[2019] JMSC Civ 60

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018HCV01370

BETWEEN	**VERONICA CLARKE-LEMMON** **(sue as near relative and next of kin of Neville Lemmon, deceased, intestate)**	**1ST APPLICANT**
AND	**MARCIA BATTIS** **(sue as mother and next friend of Jaydon Barbika Lemmon, a minor, and near relative and next of kin of Neville Lemmon deceased, intestate)**	**2ND APPLICANT**
AND	**ROCHELLE LEMMON**	**3RD APPLICANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**RESPONDENT**

Ms. Coleen Franklin instructed by Marion Rose Green and Company for the Applicants.

Mrs. Kimberley Clarke instructed by the Director of State Proceedings for the Respondent.

Heard February 14, 2019 and March 20, 2019

Limitation of Actions – Application for an enlargement of the time for filing a claim form under the Fatal Accidents Act – considerations for the Court.

MASTER N. HART-HINES (AG)

[1] The matter for the consideration of the Court is an application pursuant to section 4(2) of the Fatal Accidents Act, for leave to proceed with a claim for damages against the Respondent for the wrongful death of Neville Lemmon

on August 4, 2005. This application is supported by affidavits sworn to by Veronica Clarke-Lemmon ("the 1st Applicant") and Marcia Battis ("the 2nd Applicant"). The application was filed simultaneously with the Claim Form and Particulars of Claim on April 4, 2018, almost thirteen years after the passing of Neville Lemmon (hereinafter "the deceased"). The limitation period under the Fatal Accidents Act elapsed on August 3, 2008 and the claim is therefore statute-barred. However, Court has a discretion to enlarge the time for filing the claim. Mrs. Clarke-Lemmon is the wife of the deceased, Ms. Battis is the mother of the deceased's daughter Jaydon Lemmon, and Rochelle Lemmon is another daughter of the deceased. Though paragraph 2 of the Claim Form indicates that damages are sought under the Law Reform (Miscellaneous Provisions) Act for the benefit of the estate of the deceased, I have seen no grant of Letters of Administration attached to the Particulars of Claim filed. In the circumstances, it seems that the claim is for damages under the Fatal Accidents Act (hereinafter "the Act"). Indeed, the Notice of Application filed on April 4, 2018, seeks only the following orders:

> *"1. That leave be granted for an extension of the time within which to bring the matter under the Fatal Accidents Act.*
> *2. That the Claim Form and Particulars of Claim filed on the 4th day of April 2018 filed under the Fatal Accidents Act be allowed to stand."*

[2] The Claim Form and Particulars of Claim indicate that the wrongful death of Neville Lemmon was caused by members of the Jamaica Constabulary Force ("JCF") in the course of their employment. The Respondent is sued by virtue of the Crown Proceedings Act. As the Applicants are near relatives and dependants of the deceased, they are proper persons to bring the claim under the Act, provided that they have suffered loss as a result of his death. What is in issue before this Court is whether or not there is good justification to exercise my discretion to extend the three-year limitation period under section 4(2) of the Act, which provides:

> *"Any such action shall be commenced within three years after the death of the deceased person or within such longer period as a court may, if satisfied that the interests of justice so require, allow."*

Background and Chronology

[3] The chronology of events can be gleaned from the affidavit of Veronica Clarke-Lemmon dated April 4, 2018, filed on behalf of the Applicants, and that of Carian Freckleton-Cousins dated May 11, 2018, filed on behalf of the Respondent. The chronology is as follows:

i. On August 4, 2005 Neville Lemmon was at his home at Lot 902 Seaview Gardens, Kingston 11 in the parish of Saint Andrew when members of the JCF, during the course of their employment entered the deceased's house. The Claim Form and Particulars of Claim indicate that they "*deliberately, intentionally, maliciously, wrongfully and/or recklessly and/or negligently and without reasonable and/or probable cause discharged [their] firearm[s] shooting [the deceased] all over his body*". The deceased succumbed to his injuries on that date. It is alleged that all the JCF officers involved in the incident were at that time stationed at the Hunts Bay Police Station in the parish of St. Andrew.

ii. On October 28, 2007, Constable F. Beckford, one of the officers alleged to have been involved in the incident, passed away.

iii. On August 3, 2008 the claim under the Act became statute barred.

