr. Beneby.*”
- [15] On Monday, 15 December 2014, at about 3:55 p.m. Mrs. Bethel was released into Mr. Bastian’s custody with a view to verify her correct address. She was collected by Mr. Bastian in his vehicle with the female, Marsha Curry, seated in the front seat

of that vehicle. Marsha Curry is a friend of Mr. Bastian. Mr. Bastian took Mrs. Bethel to his residence. However, before doing so, he made a number of stops including (i) taking Mrs. Bethel to her home at Moss Road, Oakes Field, (ii) stopping at KFC to buy meals before dropping Marsha off to her vehicle; (iii) stopping at his office at the Immigration Department at Hawkins Hill; (iv) going to "On the Run" Gas Station on Bay Street to purchase gas and a bottle of wine; (v) going to Starbucks on Harbour Bay for Mrs. Bethel to use the bathroom; (vi) stopping at a location which might have been the house of Mr. Bastian's niece; (vii) stopping at a Chinese Liquor Store on Wulff Road where he bought two more bottles of wine and finally (viii) to his home.

[16] At Mr. Bastian's home, Mrs. Bethel ate some stew fish because she was hungry. She had a bath and Mr. Bastian had sexual intercourse with her. She insisted that Mr. Bastian raped her while Mr. Bastian claimed that they had consensual sex. She remained at his home overnight and, according to her, she was raped again the following morning: 16 December 2014.

[17] Later that afternoon, Mr. Bastian took Mrs. Bethel to Grove Police Station (at her request). She tricked him to go to the station under the pretext that she was going to look into her lost original spousal permit but, as she stated, "*her plan was to allow them (police) to see them (Bastian/herself) together and to explain what happened and have them (the police) take her home instead.*" The plan did not materialize as the Officer she had previously spoken to with reference to the loss of her spousal permit had stepped out. Mr. Bastian eventually took Mrs. Bethel to her house at around 2.30 p.m. on 16 December 2014.

[18] She immediately went inside her apartment, put the condom which she has taken from Mr. Bastian's house in the refrigerator and called her friend Dominic Major who accompanied her to the police station where she made a report to the police that Mr. Bastian raped her.

[19] Mr. Bastian stood trial for the rape of Mrs. Bethel but was acquitted by the Magistrate.

[20] Mrs. Bethel died on 25 May 2021 before the trial was concluded.

The evidence

[21] Mrs. Bethel testified on her own behalf and called her husband Mario Bethel as a witness. She also subpoenaed Mr. Patrick Hanlan who is the Honorary Consul of Jamaica to give evidence on her behalf. Her evidence conflicts materially with the evidence of Mr. Bastian and, as credibility is at the heart of this case, it is important that I set out in some detail the evidence adduced in this trial.

Claudia Bethel

[22] Mrs. Bethel filed a Witness Statement on 29 June 2018. It stood as her evidence in chief.

[23] She stated that she married Mario Bethel, a Bahamian citizen, on 15 February 2010 and since then, she has been permanently residing in The Bahamas on a spousal permit which expires 15 February 2020. Mrs. Bethel said that she came to The Bahamas in 2010. She met her husband at Charms, a club in Nassau while she was working there as a bartender and not a stripper, as suggested by opposing Counsel. Also in 2010, her husband was unfaithful and left the home. She then began living with a friend, Dominic Major. She interchangeably said that Mr. Major lived and visited the apartment. She admitted that she has a child with Mr. Major and the child's last name is Bethel. Her husband signed for the child. In her first statement to the police, she admitted that she incorrectly told them that she lived with her husband. She explained that she did so because she was scared that they would do something to her and her children. She said that she did not tell the Immigration Authorities that she was no longer living with her husband. She said that she never told anyone that she met her husband in Atlanta. She did not remember what she told them at her interview.

- [24] Mrs. Bethel said that she did not pay her husband to marry her. She denied the Government's suggestion that Twilight Bar was a strip club. She said it was a regular bar.
- [25] On the night of the incident, Mrs. Bethel said that when the police directed Jamaicans to board the bus, she explained that she has legal status in The Bahamas because she is married to a Bahamian. Despite showing the officer a copy of her spousal permit, he/she insisted that she board the bus. Mrs. Bethel resisted the Government's suggestion that she did not have the copy of her spousal permit when she was arrested. She said she could not remember whether the copy had the immigration stamp on it. She and eleven other females were taken to Central Police Station. They were detained overnight. She overheard the police officers speaking about charging them with prostitution. Under cross-examination Mrs. Bethel insisted that the police officers asked her whether she was forced to do any sexual acts. She later became aware that the police were no longer going to charge them with prostitution. She did not recall telling the police that her address was Sunshine Park when she was arrested.
- [26] The following day they were transported to the CDU. While there, she explained to the Jamaican Honorary Consul, Mr. Hanlan that the Department of Immigration had provided her with a copy of her spousal permit once she reported it stolen.
- [27] Also while at the CDU, an Immigration Officer, whom she later found out to be Mr. Bastian, told her "*You not supposed to be there and I will personally come and get you on Sunday.*" They were then transported to the Detention Centre.
- [28] Mrs. Bethel stated that the conditions at the Detention Centre were poor. There were hundreds of women and children sleeping on the floor and she had to step over them to move about. She eventually found a spot on the floor to rest. This was where she slept for the duration of her stay there.
- [29] One of the other detainees gave her a piece of soap which she used to bathe herself. She used her underwear to tidy herself.

- [30] According to her, some of the women who were menstruating, bled on the floors until they were given the necessary sanitary products by the immigration officers. The bathrooms were filthy and appeared as if they had never been cleaned. She said she had to urinate outside. Inside the shower was muddy. She laid on the floor with the others but she could not sleep. One of the detainees had a baby who cried throughout the night.
- [31] She said that Mr. Major brought her KFC but one of the other detainees took it away. He also brought her pajama clothing. She said that she told a police officer and her lawyer about the bad conditions at the Detention Centre but she did not tell the magistrate about it in the criminal trial because they were mostly asking about what happened with respect to Mr. Bastian.
- [32] Mrs. Bethel denied being told by immigration officers that the department was closed at that time and that they would check on her status when they opened on Monday or that, if her status showed that the copy of the permit was in their system, she would be released.
- [33] She testified that, on Monday 15 December 2014, sometime around 4:00 p.m., Mr. Bastian came into the dorm and reminded her that he told her he was coming to get her.
- [34] Mrs. Bethel said that she telephoned her husband and told him to collect her but Mr. Bastian took the phone and told her husband to meet him at the Immigration Department in 20 to 45 minutes.
- [35] Under further examination in chief, Mrs. Bethel said that she told her husband to take the kids and get away from the house because immigration was coming to inspect the house. She said that this was out of fear. She denied Mr. Munroe KC's suggestion that Mr. Bastian told her that he was checking her house to see if she was actually married, which is why she called Mr. Major to help her to not make it obvious that she no longer lived with her husband. She said she called him because she had to get her children away from there.

- [36] Mrs. Bethel said that Mr. Bastian told her that he had to take her to the Immigration Department to investigate her case further after checking her house. She left with him in his vehicle. She sat in the back seat and a woman whom Mr. Bastian referred to as "Marsha" sat in the front seat. Under cross-examination, Mrs. Bethel agreed that Marsha spoke to her about a possible housekeeper job with one of her relatives. She denied that Mr. Bastian suggested that she was prostituting at Twilight. She agreed that Mr. Bastian asked her how much she earned and how much she paid in rent but she did not agree that Mr. Bastian put to her that she could not be paying all of those expenses with her earnings. She denied that she told Mr. Bastian that she was afraid to go home or that she asked him to buy wine. She also denied drinking the wine he bought.
- [37] According to her, Mr. Bastian made a number of stops before taking her to her apartment. Once they arrived at her apartment, he checked the living room, kitchen and bedroom. He then informed her that they had to go to the Immigration Department. She got back into his vehicle believing that they were going to the Immigration Department where her husband would be waiting.
- [38] On the way, Mr. Bastian made other stops, including one to drop off Marsha to her vehicle. By the time they arrived at the Immigration Department, it was between 6 and 7 p.m. The offices were closed. She did not see her husband. Mr. Bastian then interviewed her.
- [39] Once they left the Immigration Department, Mrs. Bethel said that she kept asking Mr. Bastian when she would be allowed to go home to her children and he kept telling her "*not yet*". He asked her if she knew the names of some very bad men, one of whom was known as "Death". She told him that she had heard of them and he told her that Death is his nephew. According to her, Mr. Bastian also told her that he has a licensed firearm. Mrs. Bethel said that she was afraid so she followed all of his commands, even while protesting.

