Damages — assessment — deceased, died in police custody — damages under Law Reform (Miscellaneous Provisions) Act and Fatal Accidents Act — whether entitled to constitutional redress. [Cases referred to p21]

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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1993/F152

BETWEEN	**DORIS FULLER (Ad. Estate Agana Barrett, dec'd)**	**PLAINTIFF**
AND	**THE ATTORNEY GENERAL**	**DEFENDANT**

Messrs. Earl Witter, Barrington Frankson and Miss A. Frankson for Plaintiff

Messrs. Lennox Campbell and Audley Foster for the Defendant.

Remedies

Heard: June 19, 20, 22, 23, July 5, 1995

Coram: Harrison J. Ag.

Assessment of Damages

This assessment raises important issues of law and I am most grateful for the tremendous assistance Counsel have given this Court.

Agana Barrett, a carpenter by trade, was twenty-one years old when he died on or about the 24th October 1992. He and a number of men were detained by the police on the 22nd day of October, 1992 and whilst in police custody, he was discovered dead.

The deceased died intestate, unmarried, and without children but is survived by his parents Doris Fuller and Reuben Barrett. On the 18th day of June 1993, Letters of Administration were granted to Doris Fuller.

By Writ of Summons dated the 5th October 1993 an action was filed by the Administratrix to recover damages under the Fatal Accidents Act for the benefit of the dependants of the deceased as well as under the Law Reform (Miscellaneous Provisions) Act for the benefit of the Estate of the deceased. The writ also sought to recover damages for Assault, False Imprisonment and damages and/or compensation by way of Constitutional redress. Aggravated and/or exemplary damages were also sought.

The Attorney General had entered Appearance but defaulted in filing a defence. Interlocutory judgment was therefore entered and pursuant to an order made on the 17th day of November 1994 the matter came before me for Assessment of Damages.

Summary of the Evidence

Shawn Coleman, one of the survivors, testified that several men including the deceased and himself were taken from Granby Pen on Road to Constant Spring Police Station by the police on Thursday the 22nd day of October 1992. After being finger-printed and processed they were placed in different cells at Constant Spring Station. Coleman stated that the deceased, himself and sixteen others were placed in cell number 3. By Friday, one more man was added to their numbers.

Coleman gave a graphic description of conditions which existed in this cell. The cell which was about 8ft. x 7ft. in size, was extremely hot due to the congestion. There was very little air available and this was only accessible through small holes in a metal door for the cell. The cell had no windows and they were surrounded by concrete walls. Water dampened the floor and in order to quench thirst, perspiration and water dripping from the walls had to be used as no drinking water was made available for them. He also testified that one man had to drink his own urine in order to quench his thirst. After being released from the cell for lunch at 1:00p.m. on the Friday, they were never fed again and were locked up thereafter without further release until Saturday morning. There was constant banging on the cell door and shouting by the detainees but they received no attention from the police. After two nights of extreme agony three men including the deceased Agana Barrett were eventually found dead in cell number 3 the Saturday morning.

The post-mortem examination report, Exhibit 1, revealed that Agana Barrett's death was attributed to cardiorespiratory failure consistent with cerebal hypoxia and hypercapnia. Blunt force injuries were also noted and although they were not fatal they were considered contributory.

These injuries included lacerations and abrasions on different parts of the body, a dislocated shoulder joint and a long stablike superficial laceration to the upper chest.

The evidence also disclosed that the deceased was born on the 24th day of October, 1971. His father testified that the deceased was a second class carpenter and earning between $3,000 to $5000 per fortnight at the time of death.

The deceased lived with his mother up to the time of death and her evidence revealed that he contributed between $1500 to $2000 per fortnight towards the running of the house. She described him as a "faithful and humble son" and one who gave no "worries."

The plaintiff further testified that the funeral expenses amounted to $150,000.00. She stated that she had received $25,000.00 from the Minister of National Security as a contribution towards the funeral expenses. A sum of twenty-five thousand dollars ($25,000.00) was paid to the undertakers to cover the cost of casket, wreaths and burial spot at Dovecot Memorial Park. She admitted that this was an adequate sum to take care of the burial. The balance of $125,000.00 was as a result of expenses incurred for providing food, drinks and entertainment for several people during the two weeks before the funeral. This "set up" went on daily over a period of two weeks.