iv. On February 2, 2010 the Director of Public Prosecutions ("DPP") recommended that the matter be referred to the Coroner's Court for the Corporate Area. By a letter bearing that date, which was addressed to the Assistant Commissioner of Police, the DPP also recommended a *"departmental inquiry to ascertain whether the use of force policy in the JCF was adhered to given ... the statement of Mr. Gregory Edwards*" and injuries sustained by the deceased.

v. On October 31, 2010, Corporal Clarence Beckford, one of the officers alleged to have been involved in the incident, resigned from the JCF.

vi. On May 20, 2015 a Coroner's jury handed down a verdict of manslaughter by gross negligence.

vii. On April 4, 2018, the Claim Form and Particulars of Claim were filed in the Supreme Court, along with the application for leave to proceed with the claim.

[4] In her affidavit, the 1st Applicant averred that sometime after the death of her husband, the matter was referred to the Coroner's Court at Sutton Street in Kingston. She said that she attended that Court on numerous occasions and was aware at the end of the proceedings that the police officers involved in the shooting of her husband were to be charged for his death. However, the Applicants did not exhibit any documentation from the Coroner's Court in respect of the verdict on May 20, 2015. The 1st Applicant said it was only after the verdict that she was "*made to understand that the matter is being dealt with, did not include compensation*". In essence, the 1st Applicant asserts that she did not understand the nature of the inquest in the Coroner's Court, and that she became aware that she needed to file a claim in the Supreme Court of Jamaica for damages after the date of the verdict in the Coroner's Court. She explained that prior to his death, the Applicants depended on her husband financially. Mrs. Clarke-Lemmon asserted that the Applicants would be prejudiced if they were not granted an order enlarging the time for filing a claim form under the Act, but the Respondent would suffer no prejudice as it had notice of the Applicants' intention to bring the claim in this matter.

[5] In her affidavit filed on behalf of the Respondent, at paragraph 5, Mrs. Freckleton-Cousins averred that she was informed and believes that on May 20, 2015 a "*Coroner's jury handed down a verdict of manslaughter by gross negligence against unknown police officers who were responsible for the shooting death of the deceased*". Mrs. Freckleton-Cousins further indicated that she believed that the evidence of Constable Warren Reid, Corporal Clarence Beckford and Constable F. Beckford would be required for the Respondent to mount a viable defence. However, by way of Jamaica Constabulary Force Orders dated November 1, 2007, she is informed and believes that Constable F. Beckford passed away on October 28, 2007, and by way of Jamaica Constabulary Force Orders dated December 30, 2010, she believes that Corporal Clarence Beckford resigned from the Jamaica Constabulary Force from October 31, 2010. No mention is made in her affidavit of whether Constable Warren Reid is still a serving member of the

JCF or of his whereabouts. However, Mrs. Freckleton-Cousins averred that severe prejudice would be occasioned to the Respondent on account of the Applicants' delay.

Submissions on behalf of the Applicants

[6] Ms. Franklin submitted that in assessing whether or not to grant the application, the court should consider the reasons for the delay, and that the reason in this case is that the Applicants were laypersons with no legal knowledge. Ms. Franklin relied on the decision of ***Halford v Brooks*** [1991] 3 All ER 559 as authority for the proposition that consideration should be given to the ignorance of an unrepresented person of the legal right to seek compensation for the wrongful death of a relative.

[7] As regards the issue of prejudice, Ms. Franklin noted that there is nothing from the Respondent to say that they made efforts to locate Constable Warren Reid, or that he cannot be found. Ms. Franklin therefore submitted that the Respondent would not be prejudiced because Constable Warren Reid may well still be available to attend the trial, if required to do so. Ms. Franklin submitted that there was a possibility that Corporal Clarence Beckford was also still available to give evidence, though he had resigned from the JCF. As regards Gregory Edwards counsel submitted that there was a possibility that he too was available, although she was unable to indicate the nature of the evidence he was likely to give. She further submitted that the statements or depositions given at the Coroner's inquest could be relied on by both the Applicants and the Respondent, though, admittedly, she had not been able to obtain the notes of evidence from the Court despite making a written request for same in September 2018.