- [40] Mr. Bastian made several other stops including at liquor stores where he purchased alcohol which he offered Mrs. Bethel. She said that she declined. She explained that she never told anyone that she was being held at any of the stops because she was scared and they were Mr. Bastian's friends. She remembered stopping at an upholstery business but denied eating food from there.
- [41] They arrived at a house in Nassau Village area, which she believed to be Mr. Bastian's house.
- [42] Mrs. Bethel said that she told Mr. Bastian that she needed to go home to rest. He told her if she wanted to bathe she could go upstairs to take a shower because he has to watch TV. She took a shower and put on the same clothes she was wearing. Upon exiting the bathroom, Mr. Bastian was standing just outside of the bathroom and made sexual advances. She said that he pushed her into a bedroom and forced her to have sex with him. She did not consent to having sex with him. She fought him but he was too strong. She was afraid of him. She observed cameras around the room and she suspected that he was recording her so she tried even harder to fight him off. She said that weeks before her arrest she had an ectopic pregnancy and a surgery thereafter. She was still spotting and was in no condition to have sex. She denied initiating sexual advances.
- [43] She asserted that, after Mr. Bastian had sexually assaulted her, he told her to bathe. She locked herself into the bathroom, started to cry and pray. He told her to come out of the bathroom. She thought that he was going to take her home so she complied. He then told her that she was spending the night. She told him that she was not interested in having sex with him and that she just needed to go home to her children. Under cross-examination she said that she fell asleep in the same bed that he raped her on.
- [44] Mrs. Bethel stated that the next morning Mr. Bastian woke her up and again forced her to have sex with him. This time, he forced her to perform oral sex on him.

- [45] Someone came to see Mr. Bastian. While he left to answer the door, she decided that she wanted evidence that he raped her, so she picked up the condom, tied a knot at the end of it and pushed it in her bosom. She recorded the numbers from the cameras that were recording. Mr. Bastian again forced her to have sex. Once again, she was unsuccessful in fighting him off.
- [46] She stated that Mr. Bastian has a very intimidating tone and she was fearful of him. She suspected that he would deny that he raped her so she wanted someone else to see her in his company. So, on the morning after, she asked him to take her to the Grove Police Station where she had reported her lost spousal permit. He took her to the station. She said that her plan was for the police to see them together, she would explain what happened and for them to take her home instead. At the police station, she tried to get the female police officer, who identified herself as Miss Butler and had a badge number of 3053, to take her upstairs so she could speak with her privately but she did not allow her to. She testified that she was afraid of reporting it in Mr. Bastian's presence.
- [47] Mr. Bastian finally took her home. She immediately went inside her apartment and put the condom in the refrigerator and called her friend, Dominic Major who accompanied her to the police station. She reported what happened to the police. The police took a report. She gave them the condom and the note with the numbers from the camera. The police then took her to the hospital where she was swabbed. She gave them the clothes that she was wearing.
- [48] Later that morning, she returned to the Grove Police Station and saw Officer Butler, who said to her that she noticed that something was not quite right. She later went to her attorney and then to the Crisis Centre where she received counselling. She stated that she is still receiving counselling through the Crisis Centre. She has since moved out of her house since Mr. Bastian knows where she lived. She lived at the Crisis Centre. Under cross-examination, she could not remember the last time that she had a counselling appointment but she communicates with Ms.

Nicholls regularly on the phone. She said that she has also spoken to another psychiatrist there.

[49] Mrs. Bethel stated that, on the evening of 20 November 2015, she went back to the bar to collect money from her former boss who had money owing to her. While there, one man from a group of men asked her a lot of questions, including her name. Later, Mr. Bastian walked in and walked over to the group of men. She said that she was shocked and ran to the bathroom. She told a woman who was there, that the immigration man who she was in court with for a rape case, was in the bar. They exchanged outfits so that she could exit the bar.

[50] Mrs. Bethel said that, after she made the complaint about Mr. Bastian, she got a renewal of her spousal permit. Her husband went with her to the interview. She could not remember whether they said that they lived together or not.

Patrick Augustus Hanlan

[51] Mrs. Bethel subpoenaed Mr. Hanlan to testify. He has been living in The Bahamas for 56 years. He is the Honorary Consul of Jamaica since August 1986. In that capacity, he assists Jamaican citizens living in here.

[52] Mr. Hanlan testified that, on 14 December 2014, he received a call from the CDU advising him that they were holding 10 Jamaican nationals. He was invited to go to the CDU. While there, he spoke to the women separately. Mrs. Bethel seemed distraught and uncomfortable. She explained to him that she was married and had a spousal permit. He said that he relayed this information to Mr. Bastian and to Inspector Knowles at the CDU. He said that, based on his conversation with Inspector Knowles, they were not proposing to charge Mrs. Bethel with anything, which was why they were turning the matter over to Immigration.

[53] Mr. Hanlan said that he asked Mr. Bastian if Mrs. Bethel could be released. He said that she could not because he was instructed to detain all of them. He said that when he sensed the hesitation by Mr. Bastian to release her. Mr. Hanlan suggested that she be released into his custody and he would ensure that she

presents herself to the Immigration office on Monday. He said that such arrangement/accommodation had been made in the past with other Jamaican nationals since he is very respected and trusted by government agencies in The Bahamas. Under cross-examination, he admitted that he did not know where she lived but was willing to ensure her appearance.

[54] Mr. Hanlan further stated that he called the Detention Centre on Monday and was advised that Mrs. Bethel was still there. He then called Mr. Bastian who assured him that he would arrange her release.

[55] Under cross-examination by Mrs. Green-Smith, who appeared as Counsel for the Government, Mr. Hanlan stated that Mrs. Bethel did not make any complaints to him regarding the Detention Centre.

[56] All in all, I found Mr. Hanlan to be a respectable gentleman and I had no reasons to believe that he would mislead the Court. I found him to be frank and candid and I accept his evidence.

Mario Bethel

[57] Mr. Bethel filed a Witness Statement on 29 June 2018, which stood as his evidence in chief at trial. He is married to Mrs. Bethel but they do not live together. He said that he believed that he told the Immigration Department about Atlanta where he lived for 34 years. He met Mrs. Bethel at Charms where she was a waitress.

[58] Mr. Bethel testified that, sometime during the night of Friday 12 December 2014, he received a call from the Jamaican Consulate that his wife was in custody at the Central Police Station. He went to the station. He spoke to two police officers and told them that he is there to get his wife. The female police officer said "*She's a Jamaican and she should be sent back home.*" He was then told that Mrs. Bethel was taken to the Detention Centre and that nothing will happen until Monday.

[59] On Saturday, 13 December 2013, he called Mr. Hanlan who gave him Mr. Bastian's number. He said that when he called Mr. Bastian, he was very upset that

he had his phone number. He also stated that Mr. Bastian told him to call again on Monday as Mrs. Bethel would not be released before then.

[60] On Monday, 15 December 2014, he went to the Immigration Department and asked for Mr. Bastian. He was not there so he telephoned him. Mr. Bastian told him that he would meet him in 20 minutes. Mr. Bethel said that shortly after, he received a call from his wife who explained that she was being released and that he should come for her. Mr. Bastian came on the phone and said that he should come to the Immigration Department in 20-45 minutes.

[61] Mr. Bethel said that he promptly drove to the Immigration Department within 20 minutes and waited for over 2 hours. Mr. Bastian never showed up. He made many calls on his cell phone and there was no answer. Mr. Bethel stated that after waiting for Mr. Bastian, he left because the Immigration Department had closed and most, if not all, of the staff had left. The security guard was the only person that he recalled seeing before he left.

[62] On Monday evening, Mr. Bethel stated that he called his wife's phone but there was no answer. He also called Mr. Bastian's number and he did not answer. Later that evening, he received a call from Dominic Major enquiring whether he heard from his wife. He did not hear from his wife until days later when she told him that Mr. Bastian raped her.

[63] Under cross-examination, Mr. Bethel said that he met Mrs. Bethel in 2009, about a year before they were married. It was suggested to him that Mrs. Bethel did not arrive in The Bahamas until 2010.

[64] Mr. Bethel said that he and Mrs. Bethel lived together after they were married for about 1½ to 2 years. He assisted her in getting her spousal permit. When they first applied and had the interview, they were still living together. He did not recall any further interviews for the spousal permit. He admitted that he assisted her in obtaining a renewal of the spousal permit notwithstanding that they were no longer

living together. Mr. Bethel denied the suggestions that the marriage was one of convenience.

[65] Mr. Bethel asserted that, even though they stopped living together, they remained good friends and talk regularly. He said that he knows Mr. Major and they have a respectful relationship.

[66] He said that he made an effort to see her at the police station, but he was not allowed. He then went to the Detention Centre and they told him that she was not there. Under cross-examination, he admitted that he did not take her documentation with him to the police station.

[67] Mr. Bethel stated that Mrs. Bethel did not inform him that she lost her spousal permit.