Miss Fuller also recalls that after the funeral she had attended a meeting at the Ministry of National Security where several government officials were present. She further recalls that they did indicate to her that they had regretted what had happened.

Damages under the Law Reform (Miscellaneous Provisions) Act and Fatal Accidents Act.

I now move on to consider the question of damages under the Law Reform (Miscellaneous Provisions) Act and Fatal Accidents Act and I bear in mind the practical approach adumbrated by Lord Wright in Davies

v Powell Duffryn and Associated Collieries (No. 2) 1 All E.R. at page 665 where he states inter alia:

> "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities..."

In the Jamaican context, I would say that the assessment of damages under these Acts is a hard matter of dollars and cents subject to the element of reasonable future probabilites.

Law Reform (Miscellaneous Provisions) Act

Re Multiplier

My first task is to fix a multiplier. The deceased died at age twenty-one. In the absence of unforseen circumstances it is reasonable to conclude that he would have worked up to age 60, which would make the number of lost years equal to 39 years. Mr. Frankson submitted that a multiplier of 16 should be used, whereas Mr. Campbell argued that the multiplier ought to be 12.

I will say at the very outset that I do not agree with Mr. Campbell that a multiplier of 16 is too high. In Jamaica Public Service Co. Ltd v Elsada Morgan et al SCCA 12/85 delivered May 5, 1986 (unreported) the plaintiff was aged 25 years at the time of death. He was in excellent health. The Court of Appeal approved a multiplier of 14 years. Campbell J.A., delivering the judgment of the Court said:

> "What is plain from this case is that this court in considering a multiplier of 14 years as appropriate for a healthy man aged 25 years could not consistently approve a multiplier of 14 years much less 15 years as also appropriate for a person who is ten years older."

Implicit from this statement is, that the Court will consider using a higher multiplier where the deceased was young and in fairly good health. The cases also show that a higher multiplier is used especially where the deceased was young and had been in steady employment up to the time of death. These factors tend to show that the deceased had

a settled life-style and would have been looking forward to a reasonably comfortable future.

Here are a few examples where a high multiplier was used. In Suit C.L. A018/79, Administrator General (Ad. Estate Derrick Grant), delivered July 1983 the deceased, a male security guard aged 28 at death, a multiplier of 15 was used (See Khan on "Personal Injury Awards" Vol 3 at page 251). A multiplier of 16 was used in Wesley Johnson's case C.L. J011/81, a male student aged 18 at the time of death (See Khan in the above works at page 251). In Alicia Dixon (Administratrix estate Christopher Dixon) v Harris and the Attorney General delivered on February 25, 1993 by Harrison J. Ag., a multiplier of 14 was used in respect of the deceased who was an air pilot, 27 years old at the date of death. Also, in Royal Bank Trust Company and Anor. (Ad. Estate Clifford Anthony Silvera, deceased) Harrison J. in delivering judgment on the 19th February, 1990, held that a multiplier of 16 was appropriate in respect of the deceased who was 28 years old at the time of death.

The deceased in the instant case died at 21 years of age. There is undisputed evidence that he was a healthy youngman. I hold therefore that a multiplier of 16 would be appropriate in this case.

Multiplicand

The evidence of Reuben Barrett discloses that at the time of death, the deceased worked with him as a second class carpenter and was paid between $3,000 to $5,000 fortnightly. Income tax and other statutory deductions were not applied to these earnings. Neither was there any documentary proof of earnings. Reuben Barrett testified however, that when the deceased worked for periods of ten days he would receive $3000 and when he worked additionally, on week-ends he would pay him $5000.00.

There is indeed no evidence showing how often the deceased did work on week-ends. This court is also being told that the deceased

did "roasts", that is, extra carpentry work on some week-ends; but, there is no evidence to support his earnings from these extra jobs. I conclude therefore, that his average weekly income at the time of death should remain at $1500.

Was there any evidence that there would have been a change of weekly earnings had the deceased remained alive? There was some evidence coming from Reuben Barrett that based on Government rates, a grade 2 carpenter now earns $400 per day. Mr. Campbell submitted however, that the Court should reject the figure of $400 as there is no evidence apart from what the father said that this figure represented current Government rates. I say however that I would accept it as the figure which the deceased would have progressed to bearing in mind that his minimum earnings at death was $300 daily.