Submissions on behalf of the Respondent

[8] Mrs. Clarke submitted that the purpose of the limitation period was to ensure that there was some certainty in the law, and that to allow a matter to proceed more than 10 years after the limitation period had expired, would result in a haphazard approach in the law and would result in injustice. Mrs. Clarke relied

on the authority of ***Shaun Baker v O'Brian Brown and Angella Scott-Smith***, (unreported) Supreme Court, Jamaica, Claim No 2009 HCV 5631, judgment delivered on May 3, 2010. She addressed some of the considerations as identified by Edwards J (Ag) (as she then was) in the case, including the issue of prejudice, cogency of the evidence and the merits of the case, and the sufficiency of the reasons for the delay.

[9] Mrs. Clarke submitted that the passage of thirteen (13) years has significantly affected the Respondent's ability to defend the claim due to the lack of availability of defence witnesses. The Respondent is therefore greatly prejudiced. Firstly, Mrs. Clarke submitted that the potential witness, Corporal Clarence Beckford, was less likely to be available, having regard to the circumstances under which he left the JCF. She indicated that in her experience, JCF officers are often difficult to contact once they resign. If the defence witnesses were not available, and reliance had to be placed on statements or notes of evidence from the Coroner's Court, very little weight would be attached to such statements, in the absence of the viva voce evidence. Secondly, counsel averred that even if Corporal Clarence Beckford and Constable Warren Reid are available to give evidence, their memories might have faded in light of the passage of time. Mrs. Clarke submitted that the cogency of the evidence is a factor which the court must consider, and when one considers that thirteen (13) years have elapsed and that a further three (3) or four (4) years might elapse before the matter progressed to trial, it is highly likely that the quality of the evidence would be affected.

[10] As regards the issue of prejudice, Mrs. Clarke submitted that the Applicants had not established that they would be greatly prejudiced if the application was not granted. She further submitted that the Applicants' conduct in delaying their lawsuits for thirteen (13) years was not consistent with their assertion that they were dependent on the deceased and that they were indeed in dire straits financially. Additionally, Mrs. Clarke noted that no explanation is offered for the five-year delay between 2005 and 2010, before the matter was referred to the Coroner's Court, and again for the three-year

delay between 2015 and 2018, after the verdict in the Coroner's Court. Mrs. Clarke submitted that efforts could and should have been made by the Applicants to seek legal advice before the limitation period expired.

The Law

[11] Though the Act gives the Court a discretion to extend time, it does not state what factors are to be considered in exercising this discretion. However, guidance may be obtained from case law, including cases from the UK, which considered a similar discretion under section 33 of the English Limitation Act 1980. I have considered the cases to which the parties' Attorneys-at-law have referred during their submissions, and I have found these and some others very helpful in identifying the factors which must be considered in determining this application.

[12] In ***Donovan v Gwentoys Ltd*** [1990] 1 All ER 1018, the House of Lords held that a judge has an unfettered discretion under section 33(1) of the 1980 Act to allow an action in respect of personal injuries or death to proceed despite the expiry of the limitation period. The judge is to assess what is fair in the circumstances having regard to the balance of prejudice between the parties. The House of Lords also held that even though section 33(3) sets out factors which the court must have regard to when exercising the discretion, in assessing the prejudice to the parties, the prejudice to the defendant which occurred before the expiry of the limitation period was also a relevant matter for the court to consider. The court is to have regard to all the circumstances of the case, and to take into account prejudice caused to the defendant by the plaintiff's delay over the entire period since the accrual of the cause of action.

[13] Section 33(3) of the 1980 English Act provides for consideration of the following factors:

a) the length of, and the reasons for, the delay on the part of the plaintiff;
b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed.
c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the

plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

d) *the duration of any disability of the plaintiff arising after the date of accrual of the cause of action;*
e) *the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;*
f) *the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.*

[14] The House of Lords in ***Donovan*** reiterated the purpose of a limitation period and indicated the nature of the prejudice that might be caused by a plaintiff's delay in pursuing his claim. At page 1024 Lord Griffith said that *"...the primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim which he never expected to have to deal".* Lord Oliver said at *page 1025*:

> *"A defendant is always likely to be prejudiced by the dilatoriness of a plaintiff in pursuing his claim. Witnesses' memories may fade, records may be lost or destroyed, opportunities for inspection and report may be lost. The fact that the law permits a plaintiff within the prescribed limits to disadvantage a defendant in this way does not mean that the defendant is not prejudiced. It merely means that he is not in a position to complain of whatever prejudice he suffers. Once a plaintiff allows the permitted time to elapse, the defendant is no longer subject to that disability, and in a situation in which the court is directed to consider all the circumstances of the case and to balance the prejudice to the parties, the fact that the claim has, as a result of the plaintiff's failure to use the time allowed to him, become a thoroughly stale claim, cannot, in my judgment, be irrelevant."*

[15] On the facts of the ***Donovan*** case, the defendant was not informed of the cause of the accident or the full extent of the worker's injury at the time of the accident, and the defendant had been unable to investigate until six years after the accident. The House of Lords held that "*in the circumstances the balance of prejudice came down heavily in favour of the defendants since it would be inequitable to require them to meet a claim they would have the utmost difficulty in defending*".