Evidence adduced by Mr. Bastian and his witnesses
Norman Bastian

[68] Mr. Bastian's evidence in chief is contained in his Witness Statement filed on 25 June 2018. He is now a Chief Immigration Officer and is in charge of Investigations, Fraud and Special Investigations.

[69] On Saturday 13 December 2014, he was invited by Assistant Superintendent of Police Shanta Knowles to check the status of some Jamaican females who were arrested at a nightclub. He said that the police advised that they were suspected of prostitution. Mrs. Bethel, who was one of the Jamaican nationals, did not have her spousal permit. He stated that the women had to be detained until their statuses could be verified. Mr. Bastian said that Mrs. Bethel told him that she had a resident spousal permit which was lost. He said that he saw a copy of it at the CDU which was in their possession. The police showed the copy to him. But, he testified that the copy could have come from anywhere, as it was not department issued.

- [70] On Sunday 14 December 2014, he visited the Detention Centre with Ms. Thea Moss. He interviewed Mrs. Bethel along with the other Jamaican women. The reason for their continued detention was verification of documents/status. He stated that the authenticity of the copy could not be verified because the systems are closed at that time so they could not check anyone's status.
- [71] On Monday 15 December 2014, he visited the Detention Centre with Ms. Marsha Curry. Mrs. Bethel was advised that she was released but an inspection of her apartment was required and that he had to conduct an interview at the office. He stated that Mrs. Bethel called her husband and he (Mr. Bastian) spoke to him and told him to meet them at the Immigration Department.
- [72] Under cross-examination by Mr. Smith KC who appeared as Counsel for Mrs. Bethel, Mr. Bastian said that if she had objected to go with him then there was nothing he could do. He said that, in the presence of two (2) other officers, he told her that she was free to go. However, later on in cross-examination, he said that he did not tell her she was free to go.
- [73] Mr. Bastian asserted that, while leaving the Detention Centre, his truck started to lose power so he went to the mechanic to have it repaired to drive uptown. They then went to Mrs. Bethel's apartment and a quick inspection was done. Afterwards, they went to KFC and Ms. Curry was taken to Montrose Avenue.
- [74] After that, they went to the office where Mrs. Bethel was interviewed. He said that he did not caution her because there were no charges being brought against her. She maintained that she was a waitress at Twilight Bar and that the other women were dancers and prostitutes. Mr. Bastian stated that Mrs. Bethel told him that she also has customers but she does not take them home. According to him, she also told him that she was a dancer at Charms when she met her husband. She said that her husband was a customer and they got married so that she could obtain status in The Bahamas. She said that she lived with her boyfriend, Dominic Major, and they have a child together but she registered the child in her husband's name.

She also brought her older children from Jamaica. Mr. Bastian stated that Mrs. Bethel said that she lost her spousal permit on the beach, but initially, at the CDU, she claimed that it was lost on a jitney and that she filed a police report. She said that someone gave her a copy of the permit.

[75] Mr. Bastian stated that, after the interview, they called her husband continuously but he never showed up. He told her that he could not leave her stranded since it was late and she said that she was afraid to go home because of what she told him and the police.

[76] Mr. Bastian said that, before the interview, he and Marsha were joking about a bottle of wine so they went to a liquor store for Marsha. However, on cross-examination, he said that he did not buy the wine for Marsha.

[77] Mr. Bastian said that he told Mrs. Bethel that he had to go to Starbucks and to his niece who lives in the eastern division of the island. They drove east and during this time, they talked about Jamaica. They both went inside Starbucks and she used the restroom while he talked to a friend whom he was supposed to have met earlier. Mrs. Bethel waited in the vehicle while he went back inside to retrieve his keys which he had forgotten. Then, she requested more wine so he bought more. In that area, he had a conversations with two (2) friends.

[78] Mr. Bastian told Mrs. Bethel that he had to check on a friend who was at his house. Once they pulled up, Mrs. Bethel asked him if this is where he lives, to which he replied yes. He stated that she jumped out of the vehicle with the glass of wine and the bottle as well. She went to the wrong entrance door and his brother, Stephen, who was at his home at the time, saw her and opened the door for her.

[79] Mrs. Bethel watched wrestling and said that she was hungry so he asked Stephen to give her some stew fish that was in the refrigerator. She stated that her phone was dying so he asked Stephen to find her a charger. He said that he then asked her about her tattoo and she told him that she had another tattoo on her buttocks, which she showed him. He instructed her to pull up her pants.

- [80] Mrs. Bethel continued watching wrestling and they both fell asleep. She then woke up and asked him the time. She said it was too late to go home and asked him what time he was going to work. When he told her, she told him to take her home when he was going to work.
- [81] Mr. Bastian stated that Mrs. Bethel asked if she could have a bath. He took her to the guest bathroom upstairs as the bathroom downstairs was unavailable. He gave her towels and a toothbrush and he retired to his bedroom. As he was laying in his bed in his briefs, after her bath, she came into his room, lay on his bed and began to arouse him and requested that he have sex with her. He said that he used a condom and they had sex.
- [82] The next morning, they left the house together. He took a cushion to be repaired at Prestige Upholstery. As Mrs. Bethel waited in the vehicle, she spoke to Mr. Brown and the other workers. She ate. When they left, she requested that he take her to the police station so that she could check on a letter for her spousal permit. He drove her to the Grove Police Station where they were both identified. She asked for the officer who she dealt with on the last occasion but she was not there so they left. He took her to her apartment.
- [83] Once they arrived there, Mrs. Bethel asked him for his number to see him later but he told her that she needed to get her life together. He left.
- [84] Under cross-examination, Mr. Bastian did not accept that he had Mrs. Bethel in his sole custody. He said Marsha Curry, who is not an immigration officer but a friend, was present. He said he could not find a female immigration officer. He did not call his Supervisor, William Pratt, to ask for assistance because it was easier and more effective to get the investigation going and get Mrs. Bethel out of the Detention Centre before the 48 hours had elapsed.

Byron Brown

- [85] Mr. Brown gave evidence on behalf of Mr. Bastian. His evidence in chief is contained in his Witness Statement filed on 29 June 2018. His evidence is that he

is the proprietor of Prestige Upholstery. He was there on the morning of 16 December and he spoke to Mrs. Bethel who introduced herself. He said that she told him that she was from Ocho Rios, Jamaica and they talked about Dunns River Falls.

[86] Mr. Brown also stated that he offered her breakfast which she ate. Once the cushion was finished, she and Mr. Bastian left. She appeared well and happy. She did not appear troubled nor did she say anything about an incident that occurred.

[87] Mr. Brown stated that he knew of Mr. Bastian but it was the first time that he did any work for him.

Godfrey Brennen

[88] Mr. Brennen filed a Witness Statement on 29 June 2018 which stood as his evidence in chief at trial. He stated that he is a police officer and was present at Prestige Upholstery on 16 December 2014. He saw Mr. Bastian and greeted him. They had a conversation. He saw a female in Mr. Bastian's truck who beckoned to him. He walked to the truck but they did not speak to each other. She appeared normal but her hair was out of place.

Stephen Bastian

[89] Mr. Stephen Bastian filed a Witness Statement on 29 June 2018 which stood as his evidence in chief at trial. He is the brother of Mr. Bastian and he was in the house when Mr. Bastian and Mrs. Bethel arrived around 8:00 p.m. on 15 December 2014.

[90] He stated that Norman introduced a woman to him but he cannot remember her name. Norman told him that they were going to watch wrestling before they head out. Norman asked him if there was any food left and he said yes. Norman asked him to warm up some food for the young lady which he did. He then went upstairs to check on the house guest, Marco. He then resorted to his bedroom to go to bed.

[91] Stephen said that he woke up at around 6:00 a.m. the following morning and heard the shower running. He went downstairs because there was someone who wanted to see Norman so he called him and he came downstairs. He then left to return a vehicle that he was leasing.

Witnesses for the Government

Superintendent Adrian Curry

[92] The Government called seven witnesses to testify on its behalf. The first was Superintendent Adrian Curry. He was in charge of the raid at Twilight Bar. He said that, prior to the raid, he had no reasonable cause to suspect that any immigration offenses had been committed but once he got there, he formed a reasonable suspicion that offences against the immigration Act had in fact been committed.

[93] He stated that Mrs. Bethel was arrested for Immigration purposes, which is on the detention record.

Inspector Altida Bowles

[94] The next witness to testify was Inspector Altida Bowles who interviewed Mrs. Bethel at about 3:00 p.m. on Saturday 13 December 2014 at the CDU. She stated that Mrs. Bethel showed her a copy of her spousal permit and she informed Superintendent Knowles.