By applying $400 daily, for a 10 days work period this would now result at a minimum of $4000 fortnightly. I am of the view that the pre-trial earning should be accepted as $2000 weekly and I so hold.

Having decided that the average net earnings at the time of death is $1500 weekly, the annual earning would be $78,000.00. I am of the opinion however, that this figure has to be discounted having regard to the evidence of Reuben Barrett that they worked only 90% of the year. When discounted, the figure stands at $70,200. This sum therefore represents the multiplicand.

Computation of loss of future earnings

In Godfrey Dyer and Anor. v. Gloria Stone (Executrix, Estate Edward Joslyn Stone, dec'd.) SCCA (unreported) delivered on the 9th July, 1990 Campbell J.A, had set out in clear and lucid language the steps which must be followed in ascertaining the loss of future earnings for the "lost years". I will now set out these steps below:

1. Ascertain from credible evidence the net income of the deceased at the date of death.

2. Where a relatively long period has elapsed between the date of death and trial of the action the deceased's net income at date of trial must be estimated by reference to the net income being earned at the date of trial by persons in a corresponding position to that held by the deceased at the time of his death or by persons in a postion to which the deceased might reasonably have attained. The average of the net income at 1 and 2 is considered to be the average annual net income of the deceased for the pre-trial period.

3.(a) Total the expenditures at the time of death which are exclusively incurred by the deceased to maintain himself reasonably consistent with his status in life.

(b) Add to (a) a portion of the joint living expenses like rent and electricity which under the Fatal Accidents Act would have been treated as wholly for the benefit of the dependants.

(c) Calculate the total of (a) and (b) as a percentage of the net income at the date of death.

4. Reduce the average net income for each of the pre-trial years by the percentage at (c). The remaining balances constitute lost earnings for these years.

5. The exercise is repeated for the post trial years but instead of deducting the living expenses which were computed as a percentage of the net income at the date of death from the average net income they are deducted from the actual estimated income at the date of trial.

Calculation for Pre-trial

Net annual income at date of ~~trial~~ death - $70,200.00

Net annual income at date of trial - $93,600.00

$163,800.00

Average Annual net income for pre-trial $\frac{163,800}{2} = \$81,900$

Total expenditure -$60,000.00

[This figure represents fortnightly contribution to mother, busfare, lunch, drinks and entertainment and sums spent by the deceased on himself]

Expenditure as a % of net income at time of death - $\frac{\$60,000}{70,200} = 0.85$

Lost earnings for pre-trial years = $81,900 - $60,000 x 2.8 years = $61320

Post trial Calculation

Lost earnings for post trial years = $93,600 - $60,000 x 13.4 years=$450,240

Total lost Earnings = $61320 + $450,2400 = $511,560.00

Damages under the Fatal Accidents Act

Under the Fatal Accidents Act, the action enures for the benefit of the dependants of the deceased at the time of his death. A dependant, referred to as a near relative, is one who can satisfy a court that at the time of the death of the deceased he was in receipt of a benefit from the deceased and that the death has deprived him of such benefit.

From the evidence adduced, I am satisfied that Doris Fuller, mother of the deceased is the sole dependant. The evidence which remains uncontradicted is that the deceased contributed between $1500 to $2000 fortnightly to his mother. I therefore find that there would be an average

contribution of $1750 fortnightly. She is now 54 years of age and Counsel for the plaintiff suggested that a multiplier of eleven (11) should be used in order to compute this dependancy. Mr. Campbell on the other hand suggested a multiplier of eight (8). He has given the following reasons for the use of 8. They are:

1. The age of the dependant
2. The prospects of the deceased marrying or the forming of a relationship that would create dependence which would have the effect of either extinguishing or reducing the level of contribution.

What is the evidence in relation to the deceased's prospects of marriage or forming a common law union? The evidence of Miss Fuller is that the deceased loved children. He would buy books and pencils for them from time to time. She had heard Agana talked about his "chick" and that he had told her that he was going to let her know her one of these days. Indeed, she was looking forward to having grandchildren.