[16] In ***Shaun Baker***, Edwards J said at paragraphs 58 and 59:

> *"Justice must be considered both for the applicant and for the respondents. It is only fair and just for a potential claimant, who has a*

good claim, not to be shut out from the courts to which he has turned for redress. It is however, also justice for a potential defendant to, at some point, be able to rest with the full knowledge that he will not be asked to answer to the merits of a claim, which due to the passage of time, he can no longer adequately respond to…. [I]f a claimant has indeed rested upon his laurels until so much time has passed that it cannot fairly be expected that any cogent response can be made to his claim, then, it may indeed be unjust to allow such a claim to proceed".

[17] In ***Shaun Baker*** a six-year-old boy died as a result of being hit by a motor vehicle driven by the 1st Respondent. The Applicant was the father of the deceased child and filed an application seeking a Court Order extending the time to make a claim pursuant to the Law Reform (Miscellaneous Provisions) Act ("LRMPA") and the Fatal Accidents Act ("the Act"). Edwards J found that the limitation period for a claim under the LRMPA had expired before the claim was filed, and (unlike the Act) there is no rule of law or practice or enabling legislation which allowed a Court to extend the time within which to file such a claim. Further, while time could have been enlarged under the Act, having regard to the young age of the child, there was no reasonable probability of pecuniary benefit to the Applicant as a prospective dependant. Edwards J analysed the law on the Court's power to enlarge time under section 4(2) of the Act and under the LRMPA. In doing so, she considered five of the factors under section 33(3) of the 1980 English Act, namely, the length of the delay, its impact on the cogency of the evidence, the conduct of the defendants, the extent to which the Applicant acted promptly, and the prejudice to both parties. Edwards J was also of the view that the likely prospect of success was an important consideration. Of particular note, the learned judge gave consideration to the issue surrounding the witnesses' credibility and apparent poor memory (during the Coroner's inquest) six years after the incident, and also to the lack of any indication that any of the witnesses would be available to the Respondents as witnesses in a civil case. In the instant case, consideration will have to be given to be the memory of witnesses more than thirteen years after the incident.

[18] In ***Jenetta Johnson-Stewart v Attorney General of Jamaica*** (unreported) Supreme Court, Jamaica, Claim No 2009 HCV 4385, judgment delivered on

December 17, 2009, Jones J found at paragraph 17 that the delay by the Applicant in filing the claim three (3) years after the limitation period had expired would result in prejudice to the Respondent since, due to the passage of time, the Respondent "*would be expected to take a different posture with regard to the protection and retention of records and evidence*". Further, relevant information relating to the claim resided with the Applicant and her Attorneys-at-law from 2003 to 2009. In the instant case, it seems that neither party has any of the relevant information, and even though the verdict of the Coroner's Court was delivered in 2015, the Applicants' Attorneys have not yet obtained a copy of the Court's file or notes of evidence.

[19] In ***Halford v Brookes*** [1991] 3 All ER 559, the English Court of Appeal held that the prejudice to the plaintiff in striking out the action instituted after a nine-year delay, actually outweighed the prejudice to the defendants in permitting it to continue. The Court considered the reason for the delay, how swiftly the plaintiff acted after she received advice, the nature of the evidence and the likely cogency of the evidence.