Assistant Superintendent Dornell Brown

[95] Assistant Superintendent of Police Dornell Brown was the next witness for the Government. She stated that on Tuesday 16 December 2014 at approximately 3:00 p.m., Mrs. Bethel came to the CDU and reported that Mr. Bastian had raped her. On Wednesday, 17 December 2014, she interviewed Mr. Bastian in the presence of his attorney and when he was told that he was suspected of rape, he said that they had consensual sex. On Thursday, 19 February 2015, Mr. Bastian was formally charged with rape.

Immigration Officer Thea Moss

[96] The next witness was Immigration Officer Thea Moss who was asked by Mr. Bastian to report to the Detention Centre on Sunday 14 December 2014 because there was a need for a female officer to be present during the interviews of female subjects. She interviewed Mrs. Bethel. The details of the interview recounted by Ms. Moss were generally consistent with the evidence of Mrs. Bethel. However, she said that Mrs. Bethel was unable to produce the original nor the copy of her spousal permit. She said that Mrs. Bethel said that the original had been stolen and she obtained a copy from Immigration but she did not have it in her possession.

Senior Immigration Officer Leonard Smith

[97] Senior Immigration Officer Leonard Smith also testified. His evidence is relevant to the conditions at the Detention Centre. I shall come to that issue momentarily.

Dwight Beneby

[98] Mr. Beneby filed a Witness Statement on 3 July 2018 which stood as his evidence in chief at trial. He said that at the material time, he was an Assistant Director of Immigration with responsibility of enforcement and administration at the Detention Centre. On 13 December 2014, it was reported that Mrs. Bethel was arrested by police for immigration purposes.

[99] After Mrs. Bethel was committed to the Detention Centre on 14 December 2014 pending verification of her immigration status, a check of their record revealed that she was the spouse of Mario Bethel, a Bahamian citizen.

[100] Before her release, he received a call from Mr. Bastian, who was the investigating officer of the case, requesting a follow up on Mrs. Bethel to determine the veracity of the information given during her interview at the Detention Centre. During that interview, Mrs. Bethel gave conflicting information about her address in The Bahamas. Because her permit renewal application was approaching, it was

necessary to ascertain what her correct address was. As such, Mr. Beneby said he gave Mr. Bastian permission to lawfully conduct his inquiries.

[101] It is unclear from his evidence whether Mrs. Bethel was free to go when she was released from the Detention Centre. He said that Mrs. Bethel was released to Mr. Bastian but, if she objected to go, they would have allowed her to go. However, he said he could not say whether Mrs. Bethel was told that she did not have to leave with Mr. Bastian.

[102] Mr. Beneby said that, in retrospect, a temporary custodial order ought to have been issued for her to have been removed by Mr. Bastian. He said that, because the Department of Immigration does not issue copies, it is necessary to take someone into custody who produces a copy until it could be verified.

[103] He agreed that the Detention Centre was not made to accommodate near 300 people.

Betty Bain

[104] Ms. Bain filed an Affidavit on 20 April 2021 which stood as her evidence in chief at trial. She was the office manager at the Department of Immigration and was responsible for interviewing applicants for spousal permits, which she did from 1997 to 2012.

[105] Ms. Bain stated that her evidence is derived from her interview sheet obtained from her interview with Mr. and Mrs. Bethel which was signed by Mrs. Bethel. In the interview, Mrs. Bethel said that she met her husband in Atlanta, USA.

[106] She agreed that a person is entitled to a spousal permit by virtue of being married to a Bahamian citizen pursuant to the Immigration Act and there are policies and procedures in the department.

[107] She also stated that, although she could not recall the actual interview, she viewed her handwritten notes from the interview. She said that she wrote that Mrs. Bethel's

passport had only been issued on 2 October 2009 which made it unlikely that she went to Atlanta. She said that she did not need to check to see whether she had a US Visa because of the newness of the passport.

Factual findings

[108] In civil matters, the standard of proof is premised on a balance of probabilities which is a lower standard than in criminal trials. Lord Nicholls in **In re H (Minors)** [1996] AC 563 at p. 586 explained that it is a flexible test and stated:

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established". [Emphasis added]

[109] In **Miller v Minister of Pensions** [1947] 2 All ER 372, Denning J, as he then was, said:

"If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not. Expressing that in percentage terms, if a judge concludes that it is 50% likely that the claimant's case is right, then the claimant will lose. By contrast, if the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win..." [Emphasis added]

[110] Having considered all of the evidence and observing the demeanour of the witnesses as they testified, I preferred the evidence proffered by Mrs. Bethel and her witnesses to that of Mr. Bastian and his witnesses. I find as a fact that Mr.

Bastian sexually assaulted and battered Mrs. Bethel between Monday 15 December and Tuesday, 16 December 2014.

[111] A large part of both the cases for the Government and Mr. Bastian was aimed at demonstrating inconsistencies/untruths in Mrs. Bethel's evidence with respect to information which she gave to authorities relative to her immigration status. The desired effect was to show that she was not an honest witness since this case largely turns on credibility. It is a fact that Mrs. Bethel had lied to the Immigration Authorities with respect to how she met her husband, her place of employment, her profession and her daughter being the child of her husband but, in my judgment, they were almost exclusively related to information that she gave to obtain her spousal permit.

[112] Although she lied with respect to the spousal permit, I do not believe that she lied about the sexual assault. As I stated before, I believe that Mrs. Bethel had a genuine fear of immigration authorities which was the reason for her lying to obtain her spousal permit.

[113] On the other hand, I found Mr. Bastian to be an evasive witness with respect to his behaviour. He refused to admit that, even if the sex was consensual, he acted improperly and refused to admit that he did not have a female (officer) present with him when he was taking Mrs. Bethel on his 'joy ride' although his evidence was that he was with her alone after dropping off Marsha Curry.

[114] In addition, although it appears that there may have been several opportunities when Mrs. Bethel could have run away from Mr. Bastian while they were making various stops, I believe that she did not do so because she was afraid not just of Immigration Authorities generally but of Mr. Bastian. In my judgment, Mrs. Bethel was in a very vulnerable and helpless position over a man who was endowed with a lot of power.

[115] With respect to the conditions at the Detention Centre, I prefer the evidence of Mr. Leonard Smith that every Friday afternoon, he ensured that the items such as

sanitary pads, soap, wash cloths, toothpaste and other personal items are available for distribution by his officers.. I also believe that all detainees are given three meals a day and the Detention Centre is professionally cleaned by a janitorial company. Generally speaking, detainees are humanely treated.

[116] I believe that Mrs. Bethel's evidence on the conditions of the Detention Centre was somewhat exaggerated. I shall expound more on this aspect when I separately deal with that issue.

The issues

[117] The following issues fall for determination:

1. Whether Mrs. Bethel was unlawfully arrested;
2. Whether Mrs. Bethel was unlawfully detained at the police station;
3. Whether Mrs. Bethel was unlawfully detained at the Detention Centre?
4. Whether the conditions under which Mrs. Bethel was held at the Detention Centre were inhumane and degrading;
5. Whether Mrs. Bethel was unlawfully detained by Mr. Bastian from 3.55 p.m. on Monday 15 December 2014 to 2:30 p.m. on Tuesday 16 December 2014;
6. Whether Mrs. Bethel suffered assault and battery at the hands of Mr. Bastian?
7. If the answer to 5 and 6 above are yes, whether, in each case, the Immigration Authorities, as his employers, are vicariously liable for the misconduct of Mr. Bastian?

Preliminary issue: Survivability of the action

[118] As Mrs. Bethel died during the trial, the survivability of the action became an issue. Learned King's Counsel Mr. Smith submitted that the action survives the death of

Mrs. Bethel for two reasons: (i) by virtue of section 2 (1) of the Survival of Action Act and (ii) by virtue of the RSC. Mrs. Green-Smith, however, submitted that neither of these provisions allow the action to survive without Mrs. Bethel being substituted.

[119] Mr. Smith KC submitted that there is no need for Mrs. Bethel to be substituted because the cause of action subsists, the benefit of same automatically passing on to her estate. Any judgment in her favour accrues to her estate. He cited Order 15 Rule 8(1) of the RSC which provides:

“(1) Where a party to an action dies or becomes bankrupt but the cause of action survives, the action shall not abate by reason of the death or bankruptcy.

(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon some other person, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party. An application for an order under this paragraph may be made ex parte.”

[120] He also cited Order 31 Rule 6:

“Where a party to any action dies after the verdict or finding of the issues of fact and before judgment is given, judgment may be given notwithstanding the death, but the foregoing provision shall not be taken as affecting the power of the judge to make an order under Order 15, rule 8(2), before giving judgment.”

[121] Mr. Smith conceded that Order 31 Rule 6 does not apply to the instant case since Mrs. Bethel died before the trial and therefore there were no findings of fact. However, he urged the Court to consider the purpose of the Rule, which he argued, is to illustrate that judgment may be given notwithstanding the death of a party.