Mr. Campbell cited Dolbey v Goodwin 1955 2 All E.R. 166 in support of his submissions. In that case Hodson L.J. in reference to the deceased who was a relatively young man living with his mother at the time of death, said inter alia at page 168:

> "...It seems to me exceedingly likely that he would marry and when he married, however much the moral claims of his mother might pull on him, yet the claims of his wife, who would be the principal person to share in his prosperity, must come first. If he had succeeded in his life as appears likely, he would no doubt, have required money for other purposes, to invest in the future as well as for his wife's maintenance, and the mother, in those circumstances might have received less..."

Mr. Frankson has acknowledged the possibility of marriage and children and has taken these factors into consideration in arriving at a multiplier of 11. But, it is my view however, that the mother's age must also be considered together with the possibility of marrying and having children. I therefore hold that a multiplier of 8 would be appropriate in the circumstances.

Computation of Dependancy

Pre-trial

24th October 1992 - 19th June 1995 = 32 months

Annual average contribution at $1750 per fortnight = $45,500.00

$45,500.00 x 2 2/3 = $121,333.33

Post trial

The remainder of the years purchase = 64 months (5 years and 4 months)

$45,5000.00 x 5 1/3 = $245,700.00

Total award under the Fatal Accidents Act = $367,033.33

Funeral Expenses

A sum of $150,000.00 has been claimed under the head of Special Damages. Mr. Frankson submitted that this sum was reasonable but it should be discounted by $25,000.00 which was received from the Ministry of National Security to assist with the funeral. He has argued that the balance of $125,000.00 had been proved. He was of the view that this death was not a normal occurrence so, it would have been reasonable for the plaintiff to keep the "set-up" right up to the date of the funeral.

Mr. Campbell submitted on the other hand that the sum of $150.000.00 claimed as funeral expenses was excessive and unreasonable. The evidence disclosed that this sum included the cost of burial, providing disco music, goats, drinks and food for people who came to the home during the two weeks period of mourning. He cited and relied upon the case of Hart v Griffiths-Jones [1948]2 All E.R. 729. There, it was stated inter alia:

> "...One other matter I have to consider - the funeral expenses which were claimed at the figure of L39.16s. 0d. Part of that account is for the embalming of the body, and it has been suggested that that is an extravagance which should not be included in funeral expenses. I do not take that view. I think that the parents of a child who has been killed are not acting unreasonably if they have the body embalmed, and so I award the full amount of L39. 16s. 0d as claimed under the head of funeral expenses.

> By way of an amendment a sum of L225 was added to the plaintiff's claim in respect of the cost of a monument to be erected over the grave of this child. It is not for me to pass judgment on people's views in spending sums on monuments over graves, although I cannot help thinking that a greater duty is owed to the living than to the dead. But I am clear that this sum is irrecoverable as funeral expenses under Law Reform Act."

In Göldstein v Salvation Army Assurance Society [1917] 2 KB 297 McCardie, J. stated that funeral expenses must be reasonable and proper and said:

> "He [the judge] must remember the station in life, the occupation, and the creed of the dead person, and the general circumstances of the case, and he ought not to allow as a funeral expense anything beyond these reasonable and proper limits."

Rowlatt, J. in his judgment in the said Goldstein case stated inter alia:

> "It is a well-known and inveterate practice acquiesced in by everybody that a tombstone, like mourning, is not allowed as part of the funeral expenses which are deducted in estimating estate duty...I am guided by what is reasonable."

Mr. Campbell expressed the view that a "wake" would have been a reasonable event having regard to the plaintiff's evidence that this was the practice she was accustomed to in her Parish. However, he asked the Court to award a sum of $15,000.00 as this could be considered reasonable expenditure for such an event. He also submitted that the sum of $25,000.00 given by the Ministry of National Security towards the funeral, should be considered a benefit consequent on the death of Agana Barrett and as such should be included to offset the funeral expenses.

The test is one of reasonableness as the cases show. I cannot accept the argument that the circumstances of this case caused this type of expenditure. The legal position is that a "set up" may properly be considered as part of the funeral expenses if it is a reasonable expenditure for the persons in the position of the deceased and of his relatives who are responsible for the actual cost of providing drinks and food. But, so far as it is done to show the love and affection for the deceased, the Court should be extremely careful how it makes its award.

I have reached the conclusion that this type of expenditure was extremely extravagant. The plaintiff has decided to observe memoriams in like fashion but instead of two weeks she will confine it to a single day. She did not think that it would be more fitting to donate the money to some charitable cause.

