

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO C. L. 2001/A073

BETWEEN           The Administrator General for Jamaica  
                          (Administrator of the Estate Eric David  
                          Black, deceased, also known as  
                          David E.A. Black)                           CLAIMANT

A N D               The Attorney General of Jamaica       DEFENDANT

Mr. Ransford Braham and Mr. Matthew Hogarth for Claimant  
instructed by Messrs. Livingston Alexander and Levy.

Mr. Patrick Foster and Mr. Garfield Haisley for Defendant, instructed by the  
Director of State Proceedings.

**CORAM: BROOKS, J.**

**ASSESSMENT OF DAMAGES**

**HEARD 16<sup>TH</sup>, 20<sup>TH</sup> AND 30<sup>TH</sup> MAY, 2005**

When I made the award in this matter on the 20<sup>th</sup> May, I promised to  
put my reasons in writing. I now do so.

Mr. Eric David Black was murdered sometime between the 9<sup>th</sup> and  
14<sup>th</sup> September 1995. His assailants unlawfully beat him and he succumbed  
to the injuries so sustained. His decomposing corpse was later recovered at  
sea in a horrific state.

Three persons were convicted for this crime. They were police  
officers who were at the time acting as agents of the State.

Against this background, the Attorney General did not seek to contest the issue of liability when the present action was brought against him. The claimant is the Administrator General for Jamaica who has been appointed the administrator of Mr. Black's estate.

In light of the fact that there were convictions secured in a criminal court it was surprising that, before this tribunal, the evidence produced in support of the present claim for compensation was, at best, sparse.

The claimant seeks compensation under the following heads:

1. Pursuant to the Law Reform (Miscellaneous Provisions) Act.
2. Pursuant to the provisions of the Constitution of Jamaica.
3. Aggravated damages and Exemplary Damages.
4. Refund of funeral expenses

(Though a claim under the provisions of the Fatal Accidents Act was pleaded, this was not pursued before the Court.)

I shall first outline the evidence provided by the claimant and thereafter determine what, if any, award may be made under each head.

### **Evidence**

There was no witness called to testify as to how and under what circumstances Mr. Black was assaulted and killed. Only two clues were

given to the Court in this regard. The first was contained in paragraphs 4 and 5 of the Statement of Claim, which averred as follows:

- “4. In or about September 1995 members of the Jamaica Constabulary Force, including Billy West, Karl Wauchorpe and Rudolph Dodd, unlawfully beat, assaulted and/or battered the deceased, as a result the deceased suffered severe personal injuries from which he died.
5. The said members of the Jamaica Constabulary Force acted unlawfully, arbitrarily and are in breach of the Constitution of Jamaica as a consequence the deceased was:
  - a. wrongfully and/or unlawfully deprived of his life;
  - b. wrongfully and/or unlawfully deprived of his liberty;
  - c. subjected to torture and/or inhuman and/or degrading punishment.”

The second clue was contained in the report of a post mortem examination conducted on Mr. Black’s body by a Dr. Odunfa. The report stated, in part:

“The body is that of a 6’ 2” about 175lbs. (male?) said to be 52 years old. The body is in a state of advanced decomposition with extensive mutilation, skin (peeling?) and abdominal ballooning. However, there are no signs of any (significant?) probably lethal antemortem injuries.”

and concluded that:

“Cause of death is undetermined due to decomposition.”

(The words in brackets are assumed based on incomplete photocopying of the report.)

In allowing a judgment in default of defence to be entered against him the Attorney General is deemed to have admitted the contents of the

paragraphs of the Statement of Claim, which deal with liability, including those quoted above. (See Young v Thomas [1892] 2 Ch.134 at p. 137.)

There was also no contest to the contents of the Post Mortem Report, which, no doubt, the Crown would have relied on in its case against the offending police officers.

The other evidence, proffered by the claimant, that concerned Mr. Black's death, were three certificates issued by the Deputy Registrar of the Supreme Court as to the conviction of the three police officers.

The evidence as to damages came from Mr. Garfield Heron, a long-time friend, colleague, housemate, and eventually, customer of Mr. Black. Mr. Heron testified as to his own qualifications as an auto-mechanic and sought to say that Mr. Black was similarly qualified. It proved however that they had worked at different establishments and so Mr. Heron's information would have been hearsay and inadmissible. What could be gleaned from Mr. Heron's testimony, which was relevant to this claim, is that Mr. Black was a very talented auto-mechanic, with experience gained in New York as well as in Jamaica.