[122] I agree with Mr. Smith that the mischief that gave rise to Order 31 Rule 6 is causes of action being lost as a result of the death of a party. Although Mrs. Bethel had already given her evidence at the time of her death, the section is clear that the

death of a party only ceases to affect the ability to give judgment where findings of fact have been made.

[123] Mr. Smith argued that, by virtue of section 2(1) of the Survival of Action Act, Mrs. Bethel's action survives notwithstanding her death. Section 2 provides:

“(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in that person shall survive against, or, as the case may be, for the benefit of, that person's estate:

Provided that this subsection shall not apply to causes of action for defamation, seduction or breach of promise of marriage.

(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person —

(a) shall not include any exemplary damages” [Emphasis added]

[124] I agree that the Survival of Action Act saves Mrs. Bethel's cause of action. However, I agree with Mrs. Green-Smith that the estate will not be entitled to recover exemplary damages. As I understand the law, any application for substitution of Mrs. Bethel by her personal representative may even be made by the Attorney General or, by the Court, of its own initiative.

The issues:

Issues 1-3: Whether Mrs. Bethel was unlawfully arrested and/or unlawfully imprisoned by the Government

[125] Issues 1 to 3 may be subsumed under this sub-head. The Government's defence to Mrs. Bethel's assertion that she was unlawfully imprisoned was that she was lawfully detained for the purposes of determining whether an immigration and/or other offence under section 9 of the Immigration Act (“the IA”) has been committed. They also asserted that Mrs. Bethel, along with the other women, were taken to CDU to be assessed to ensure that they were not victims of Human Trafficking. The copy of her spousal permit was being verified.

[126] Mr. Smith KC submitted that the power of arrest does not provide for purposes of determining whether there has been a breach of immigration law, to ensure that they were not victims of a crime or to verify immigration documents.

[127] The power to arrest is provided for in section 9 of the IA. It provides as follows:

“If any Immigration Officer or police officer has reasonable cause to suspect that any person, other than a citizen of The Bahamas or a person who is a permanent resident, has committed an offence under this Act or any regulations and if it appears to him to be necessary to arrest such person immediately in order to secure that the ends of justice for the purposes of this Act shall not be defeated, he may arrest such person without warrant whereupon the provisions of section 18 of the Criminal Procedure Code Act shall apply in every such case.”

[128] Mr. Smith’s submission that section 9 does not provide for an arrest for purposes of determining whether there has been a breach of immigration law, to ensure that they were not victims of a crime, or to verify immigration documents is misconceived. All of these reasons are reasons why the government alleges that it was necessary to ensure the ends of justice for the purposes of not defeating the IA.

[129] I therefore agree with learned Counsel, Mrs. Green-Smith that the need to verify Mrs. Bethel’s immigration status (if she did not produce her spousal permit which is a factual dispute between the parties) was necessary to ensure that the IA is not undermined. I accept the evidence of Superintendent Curry that he had reasonable cause to suspect that an offence under the IA had been committed and therefore, her arrest was lawful.

[130] Mr. Smith contended that it cannot be said that an immediate arrest is necessary to prevent the purposes of the IA from being defeated. According to him, there is no offence under the IA of walking around or being out in public without immigration documents. Even if there were such an offence, the purpose of section 8 is to empower immigration officers to summon and investigate the immigration status of persons suspected to have committed immigration offences without arresting

them. The power of arrest is preserved for situations where there is a reasonable suspicion that an offence has been committed *and* where it is necessary to immediately arrest the suspect to prevent the purposes of the IA being defeated.

[131] Mrs. Green-Smith suggested that detaining Mrs. Bethel was the only way to secure her presence. Although this is an attractive argument, it does not follow from a failure to utilize the section 8 power to summon and investigate that the standard required of section 9 has not been met. In my judgment, a more reasonable approach could have been utilized especially having regard to the fact that Mrs. Bethel has a copy of a spousal permit in her possession (which Inspector Bowles saw and alerted Superintendent Knowles on Saturday 13 December 2014 around 3:00 p.m.) and Mr. Hanlan agreed to see to it that Mrs. Bethel appeared on Monday, 15 December 2014 at the Immigration Department. As I mentioned, there was no reason to disbelieve Mr. Hanlan that it was an arrangement that was allowed sometimes.

[132] With respect to the reason for the arrest, I accept Superintendent Curry's evidence that there were reasonable grounds to suspect that the women were unlawfully in the jurisdiction. I am therefore satisfied that Mrs. Bethel's arrest was lawful and it is clear that the women including Mrs. Bethel were being arrested for "immigration purposes". They were asked to produce proof of status before being arrested. Mrs. Bethel herself stated that she had a copy of her spousal permit but since it was only a copy, she was detained for verification.

[133] Mr. Smith forcefully argued that Mrs. Bethel's imprisonment thereafter was also unlawful. The officers who accompanied Superintendent Curry inspected their documents and interviewed them briefly before they were taken to the police station. Mr. Bastian said that he viewed a copy of Mrs. Bethel's spousal permit at the CDU but that she had to be further detained because the authenticity of the copy could not be verified at that time.

[134] However, the fact that Mrs. Bethel's profile document created at the CDU stated that she had a valid spousal permit until February 2015 is strong evidence that does not support the Government's position that she had to be detained. This is because it supported Mrs. Bethel's claim that she had a spousal permit. As such, at the very least, it ought to have been apparent to the officers that Mrs. Bethel had legal status, dispelling any suspicion(s) that she had no legal immigration status. As such, Mrs. Bethel's detention was unlawful from around 3:00 p.m. on Saturday 13 December 2014 to when she was released into Mr. Bastian's custody at about 3:55 p.m. on Monday, 15 December 2014.

[135] Much was made of the fact that her marriage may have been a "sham" marriage in an effort to show that she was not lawfully in The Bahamas and therefore she was lawfully detained. I do not think this was proven by the Government. The suspicion as to the genuineness of her marriage was not a plausible reason for detaining her because the spousal permit was conclusive. In determining whether Mrs. Bethel was lawfully imprisoned is a question of whether she had the correct documentation to be here and what was apparent at that time to justify detaining her. The genuineness of the relationship was not in issue at that time. The main question is whether she had a copy of her spousal permit when she was arrested. What were the facts as they appeared at the time of arrest is what is relevant. There is no evidence that the marriage was suspected to be fraudulent at that time. The Immigration Department was not prevented from investigating the genuineness of her marriage and/or putting their suspicion to her upon her application for renewal of her spousal permit. However, it could not be used as a reason to detain her.

[136] Mr. Smith also submitted that Mrs. Bethel was not informed of the reason for her arrest. Consequently, she was unlawfully arrested. In support, he cited **Kevin Collie v AG** 2017/CLE/gen/00916, where the Supreme Court applied the House of Lords case of **Christie v Leachinsky** [1947] AC 573, which makes it clear that an arrest is unlawful if the arresting officer does not inform the suspect of the reason for his arrest as soon as practicable. Superintendent Curry's evidence was

that the women were told that they were being arrested for offences under the IA. Further, and in any event, it is clear from Mrs. Bethel's evidence that once they arrived at the police station, she was aware that she was being detained in relation to her immigration status. Her evidence was that she told the officers upon being arrested and while she was being detained that she has a spousal permit which plainly suggests that she knew of the reason. The fact that the actual alleged offence instead of "immigration purposes" was not included on the detention record is, in my judgment, bad practice, but does not mean that Mrs. Bethel was unaware of the reason for her arrest.

[137] Mr. Smith made much of the alleged inconsistencies in Superintendent Curry's evidence with respect to the reason for the arrest. Although the nudity and exotic dancing of the women may have been an aspect of the reason for the arrest, I accept Superintendent Curry's evidence that the primary purpose for the arrest was "immigration purposes" and this was made clear to them.

[138] Mr. Smith submitted that another reason that made Mrs. Bethel's arrest unlawful is that she was not taken before a court and charged "without delay" as is required by section 18 of the CPC or within 48 hours. Mr. Smith argued that having been arrested at 1:30 am on Saturday 13 December 2014, she ought to have been released by 1:30 a.m. on Monday 15 December 2014 *at the very latest* unless she was taken before a Magistrate to be charged or to seek an extension of time (neither of which was done).

[139] Mrs. Bethel was released at 2:30 p.m. on Monday 15 December 2014. In other words, she was detained for 13 extra hours but this argument becomes moot since I have already found that Mrs. Bethel was unlawfully imprisoned from about 3:00 p.m. on Saturday, 13 December 2014 to 3:55 p.m. on Monday, 15 December 2014.

[140] As Mrs. Bethel was unlawfully imprisoned for that period of time, to wit: 48.55 hours, her constitutional right under article 19 right not to be arbitrarily arrested

and detained was breached. She is entitled to damages to be assessed for 48.55 hours.