There has been no documentary proof of these expenses. Neither has evidence been satisfactorily adduced in relation to the expenses to properly assist the Court. While there will always be some element of speculation, the court's finding cannot solely be based on speculation. I must strongly recommend the words of advice given by Goddard C. J in Bonham-Carter v Hyde Park Hotels Ltd. [1948] T.L.R. 177 at 178 where he said:

> "Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars and so, to speak, throw them at the head of the Court, saying: 'this is what I have lost, I ask you to give me damages.' They have to prove it."

Making the best estimate that I can, I would regard the sum of Fifteen Thousand dollars ($15,000.00) as a reasonable sum for expenses in relation to this "set-up". I also treat the sum of Twenty-five thousand dollars ($25,000.00) given by the Ministry of National Security, as a benefit consequent on the death of Barrett. The sum of $15,000.00 is therefore allowed for funeral expenses.

General Damages

Mr. Witter submitted that the Plaintiff was entitled to General Damages in respect of:

1. Assault and Battery committed upon the deceased.
2. False imprisonment of the deceased.
3. Constitutional redress by virtue of section 25 of the Constitution of Jamaica due to infringement of the deceased's fundamental rights and freedom under the Constitution.

Claim for Assault and Battery

The evidence revealed that the deceased was fingerprinted and thereafter detained in a cell. Mr. Witter submitted that the assault and battery comprised the finger printing of the deceased without lawful authority and the application of force indirectly on the deceased. He argued that the deceased was exposed to unbearable heat and lack of oxygen in a cell which was 8ft x 7ft in size, housing nineteen men, for an unconscionably long period of time.

According to the postmortem examination report death was attributed to cardiorespiratory failure consistent with cerebal hypoxia and hypercapnia. Hypoxia has been described as the deprivation of oxygen and hypercapnia as excess supply of carbon dioxide. The post-mortem examination also revealed inter alia, that the brain showed congestion and oedema with cerebellar tonsillar herniation. The heart was grossly unremarkable except for petechial haemorrhages. There was also pulmonary congestion.

Mr. Witter referred to "Simpson's Forensic Medicine" 10th Edition, by Bernard Knight, Professor of Forensic Pathology, where it states at page 139 that functionally, a person with obstructed air entry will show various phases of distress and physical signs listed hereunder:

1) Increased efforts to breathe, with facial congestion and commencing cyanosis (blueness of the skin).
2) Deep laboured respirations, with a heaving chest if free to move, deepened cyanosis and congestion, with appearance of petechiae if venous return is impaired.
3) Loss of consciousness, convulsions, evacuation of bladder, vomiting. If continued, respirations become shallow and cease, pupils dilate and death ensues.

Mr. Witter submitted therefore that the gravity of the battery upon the deceased, no doubt would have caused pain and suffering before death. He submitted that although little guidance if any can be had from previous awards, a not unreasonable award would be somewhere in the region of five million dollars.

The Court did not have the benefit of hearing Dr. Clifford as the post-mortem examination report was admitted in evidence by consent. But, it cannot be disputed that the Doctor's evidence would have been of tremendous

help had he been called to give evidence. He could have explained for example, the degree of pain and suffering which the deceased experienced, and the likely duration. He could also have explained whether some or all the phases of distress and physical signs mentioned in the above works by Professor Bernard Knight, would have taken place. It would have been helpful also to ascertain how quickly the deceased lost consciousness after he began showing signs of distress. Coleman's evidence is equally unhelpful as he was unable to see the deceased in the darkness which had engulfed the cell.

It is my view however, that an award of One Hundred and fifty thousand dollars ($150,000.00) for assault and battery would be reasonable in all the circumstances.

Claim for False Imprisonment

Mr. Witter asked the Court to consider no less than $50,000.00 under this head. According to Mr. Campbell, nothing has been demonstrated to the Court to distinguish the circumstances of Leroy Samuels (a survivor of cell number 3) from that of the instant case. (See Leroy Samuels v The Attorney General of Jamaica C.L 1992/S415 delivered 11th November, 1994.) He submitted that an award of $50,000.00 would be justified.

In the circumstances, I believe that an award of $50,000.00 would be appropriate and I therefore award this sum in respect of the claim for false imprisonment.

Exemplary /Aggravated Damages

The plaintiff did not pursue the claim for exemplary damages. Instead, Mr. Witter submitted that this was a proper case to award aggravated damages.