[20] The different approaches in the cases of ***Donovan*** and ***Halford*** is due to the facts of each case. In ***Halford***, the plaintiff was the administratrix of the estate of her 16-year-old daughter, and issued a writ for trespass to the person in 1987, claiming damages for the injury done to her daughter, following her daughter's murder in 1978. In the civil proceedings, the defendants denied liability and sought to strike out the statement of claim on the ground that it was time-barred. The plaintiff was first advised of the availability of a civil remedy in October 1985, but at the end of the criminal trial in 1978, she understood in general terms that her daughter's death was attributable to the actions of one or both of the defendants. Though the plaintiff had knowledge from 1978 of the basic facts that gave rise to a cause of action, the Court of Appeal indicated at page 570 that:

> "*There is no restriction on the reasons for the delay to which the court must have regard. And in some cases, of which this is one, the plaintiff's ignorance of her legal rights may be a very important factor to be placed on her side of the balance.*"

[21] The Court of Appeal considered that the sole reason for the delay was that the plaintiff did not know of her legal rights and found that shortly after being advised of the availability of a civil remedy in 1985, she applied for legal aid. However, she was not granted a certificate for the commencement of proceedings until March 1987. The Court of Appeal therefore concluded that no legitimate criticism could be levelled against the plaintiff in respect of the delay between 1985 and 1987 since she acted promptly once she knew of the existence of the civil remedy and had done all that could reasonably be expected of her. The Court considered that the lapse of time between 1978 and 1987 was unlikely to reduce the cogency of the evidence or the likelihood of a fair trial. It was held that, based on the facts of that case, the questions of who killed the plaintiff's daughter and whether a confession was made would not depend upon the accuracy of anyone's recollection but essentially on the extent to which the defendants were telling the truth or lying.

[22] The principles distilled from the cases are that consideration must be given to when an Applicant knew of his/her rights to civil remedy, the length of the delay before and after such knowledge and the explanation for the delay. As part of my consideration of the balance of prejudice between the parties, regard must also be given to the nature of the likely evidence and the likely effect of the delay on the witnesses' memories and the cogency of the evidence. Sykes J (as he then was) stated in ***Carlton Edwards et al v Attorney General*** (unreported) Supreme Court, Jamaica, Claim No 146 HCV 2004, judgment delivered on October 10, 2007, that there must be evidence on which the Court can exercise its discretion in favour of the Applicant. Likewise, Master Sharon George (Ag) (as she then was) stated in ***Administrator General (Administrator of Estate of Rohan Wiggins, deceased) v Jermaine Williams*** (unreported) Supreme Court, Jamaica, Claim No 2009 HCV 5364, judgment delivered on May 19, 2011, that even if the delay is found to be inordinate, there must be evidence of prejudice or likely prejudice to the Respondent due to the Applicant's delay.

[23] Consideration should therefore be given to the availability of witnesses and records to both parties. I will therefore consider the application having regard to the factors aforementioned, and assess whether it is in the interests of justice to grant the application.

Analysis

[24] In the instant case, the 1st Applicant understood from May 20, 2015 that she needed to institute civil proceedings, but she delayed in so doing until 2018 and she offers no explanation for this lengthy delay. The instant case is therefore distinguishable from the ***Halford*** case in that, that plaintiff acted swiftly after she obtained advice. Whilst it is not clear when the 1st Applicant received legal advice after May 20, 2015, it is clear that she knew from that date that she needed advice and needed to instruct an Attorney-at-law to file a claim in the Supreme Court. However, she failed to file a claim until 2018. If she gave her Attorneys-at-law instructions in 2015 to institute proceedings and they failed to do so until 2018, such delay ought properly to be attributable to the Attorneys-at-law. Indeed, in ***Donovan***, the House of Lords considered that the plaintiff in that case had a very strong claim against her solicitors for failing to issue a protective writ. Counsel Ms. Franklin indicated to this Court that prior to civil proceedings being instituted, efforts were made to negotiate with the Respondent. However, the affidavits filed on behalf of the Applicants do not indicate when legal advice was obtained, or when their Attorneys-at-law were instructed to negotiate with the Respondent or when they were instructed to file a claim. Also, there is nothing in the affidavit evidence to suggest that there was any conduct by police or the Respondent itself which contributed to the delay in the filing of the claim, or which merits criticism. In the circumstances, I can only rely on the information available to me, which suggests that between 2015 and 2018 the Applicants delayed unreasonably in instituting civil proceedings.