Issue 4: Conditions at the Detention Centre

[141] Mrs. Bethel insisted that the conditions at the Detention Centre were very poor and inhumane. According to her, there were hundreds of women and children mainly Haitians sleeping on the floor. She had to step over them to move about. She eventually found a spot on the floor to rest and she slept there for the duration of her detention. One of the detainees gave her a piece of soap which she used to bathe herself. She used her underwear to tidy herself.

[142] According to Mrs. Bethel, the bathrooms were filthy and appeared as if they had never been cleaned. She had to urinate outside. Inside the shower was muddy. She laid on the floor with the other detainees but she could not sleep. One of the detainees had a baby who cried throughout the night.

[143] She said that she told a police officer and her lawyer about the bad conditions at the Detention Centre but she did not tell the magistrate about it in the criminal trial. She also did not complain to Mr. Hanlan about the conditions at the Detention Centre.

[144] As I already mentioned, I prefer Mr. Leonard Smith's evidence on the conditions of the Detention Centre. In December 2014, he was attached to the Detention Centre and was so attached from 2011 to 2015. His duties included the day-to-day operations of Detention Centre, intake of persons entering the Centre and the deportation and release of persons. He has a staff of 20 persons.

[145] Mr. Smith also stated that, while he was attached to the Centre, every Friday afternoon, he would ensure that the store room items such as sanitary pads, soap, wash cloths, toothpaste, personal items, washing products and food items were available for distribution by the officers. All detainees are fed three (3) balanced meals a day. The Centre is professionally cleaned daily by a janitorial company

and generally, detainees are treated humanely. A medical doctor also visits the Centre twice weekly to attend to the medical needs of the detainees.

[146] Mr. Smith agreed that toward the end of 2014, there was a dramatic increase in the number of arrests and detention of people which led to overcrowding. However, he did not agree that there were hundreds of people there. He said maybe a little over a hundred but not hundreds.

[147] He said that there was a big influx of females around the time that Mrs. Bethel was brought in. He estimated that the Detention Centre could accommodate about 90 males. He said that there were not many beds in the female dormitories because they usually do not have many female detainees. There was only one (1) female dormitory whereas there were three (3) for males but when there are no beds, they move from the male to the female dormitories.

[148] I prefer the evidence of Mrs. Bethel to that of the witnesses for the Government in that the facility was overcrowded which caused the women to have to sleep on the floor. The population sheet of the Detention Centre at that time showed that there were over three hundred and fifty (350) detainees. However, I believe that Mrs. Bethel's evidence was exaggerated and I do not believe that the conditions of the Centre were so egregious that they amounted to a breach of her Article 17 right not to be subjected to torture or inhuman or degrading treatment or punishment.

Issue 5: Whether Mr. Bastian unlawfully imprisoned Mrs. Bethel

[149] Mrs. Bethel's evidence was that Mr. Bastian unlawfully imprisoned her from 3:55 p.m. on Monday 15 December 2014 to about 2:30 p.m. on Tuesday 16 December 2014. On the other hand, Mr. Bastian testified that Mrs. Bethel was free to refuse to go with him. In other words, she voluntarily went with him.

[150] It is well-established that the tort of false imprisonment can be committed without the use of physical force. The use of authority is enough. However, in **Davis v Attorney General** (1990) 25 Barb LR 42 (High Court, Barbados), it was made clear that an invitation by police officers to accompany them to the police station

could not be false imprisonment so long as the police officers made it clear to the civilian that he was entitled to refuse to go.

[151] What is relevant is what Mrs. Bethel understood. Although I believe that Mrs. Bethel *could* have refused to go with Mr. Bastian, having heard the evidence, I believe that she was not told that she could refuse. I accept Mrs. Bethel's evidence that did not believe that she had freedom of movement and she was afraid. I believe that Mr. Bastian misused and abused his authority as a senior immigration officer to make Mrs. Bethel believe that she had no choice but to go with him. As such, Mrs. Bethel was falsely imprisoned by Mr. Bastian for 22.35 hours. She is therefore entitled to damages for false imprisonment.

Issue 6: Whether Mr. Bastian assaulted and battered Mrs. Bethel

[152] Mrs. Bethel contended that Mr. Bastian forced and threatened her to have sex with him despite her refusal. Learned Counsel Mr. Gibson appearing for Mr. Bastian submitted that Mrs. Bethel was a willing participant and consequently, Mr. Bastian did not assault and/or batter her.

[153] In the recent judgment of **Lynden Saunders v Jeron Thompson, Sr. & Ors.** 2019/CLE/gen/00522 delivered on 30 November 2022, this Court set out the law on assault and battery at paras 49-50:

“[49] The tort of assault and battery comprise of the act of making contact with the plaintiff. It must be a direct and intentional act. The plaintiff must not have consented to the act. Croom-Johnson LJ in Wilson v Pringle [1986] EWCA Civ 6 (26 March 1986) stated at page 4 of the judgment:

“Another ingredient in the tort of trespass to the person is that of hostility. The references to anger sufficing to turn a touch into a battery (Cole v Turner) and the lack of an intention to assault which prevents a gesture from being an assault are instances of this. If there is hostile intent, that will by itself be cogent evidence of hostility. But the hostility may be demonstrated in other ways.”

[50] The learned authors of Halbury's Laws of England 3rd Ed Vol 10 at page 740, define assault and battery as follows:

"An assault is an offer or attempt to apply force or violence to the person of another in an angry or hostile manner; and if force is actually applied, directly or indirectly, either illegally or without consent of the person assaulted, and in an angry, rude, revengeful or violent manner, the assault becomes a battery, however slight the force may be. The direct application of any physical force to the person of another may amount to a battery ...anything that can be called a blow, whether inflicted with hand, weapon or missile is a battery. See: Clerk & Lindsell on Torts, 14th edition at page 357." [Emphasis added]"

[154] Despite the fact that Mr. Bastian was acquitted of the charge of rape in the Magistrate Court, this issue is a relevant consideration in determining the question of whether he forced himself upon her or used duress but it is not conclusive. As already mentioned, the standard of proof in civil trials is proof on a balance of probabilities, namely, proof that something is probable or more likely than not.

[155] Finding that the evidence adduced by Mrs. Bethel and her witnesses is to be preferred, I find (as I have earlier done) that Mr. Bastian sexually assaulted and battered Mrs. Bethel. She is therefore entitled to damages for assault and battery; such damages are to be assessed by a Registrar.

Issue 7: Whether the Immigration Authorities are vicariously liable for Mr. Bastian's assault, battery and false imprisonment

[156] Having found that Mrs. Bethel was falsely imprisoned, assaulted and battered by Mr. Bastian, the question here is whether the Immigration Authorities are vicariously liable for his actions.

[157] Mrs. Green-Smith maintained that the Immigration Authorities are not vicariously liable for the actions of Mr. Bastian.

**The law:
Vicarious liability**

[158] 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 an employer. There may, of course, be

cases of vicarious liability where employers were at fault. But this is not a requirement.

[159] It is well-established that an employer is only vicariously liable for his servant's tort if the tort was committed during the course of his employment. According to the Winfield and Jolowicz, **Tort** 15th edn, 1998, a tort comes within the course of a servant's employment if: (i) it is expressly or impliedly authorised by his master, or (ii) it is an unauthorised manner of doing something authorised by his master, or (iii) it is necessarily incidental to something which the servant is employed to do.

[160] In **United Africa Co Ltd v Owoade** [1957] 3 All ER 216 at page 218, Lord Oaksey explained that whether a servant's actions are within the course of his employment is a question of fact.

[161] In the Privy Council case of **Clinton Bernard v Attorney General of Jamaica** [2004] UKPC 47 (07 October 2004), Lord Steyn, in delivering the Judgment of the Board, noted the following principles relating to vicarious liability as established in **Lister v Hesley Hall Ltd** [2002] 1 AC 215 at paras 18 to 19:

"18. In *Lister* a warden of a school boarding house had sexually abused resident children. The question was whether the employers were vicariously liable. In the leading opinion a single ultimate question was posed, namely [at 230C]:

"... whether the warden's torts were so closely connected with his employment that it would be fair and just to hold the employers vicariously liable."