Mr. Campbell on the other hand, submitted that it was not intended under the Fatal Accidents Act or the Law Reform(Miscellaneous Provisions) Act to award punitive damages. The latter Act expressly prohibits an award of exemplary damages.

It was contended by Mr. Campell that damages under the Fatal Accidents Act were limited to actual financial loss by reason of the death. Section 4(4) of this Act provides inter alia:

> "...the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person and the amount so recovered (after deducting the costs not recovered from the defendant) shall be divided accordingly among the near relations."

He argued that the words "actual" and "reasonably expected" were clear and unambiguous and they should be given their ordinary dictionary meaning. For these reasons, he submitted that aggravated damages were excluded under this Act. The purport of the Act, he says, is to compensate dependants for pecuniary loss and it will not countenance awards which are subjected to the deceased and which are punitive in nature.

The basis of the action as I understand it, is one dealing with pecuniary losses suffered by the dependants in consquence of the deceased's death. Nothing may be given by way of solatium - see Barnett v Cohen [1921] 2 K.B. 461. As Lord Wright said in Davies v Powell Duffryn Associated Collieries Ltd. [1942] A.C. 601 at page 617, "It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilites.." In my judgment therefore, aggravated damages are excluded under the Fatal Accidents Act.

Mr. Witter argued that if the Legislature had intended to exclude aggravated damages as a head of award under the Law Reform (Miscellaneous Provisions) Act, it would have said so by including those words in the exclusionary provision of the statute. He contended however, that by not doing so, it is plain that aggravated damages may be awarded under this Act.

The general principle is that the estate may recover damages for all the losses which the victim had sustained before his death and for which he would have recovered compensation if he had survived to pursue his action. I would therefore agree with Mr. Witter that the

Law Reform (Miscellaneous Provisions) Act does not exclude the award of aggravated damages.

It is my considered view therefore that I must have regard to any aggravating feature in so far as it relates to the detention of the deceased and the circumstances relating to this detention.

Mr. Witter submitted that the plaintiff entitled to aggravated damages for the following reasons:

1) the conduct of the jailers who are servants or agents of the State.

ii) the wilfulness exhibited by the jailers in the manner and degree of the incarceration to which the deceased was subjected to.

iii) the malice (ill-will) exhibited by the jailers.

iv) the good character and reputation of the deceased.

v) the supposed apology.

What is the evidence which has been presented to support this award? The conditions under which the men were subjected to whilst in the cell have been alluded to already. On Friday morning when the men were taken from the cell, they were told by the police that the papers relating to their finger-print records would be forthcoming anytime between 10:00 a.m. and 11:00 a.m. When the men told the police of the conditions which existed in the cell they were told that they should remain in the passage while checks were made for the papers. The police it is said,

returned and told them to co-operate and return to the cells as their papers had been received. The men pleaded with the police for them to remain in the passage leading to the cell but they were nevertheless taken back to the cell. During the night, the men kept banging on the cell door. This loud banging went on for almost the entire night. The men shouted, crying out for help, but the only response they got was the sound of dominoes and a radio playing somewhere in the station. The louder they shouted, the higher was the volume on the radio.

I also take into account that there was an apology extended to the Plaintiff by officials of the Ministry of National Security and Justice.

I am of the view therefore, that in light of the conduct of the police towards the deceased and others, the conditions under which they allowed the men to remain in the cell, and adding to their numbers when they knew what the conditions were, are factors which warrant the grant of aggravated damages in this case. I therefore award the sum of $100,000.00 under this head.

Claim for Constitutional Redress

Mr. Witter submitted that the Court ought to assess damages for constitutional redress notwithstanding the proviso to section 25. It was his view that the evidence of Coleman and the pleadings which have not been traversed, amount to the most horrendous illustration of the inhumanity of the jailer to the jailed in modern times, if not in all recorded history. He argued that the experience of the men in cell No. 3 far surpassed those in the other cells and what took place in the "Dark Hole of Calcutta."

CONSTITUTION OF JAMAICA

Section 25 provides inter alia:

> "(1)Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this

> Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person is entitled:
>
> Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law. (emphasis mine.)