[25] The instant case also seems distinguishable from the ***Halford*** case in that there appeared to be no uncertainty surrounding the allegations in the ***Halford*** case and the Court of Appeal held that, based on "*the starkness of*

the facts and since the case turned on the veracity of the defendants, the lapse of time was unlikely to reduce the cogency of the evidence or the likelihood of a fair trial". There, the deceased died as a result of multiple stab wounds. The juvenile defendant initially confessed to stabbing the deceased but alleged that he had been provoked. He later retracted his confession and sought to incriminate his stepfather, who had given a statement seeking to incriminate the juvenile. Based on the evidence, no other persons could conceivably have been involved in the murder and provocation was not a live issue. In the instant case however, there appears to be some uncertainty surrounding the events of August 4, 2005 and the role played by each police officer. The passage of 13 years seems likely to reduce the cogency of the evidence. For example, it is not apparent which, if any of the three police officers, discharged their JCF issued firearms and why, and what the sequence of events were. The DPP's letter dated February 2, 2010 made reference to the statement of one Mr. Gregory Edwards. However, the extent of Mr. Edwards' observations on August 4, 2005 and the likely nature of his evidence remains unclear. The Applicants' affidavits also do not indicate whether or not Mr. Edwards gave evidence at the Coroner's inquest and his whether his whereabouts are known at this time.

[26] It is accepted that the verdict in the Coroner's Court was one of manslaughter by gross negligence. However, it remains unclear what evidence was presented to the jury at the inquest and whether or not the jury heard from any of the police officers allegedly involved in the shooting. It will not be sufficient for the Applicants simply to rely on the verdict to establish liability on the part of the Respondent, just as a certificate of conviction in a criminal court would not be sufficient to establish civil liability (see ***Hollington v Hewthorn*** [1943] 2 All ER 35). There must be some evidence to mount a case for the Applicants. Likewise, the Respondent ought to be in a position to respond to the claim. If the delay has resulted in the inability to locate witnesses or a fading of witnesses' memories, this would mean that the Respondent is prejudiced.

[27] I examined the affidavits filed in respect of this application in an attempt to assess the nature of the evidence that is likely to be adduced at a trial and whether the cogency of the evidence is likely to be affected by the thirteen-year delay in instituting proceedings. It is accepted that there must have been some evidence before the Corner's Court for the jury to reach the verdict it did. However, the Applicants' affidavits do not disclose the evidence on which they propose to rely at a trial, and it is unclear whether reliance is to be placed on hearsay evidence. I have already indicated my concerns regarding the dearth of information about the statement of potential witness Gregory Edwards, and his availability. I have noted that though the 1st Applicant was the wife of the deceased, there is no evidence in her affidavit that she was at home on August 4, 2005 at the time the police entered the address, or that she witnessed any of the events.

[28] Mrs. Clarke has submitted on behalf of the Respondent that, as a result of the Applicants' delay, the Respondent has been disadvantaged in terms of her ability to collect evidence, locate witnesses and secure their attendance at a trial. It is my understanding that in 2005, the Bureau of Special Investigations ("BSI") would have been responsible for the investigation of fatal shootings involving the police, and would have forwarded their file to the DPP for a ruling as regards whether or not to charge the police officers involved. It is clear that none of the officers were charged. However, what is not clear is the nature of the evidence that was referred to the DPP between 2005 and 2010, and subsequently referred to the Coroner's Court in 2010. In the DPP's letter addressed to the Assistant Commissioner of Police, the DPP recommended that a departmental enquiry be conducted to ascertain whether the JCF Use of Force Policy was adhered to. It is not clear whether any such internal enquiry was conducted and whether any disciplinary action was taken in respect of any wrongful conduct by any of the three police officers.

[29] It seems to me that the Respondent might have an opportunity to investigate the claim by contacting the BSI and the JCF Commissioner's office. However, there is also a possibility that any records created or obtained thirteen years

ago by the BSI or by the Commissioner's office in respect of the incident on August 4, 2005, might be lost or misplaced at this time. Neither of the parties have said that efforts have been made to locate these records or that these records are available. Whilst it ought to be expected that government departments such as the BSI and the JCF would retain important documents for a period, if these departments were not put on notice of a possible claim for damages, it is possible that such records might have been archived after a reasonable period of time. There is nothing in the 1st Applicant's affidavit to suggest that she ever made a verbal complaint or wrote a letter to the JCF between 2005 and 2015 in respect of her husband's death. In the circumstances, it seems that neither the JCF nor the Respondent had early notice of the claim. Though Ms. Franklin indicated during her submissions that her firm made attempts to negotiate with the Respondent before the claim was filed, it seems that this would have been at some point after the verdict in the Coroner's Court in 2015. This would have been more than ten years after the incident and as such, it could not be said that the Respondent had early notice of the claim. I conclude therefore that due to the Applicants' delay, the Respondent would not have been put in a position to investigate the claim and to take steps to preserve records or locate witnesses at an early stage.