The four substantial opinions delivered in *Lister* revealed that all the Law Lords agreed that this was the right question. On the facts the members of the House unanimously took the view that the answer was "yes" because the sexual abuse was inextricably interwoven with the carrying out by the warden of his duties in the boarding house. This decision did not come out of the blue. On the contrary, it was a development based on a line of decisions of high authority dating from *Lloyd v Grace, Smith & Co* [1912] AC 716 where vicarious liability was found established in cases of intentional wrongs. *Lister* is, however, important for a number of reasons. It emphasised clearly the intense focus required on the closeness of the connection between the tort and the individual tortfeasor's employment. It stressed the need to avoid terminological issues and

to adopt a broad approach to the context of the tortious conduct and the employment. It was held that the traditional test of posing, in accordance with Salmond's well-known formula, the question whether the act is "a wrongful and unauthorised *mode* of doing some act authorised by the master" is not entirely apt in cases of intentional wrongs: *Salmond, The Law of Torts*, 1907, 83, now contained in the current edition of *Salmond and Heuston, The Law of Torts*, 21st ed., 1996, 443. This test may invite a negative answer, with a terminological quibble, even where there is a very close connection between the tort and the functions of the employee making it fair and just to impose vicarious liability. The correct approach is to concentrate on the relative closeness of the connection between the nature of the employment and the particular tort, and to ask whether looking at the matter in the round it is just and reasonable to hold the employers vicariously liable. In deciding this question a relevant factor is the risks to others created by an employer who entrusts duties, tasks and functions to an employee. This strand in the reasoning in *Lister* was perhaps best expressed by Lord Millett who observed (para 83, at 250D):

"... Experience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust."

While the facts of *Lister* are very different from the circumstances of the present case, the principles enunciated in *Lister* are of general application to intentional torts.

19. A year later in *Dubai Aluminium Company Limited v Salaam and Others* [2003] 2 AC 366 the House of Lords applied the principles in *Lister* in a very different context. The issue was whether a solicitors' firm was vicariously liable for the fraudulent acts of one of its partners who, together with others, had defrauded the Dubai Aluminium Company. If the firm, which had paid compensation to the company, was vicariously liable, it could properly claim contribution from the other participants in the fraud. The House found vicarious liability established. All the opinions are closely reasoned and important but it is not necessary to review the case generally. A citation from the leading opinion of Lord Nicholls of Birkenhead, reveals the link with *Lister*. Lord Nicholls stated (para 23, at 377E):

"... Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the

purpose of the liability of the firm or the employer to third parties, the wrongful conduct *may fairly and properly be regarded* as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."

Throughout the judgments there is an emphasis on the proposition that an employer ought to be liable for a tort which can fairly be regarded as a reasonably incidental risk to the type of business he carried on".

[162] Two key points which emanate from **Clinton Bernard** are (1) that the vicarious liability is to be determined by the principles of the House of Lords' decision in **Lister** which include a consideration of any risks to others created by an employer that entrusts duties, tasks and functions to an employee and (2) an employer can be held liable if the wrong is so closely connected with the employment that it can be said that the employer has introduced the risk. In **Bernard**, allowing police officers to take loaded service revolvers home and carry them while off duty created the risk incidents leading to vicarious liability.

[163] Also, in Privy Council case of **Kooragang Investments Pty Ltd v Richardson & Wrench Ltd** [1981] 3 All ER 65 at 70–71, Lord Wilberforce opined:

' ... the underlying principle remains that a servant, even while performing acts of the class which he was authorised, or employed, to do, may so clearly depart from the scope of his employment that his master will not be liable for his wrongful acts.'

[164] In **Attorney General for the British Virgin Islands v Craig Hartwell** [2004] UKPC 12 (23 February 2004), the Privy Council held that the government was not vicariously liable for the actions of a police officer who left his post, went into a bar where his partner worked as a waitress and, in a fit of jealous rage at finding her there with another man, fired a number of shots at one or other or both of them with a service revolver to which he had access in the course of his duties. A bystander was injured and claimed damages from the Government. It was further held that the police officer was "*on a frolic of his own*" having deliberately and consciously abandoned his post and his duties. His wrongful use of the service

revolver was not so closely connected with acts he was authorised to do that, for the purposes of liability of the government as his employer.

[165] On vicarious liability, Lord Nicholls, in delivering the Judgment of the Board, stated that paras 15-17:

“Vicarious liability

15. Mr Hartwell's claim is that, nonetheless, the Government of the British Virgin Islands is liable in law for the consequences of PC Laurent's wrongful acts. There are many circumstances where one person may be liable for a wrong deliberately committed by another. Foremost among such instances are those giving rise to "vicarious" liability of an employer for acts done by an employee in the course of his employment. Mr Hartwell has advanced a case based on the Government's vicarious liability as employer for acts done by Laurent as a police officer.

16. This is not Mr Hartwell's primary case, but it will be convenient to mention it first as the outcome of this claim is clear cut. The applicable test is whether PC Laurent's wrongful use of the gun was so closely connected with acts he was authorised to do that, for the purposes of liability of the Government as his employer, his wrongful use may fairly and properly be regarded as made by him while acting in the ordinary course of his employment as a police officer: see *Lister v Heselley Hall Ltd* [2001] UKHL 22, [2002] 1 AC 215, 230, 245, paras 28, 69, and *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 2 AC 366, 377, para 23,. The connecting factors relied upon as satisfying this test are that Laurent was a police constable on duty at the time of the shooting (working his three day shift on Jost Van Dyke), that his jurisdiction extended to Virgin Gorda, and that before leaving Jost Van Dyke he had improperly helped himself to the police revolver kept in the substation on that island.

17. These factors fall short of satisfying the applicable test. From first to last, from deciding to leave the island of Jost Van Dyke to his use of the firearm in the bar of the Bath & Turtle, Laurent's activities had nothing whatever to do with any police duties, either actually or ostensibly. Laurent deliberately and consciously abandoned his post and his duties. He had no duties beyond the island of Jost Van Dyke. He put aside his role as a police constable and, armed with the police revolver he had improperly taken, he embarked elsewhere on a personal vendetta of his own. That conduct falls wholly within the classical phrase of "a frolic of his own". [Emphasis added]

[166] The basic principle applicable to cases where an employee is engaged in an independent personal venture was explained in **Joel v Morison** (1834) 6 C & P 501, where the well-known phrase '*frolic of his own*' was coined by Parke B when he stated that **the servant must be engaged on his master's business, not 'on a frolic of his own'**. Parke B said at p. 503:

"The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

Discussion

[167] Mr. Smith KC relied heavily on the case of **Mohamud v WM Morrison Supermarket** [2016] AC 677 in which the Supreme Court held that the employer, WM Morrisons Supermarkets, was vicariously liable for an employee's violent assault on a customer. There was a 'sufficiently close connection' between the employee's job (attending to customers) and the assault on the customer. This case acknowledged that the test was imprecise and required the court to make an evaluative judgment in each case having regard to the circumstances.

[168] The brief facts of **Mohamud** are that the claimant parked his car at a Morrisons petrol station and entered the kiosk to ask whether he could print some documents from a USB stick. Mr. Khan, the respondent's employee, refused the request in a rude manner and a heated exchange ensued. Mr. Khan directed racist and threatening language towards the claimant and told him to leave. The claimant returned to his car and Mr. Khan followed him. Before he could drive off, Mr. Khan opened his passenger door, threatened him and then punched him on the side of the head. The claimant then got out and walked around to close the passenger door. Mr. Khan subjected him to a further serious physical assault.

[169] The claimant brought proceedings against the supermarket on the basis that it should be held vicariously liable for the actions of its employee. The claimant was

unsuccessful up to the Court of Appeal on the basis that there was an insufficiently close connection between what Mr. Khan was actually employed to do and his conduct in attacking the claimant. The claimant appealed to the Supreme Court, mainly on the basis that a new test for vicarious liability should be adopted. Rather than the 'close connection' test that the courts have applied for many years, it was argued that the court should adopt a broader test of 'close representative capacity'. As a second strand, and in the alternative, the claimant argued that he was a lawful visitor to the respondent's premises and Mr. Khan was acting within the scope of the activities assigned to him as an employee.

[170] The Supreme Court resisted the adoption of a new test for vicarious liability. It however concluded that at no point did Mr. Khan metaphorically take off his uniform. This was not a personal quarrel but something that took place within the sphere of Mr. Khan's ordinary duties.

[171] Later cases such as **Cox v Ministry of Justice** [2016] UKSC 10 and **Armes v Nottinghamshire CC** [2017] UKSC 60 have shown that the relationship, while primarily that of employer and employee, can extend to relationships *akin* to employment. The Supreme Court in **Mohamud** also broadened the "connection" test to impose vicarious liability for torts which were connected to the field of activities of the employee, and where there is a sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable.

[172] Mr. Smith submitted that the parallels to the present case are clear. Taking Mrs. Bethel to his home and falsely imprisoning and raping her there are obviously far removed from what Mr. Bastian was employed to do but the justice of the case is obvious. The Minister of Immigration and the Director of Immigration employed Mr. Bastian and placed him in a position to deal with Mrs. Bethel and Assistant Director Beneby expressly authorised him to take her into his custody and carry out an investigation of her apartment and conduct and interview with her at Hawkins Hill. He abused that position and took advantage of her. It is obviously fair that the

Immigration Authorities compensate for the wrongdoing than that Mrs. Bethel (now, her dependent children) be left without compensation.