Mr. Witter strongly urged the Court that it was perfectly obliged to "cast off the shackles" of the proviso and to award constitutional redress by means of compensation as prayed for. He argued that despite the proviso in the Bahamian Constitution, the Supreme Court in the case of Tamara Merson v Drexel Cartwright and the Attorney General Suit No. 1131/87 (unreported) delivered 22nd June, 1994, had awarded compensation for breaches of the plaintiff's constitutional rights in additon to damages for false imprisonment and malicious prosecution.

In support of his submissions relating to compensation for constitutional redress, Mr. Witter drew my attention to and relied on a number of Commonwealth decisions which dealt with breaches of fundamental rights. They include Attorney General of St. Christopher, Nevis and Anguilla v Reynolds [1979] 3 All E.R. 129, Jamakana V Attorney General [1985] LRC 569, Maharaj v Attorney General of Trinidad and Tobago [1979] A.C. 385, and The Attorney General of Gambia v Jobe [1985] LRC 556. I am most grateful to him for making these cases available.

Mr. Campbell for his part, submitted that the Court could not "shake off the shackles" of the proviso in light of the decisions in

Leonard Graham v The Attorney General SCCA No. 6/83 (unreported) delivered March 17, 1989, and Kemrajh Harrikissoon v Attorney General for Trinidad and Tobago [1979] WLR 62.

It is a fact that a number of countries have similar Constitutional provisions providing compensation for contravention of fundamental rights and they have been considered in a number of cases before the Courts. But, as Daly C.J. stated in the Jamkana's case, care must be given to take into account differences however slight, in the form of the Constitutions with which the Courts were concerned. For example, the proviso in section 25 of the Constitution of Jamaica is noticeably absent in the Constitution of Trinidad and Tobago, hence, the Maharaj case is clearly distinguishable. The Jamkana case which originated from the Solomon Islands has a proviso which uses the words, "may exercise its powers", unlike its Jamaican counterpart which states inter alia, that the Supreme Court "shall not exercise its powers under this subsection if it is satisfied that adequate means of redress... are or have been available..."
In relation to the Bahamian Constitution, I gather that the section dealing with constitutional redress is indeed similar to that of section 25 of the Constitution of Jamaica. I am not aware however, that the case of Tamara Kersen (supra) has been tested on appeal. It is a case at first instance, and I am not convinced that I should rely on it.

In so far as the instant case is concerned, I am bound by the decision of Leonard Graham (supra). In that case Carey J.A had stated inter alia, at page 5:

> "Section 25 of the Constitution gives to the Supreme Court power to grant relief where some citizen alleges a breach of his fundamental rights, but also provides some checks and balances by permitting the Court to decline jurisdiction..."

At page 7 the learned Judge of Appeal continued.:

> "...The proviso in terms obliges the Court to decline jurisdiction if adequate means of redress are available under any law. There is authority for venturing to suggest that Section 25 in providing redress for

> infringements of fundamental human rights ought to be reserved for breaches where redress in the sense of compensation is not otherwise available."

In that case section 79 of the Justices of the Peace Jurisdiction Act provided adequate means of redress for the unlawful detention of the appellant pursuant to the order of a Magistrate which she had no jurisdiction to make.

I am satisfied that in respect of the matter before me, adequate means of redress are available. The plaintiff is therefore caught by the proviso to section 25 of the Constitution and accordingly the claim for an award for breach of the deceased's constitutional rights cannot be granted.

Conclusion

On the principle that where the beneficiaries are the same under both the Fatal Accident and Law Reform Acts, the damages recoverable under the Law Reform (Miscellaneous Provisions) Act should be taken into account in assessing the Fatal Accidents Act. No award is made therefore under the Fatal Accidents Act (See Gammel v Wilson [1981] 1 All E.R. 578).

Damages are therefore assessed for the Plaintiff as follows:

1. Law Reform (Miscellaneous Provisions) Act

Plaintiff (deceased's mother and sole dependant)	-	$511,560.00
Loss of Expectation of life	-	$3,000.00
Funeral Expenses	-	$15,000.00
Total	-	$529,500.00

Interest is awarded at 3% on Ninety-three thousand dollars ($93,000.00) being the pre-trial portion from the 24th October, 1992 to July 5, 1995.

Interest is also awarded at 3% on the funeral expenses of Fifteen] thousand dollar ($15,000.00) from the date of service of the Writ to the 5th July, 1995.