[30] I am guided by dicta in ***Cain v Francis and McKay v Hamlani*** [2009] 3 WLR 551 where Lady Justice Smith indicated that in her view, the issue was not just a question of the length of the delay, but rather, the effect the delay has had. At paragraphs 57 and 73 the learned judge said this:

> *57. "…. it does not seem to me that the length of the delay can be, of itself, a deciding factor. It is whether the defendant has suffered any evidential or other forensic prejudice which should make the difference."*
>
> *73. "… In the exercise of the discretion, the basic question to be asked is whether it is fair and just in all the circumstances to expect the defendant to meet the claim on the merits, notwithstanding the delay in commencement. The length of the delay will be important, not so much for itself as to the effect it has had. To what extent has the defendant been disadvantaged in his investigation of the claim and/or the assembly of evidence, in respect of the issues of both liability and quantum? But it will also be important to consider the reasons for the delay. Thus, there may be some unfairness to the defendant due to the delay in issue but the delay may have arisen for so excusable a reason, that, looking at the*

matter in the round, on balance, it is fair and just that the action should proceed. On the other hand, the balance may go in the opposite direction, partly because the delay has caused procedural disadvantage and unfairness to the defendant and partly because the reasons for the delay (or its length) are not good ones."

[31] It seems to me that the Respondent stands to be seriously prejudiced in not having an adequate opportunity to meet the claim. Had the claim been brought in 2005 or within the limitation period, the Respondent would have had an opportunity to interview witnesses and collect witness statements from potential witnesses and to preserve any documentary evidence including any forensic or ballistic reports or photographs of the scene. Even if investigation records and witness statements compiled in 2005 can still be located at this time, it is not clear whether or not the two potential defence witnesses are in fact available to attend the trial. Further, even if the witnesses are available, I feel compelled to agree with Mrs. Clarke's submission that the cogency of the evidence will be affected by the passage of thirteen (13) years as the recollection of witnesses would be affected. I am also mindful that a further four (4) years is likely to pass before the matter is tried.

[32] The prejudice to the Applicants if leave to proceed with their claim is not granted is obvious. Neville Lemmon is now deceased and his relatives will not be able to receive compensation for any criminal or civil wrongdoing by the police if time is not extended. The loss of a life is a serious matter and the law affords a deceased's dependants the right to seek justice and compensation for any criminal or civil wrong. However, there is nothing in the Applicants' affidavits to suggest that they treated this matter with the seriousness that it deserved or that they took steps to seek information or advice at an early stage. It seems that between 2005 and 2010 an investigation was carried out and that a file was compiled and referred to the DPP for a ruling. Unlike the facts in the ***Halford*** case, in the instant case there was no criminal prosecution in relation to the fatal shooting. It would seem only reasonable for the Applicants to make enquiries regarding the progress of any investigation between 2005 and 2010. However, the Applicants have not said what they did between 2005 and 2010 to seek redress, or to seek information at a time

when it might have appeared that no progress was being made with any investigation. While I appreciate that the Applicants are laypersons, it seems unusual that they did not seek legal advice between 2005 and 2010, or seek to write to the DPP for information during that period. Though the Notice of Application stated that the Applicants encountered difficulties in obtaining information and statements from police officers concerning the death of Mr. Lemmon, no reference is made to this in any of the Applicants' affidavits. Further, there is no explanation for the delay between May 20, 2015 and April 4, 2018. The Applicants simply did not act promptly after they knew that the acts of the JCF officers might be capable of giving rise to an action for damages.

[33] The limitation period is set to prevent very stale claims being filed. I have considered the length of the delay and the lack of an explanation for the delay between 2005 and 2010 and again between 2015 and 2018. I have also considered the uncertainty surrounding the nature of the evidence on which the Applicants would rely, the likely prejudicial effect of the delay on the Respondent's ability to gather and present evidence, and the effect of the delay on the cogency of the evidence. Having regard to these considerations, I find that the balance of prejudice is in favour of the Respondent, and it does not seem fair and just that the action should proceed at this time

Disposition

[34] The Court therefore makes the following Orders:

1. The application is refused.
2. The Claim Form and Particulars of Claim are struck out.
3. No order as to costs.
4. Leave to appeal granted.