[173] Mr. Smith further argued that a senior immigration officer who is authorised to take a detainee off the premises [Mrs. Bethel was released into his custody on Mr. Beneby's instructions] needs to be capable of acting properly and with restraint for the safety of the detainee and it would be wrong for a raped detainee to be left with her only remedy against Mr. Bastian.

[174] He also argued that it would be artificial to describe the rape of Mrs. Bethel by her Immigration Officer as a mode of performing what he was employed to do. But "**in a broader sense**" the rape occurred in the course of his employment in that Mr. Bastian was employed to investigate detainees and it was in that capacity that he had Mrs. Bethel released to him and had her in his vehicle and in his custody and went to her apartment and was with her and interviewed her at Hawkins Hill.

[175] Mr. Smith further argued that Mrs. Bethel had no knowledge of the exact limits of Bastian's responsibilities. Her evidence was that she understood she remained in his custody the entire time. She was not allowed to remain in her apartment (she did not shower or change out of the night clothes she wore in the Detention Centre. In addition, W/Corporal Butler's evidence (who did not testify in this trial) is that Mr. Bastian said to her on the Tuesday (after the rape had taken place) that she had been arrested on the Friday and was in his custody. Mr. Smith reasoned that it is clear from Lord Toulson's judgment in **Mohamud** that the fact that Mrs. Bethel was not aware of "**the exact limits of [Mr. Bastian's] responsibilities**" is a relevant consideration. As far as Mrs. Bethel was concerned, Mr. Bastian was at all times acting as Immigration Officer.

[176] Mrs. Green-Smith argued that Mrs. Bethel remained in lawful custody, with a view to investigate the veracity of her marital status to Mr. Bethel, until the point at which she left the Department of Immigration at Hawkins Hill. It is at this point that the Government asserted that Mr. Bastian was on a frolic of his own and they are

wholly absolved from any liability for any alleged actions against Mrs. Bethel after. In other words, the assault and battery between Mrs. Bethel and Mr. Bastian took place in the privacy of Mr. Bastian's home and after he completed his duties as an Immigration Officer and it had absolutely nothing to do with the employment of as an immigration officer.

[177] Mr. Green-Smith next argued that, in any case, the onus of proving the existence of a master/servant relationship and the commission of a tort during the course of the servant's employment rests on Mrs. Bethel and, on a balance of probabilities, she has not shown how Mr. Bastian committed the acts against her in the course of his employment. But before we arrive at that point, Lord Denning explains, in **Young v Box an Co Ltd** [1951] 1 TLR 789, p 793, '...to make a master liable for the conduct of his servant, the first question is to see whether the servant is liable. If the answer is "yes', the second question is to see whether the employer must shoulder the servant's liability.'" In other words, vicarious liability of the master only arises on the primary liability of the servant.

[178] Following the decision of the House of Lords in **Lister v Hesley Hall Ltd** [2001] UKHL, a tort is now deemed to be in the course of employment if it is so closely connected with the employment that it would be *fair and just* to hold the employer vicariously liable. Mr. Smith KC asked the Court to apply the "close connection" test in the light of Lord Toulson's restatement of the test in **Mohamud** where Lord Toulson had stated that, in applying the test for "close connection", the court has to consider two matters namely:

1. What are the functions or "field of activities" entrusted by the employer to the employee, or, in everyday language, what was the nature of his job?
and
2. Is there a sufficient connection between the position in which the employee was employed and his wrongful conduct to make it right for the employer to be held liable under the principle of social justice?

[179] Each case will turn on its own peculiar facts and circumstances. In the present case, as a senior immigration officer, it is within Mr. Bastian's remit to interview Mrs. Bethel and to seek to verify her correct address especially since, as Mr. Beneby stated, her spousal permit renewal was approaching. As I understand it, part of this due diligence is also to verify that she and her husband are also living together. However, Mr. Bastian well knew that, in doing so, he ought to take along a female officer. He lied to Mr. Beneby that he had a female with him but did not indicate that the female, Marsha Curry, was his friend and not an employee at the Department of Immigration.

[180] As a senior immigration officer who have worked in the Immigration Department for many years, Mr. Beneby relied on Mr. Bastian's words that he was taking Mrs. Bethel to verify her correct address and a female (immigration employee) was also going with him. It is under those circumstances that Mr. Beneby released Mrs. Bethel into Mr. Bastian's custody.

[181] In addition, although Mrs. Bethel may not have been aware of the exact limits of Mr. Bastian's responsibilities," it must have been clear to her, during his eight stops, especially to the Chinese Liquor Store to purchase wine, that that was not within his remit of verifying her correct address.

[182] In my judgment, it cannot be said that taking Mrs. Bethel to his home and sexually assaulting her was within the course of his employment and/or sufficiently close to make it right and just for the Immigration Authorities to be held liable under the principle of social justice. Shortly put, Mr. Bastian was on a frolic of his own when he took Mrs. Bethel to his home having deliberately and consciously abandoned his post and his duties. He had no duties beyond investigating Mrs. Bethel's correct address and he was fully aware that a female officer ought to be with him. He put aside his role as an immigration officer and embarked on a frolic of his own. Therefore, the Government is not vicariously liable for his actions namely falsely imprisoning Mrs. Bethel for 22.35 hours; assault and battery. Mr. Bastian must pay damages to Mrs. Bethel to be assessed by the Registrar.

Exemplary damages

[183] Section 2(2)(a) of the Survival of Action Act is plain. It states that where a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any exemplary damages. The section expressly prohibits recovering exemplary damages.

Interest

[184] Mrs. Bethel seeks interest not only after judgment but from the date that the cause of action arose.

[185] In paragraphs 50-59 of **Douglas Ngumi v The Hon. Carl Bethel & Ors** SCCivApp No. 6 of 2021, the Court of Appeal varied the order which I made in the Supreme Court and stipulated that interest at the statutory rate will run from the date of the filing of the Writ of Summons to the date of judgment.

[186] In the present case, I will make an order that interest at the statutory rate of 6.25% per annum will run from 26 February 2015 (the date of the filing of the Writ of Summons) to the date of payment. This is in accordance with section 2(1) of the Civil Procedure (Award of Interest) Act 1992 as amended by the Civil Procedure (Rate of Interest) Rules, 2008.

Costs

[187] This is a case where Mrs. Bethel is successful against Mr. Bastian and partly successful against the Government for unlawful imprisonment for 48.55 hours. The Government is also successful against Mrs. Bethel in respect of the survivability of this action in relation to exemplary damages and also vicarious liability.

[188] Mrs. Bethel seeks indemnity costs. In **Douglas Ngumi** at paragraphs 63-65, the Court of Appeal comprehensively addressed the issue of indemnity costs. At the end of the day, the Court upheld the order of the Supreme Court that costs shall be on a party and party basis.

[189] I shall therefore make an order that Mrs. Bethel is entitled to costs on a party and party to be taxed if not agreed. The unlawful imprisonment by the Government for 48.55 hours was not malicious or outrageous but done, albeit wrongly, to verify the immigration status of Mrs. Bethel. Once that was verified on Monday 15 December 2014, she was released into Mr. Bastian's custody pending further investigations with respect to her spousal permit which was expiring in February 2015.

[190] With respect to indemnity costs against Mr. Bastian, I will also make an order for costs on a party and party basis even though his conduct was unbecoming of a senior immigration officer.

[191] With respect to costs to the Government for their success also, I will make a similar order of costs to be taxed on a party and party basis if not agreed.

[192] If costs are not agreed, then the successful parties will file their Bill of Costs in accordance with the Rules of Court; such costs are to be taxed by the Registrar. In the recent Court of Appeal decision in **Jennifer Bain v Family Guardian Insurance Company Limited** SCCivApp No. 64 of 2022, Sir Michael Barnett P., in delivering the Judgment of the Court held that the judge had no jurisdiction to tax costs so representing to the Appellant that she would tax the Bill of Costs may have induced the Appellant to accept \$60,000 under duress.

Conclusion

[193] In the premises, the Court makes the following orders:

1. The action survives notwithstanding the death of Mrs. Bethel. However, Mrs. Bethel's estate shall not be entitled to exemplary damages.
2. Mrs. Bethel's right under Article 19 of the Constitution had been breached. She is therefore entitled to damages from the Government for 48.55 hours. Such damages are to be assessed by the Registrar.

3. Mrs. Bethel's right under Article 17 of the Constitution not to be subjected to torture or inhuman or degrading treatment or punishment has not been breached.
4. Mrs. Bethel is entitled to damages for false imprisonment for 22.35 hours, assault and battery against Mr. Bastian. Such damages are to be assessed by a Registrar and are to be personally paid by Mr. Bastian.
5. The Government is not vicariously liable for Mr. Bastian's actions since he was on a frolic of his own.

Dated this 27th day of January 2023

**Indra H. Charles
Senior Justice**