Mr. Black returned to Jamaica during the 1980's and was a self-employed mechanic operating his own business. Mr. Heron testified that Mr. Black was a very busy mechanic and so there were only a few occasions

when he would do work for Mr. Heron. One job was the overhaul of the pair of engines and the transmission for a Sport Fisherman boat. Other jobs involved some minor servicing of Mr. Heron's motorcars.

Mr. Heron says that he paid approximately \$300,000.00 for the boat job and between \$5,000.00 and \$25,000.00 for each of the motorcar jobs.

No evidence was adduced as to the income, expenditure or profitability of Mr. Black's business. Neither was the Court given the benefit of any evidence as to whether he had any employees, what his personal expenses were, if he saved any money, or as to his lifestyle.

What the claimant did was to put into evidence, with the consent of the Attorney General's counsel, a copy of the Jamaica Employers Federation's Wage Salary and Benefits Survey for Supervisory Clerical and Hourly Rated Employees ("JEF Survey"). In particular, counsel for the claimant directed the court's attention to the earnings of the following categories listed therein:

<u>Pg. #</u>	<u>Job Title</u>	<u>Maximum</u>	<u>Minimum</u>	<u>Mean</u>
71	Mechanical Technician	1,121,278	641,940	881,609
74	Mechanic	1,151,662	383,330	641,785

I shall now examine the claim for damages based on that evidence.

### Law Reform (Miscellaneous Provisions) Act

Under the provisions of this Act the estate of the deceased is entitled to benefit from any claim to which the deceased would have been entitled had he survived the fatal incident. One of these claims is for the Loss of Expectation of life. Another is for Loss of Earnings

#### (a) Loss of Expectation of Life

This award is to be a conventional sum.

Mr. Hogarth, for the claimant, submitted that awards of \$10,000.00 were being made from as far back as 1993 as is demonstrated by the case of Alicia Dixon (Administratrix estate Christopher Dixon, deceased) v. Kenneth Harris and the Attorney General (1993) 30 JLR 67. He submitted that the award should be given a present day value and that it be updated using the consumer price index of 2041.7 (Feb. 2005). Using that method, Mr. Hogarth submits that \$48,017.40 is the appropriate award for this head.

Mr Haisley for the Attorney General countered that in 1998 the Court of Appeal did not disturb an award of \$3,000.00 for this head of damages in the case of Doris Fuller (Administratrix Estate Agana Barrett deceased) v The Attorney General (1998) 56 WIR 337. He also cited the oral judgment of Wesley James J. in Birdie Johnson (mother of deceased Patrick Keyes) v

The Attorney General (C.L. J 359 /1990), in which the sum of \$10,000.00 was awarded in August 2003.

Although the sum awarded under this head is a conventional one, it ought not to be a nominal one. The Court of Appeal, in the case of Anthony Rose and anr. v. Thomas Smith (1985) 22 JLR 305, cited with approval the following comment made by Lord Scarman in Lim Poh Choo v Camden and Islington Area Health Authority [1979] 2 All E.R. 910 (at p. 920):

“An award for pain, suffering and loss of amenities is conventional in the sense that there is no pecuniary guideline which can point the way to a correct assessment. It is, therefore dependent only in the most general way on the movement in money values. Like awards for loss of expectation of life, there will be a tendency in time of inflation for awards to increase, if only to prevent the conventional becoming the contemptible....”

There has been movement in the awards for loss of expectation of life over the years. McGregor on Damages (16<sup>th</sup> Edition para. 697) describes the then movement in the United Kingdom as being in “fits and starts rather than by estimation of the purchasing power of the pound”. The movement in Jamaica may be demonstrated by citing some typical awards as follows:

<u>Case</u>	<u>Award</u>	<u>Date</u>
<u>Jamaica Public Service Co. Ltd. v. Elsada Morgan.</u> (1986) 23 JLR 138	\$2,000	5/ 5/86
<u>Clarendon Parish Council and Stanley Ewan v. Junie Gouldbourne (Administratrix of Estate Earnold Gouldbourne)</u> (1990) 27 JLR 430	\$3,000	29/10/90

Jasmin Mahabeer & anr. v Andrea Thompson  
 (Administratrix estate Donovan Rudolph Thompson  
 deceased) C.L. T028/94 \$5,000 7/6/96

Birdie Johnson v. The Attorney General (oral judgment) \$10,000 15/8/03

In 1998 an award of \$15,000.00 was made by the learned judge at first instance in the case of Inez Brown v David Robinson. The award went unchallenged by the parties and without comment by the Judicial Committee of the Privy Council in its judgment delivered on 14/12/04 (PC 27/2004). In Elizabeth Morgan v. Enid Foreman and Owen Moss (HCV 0427/2003 – delivered 15<sup>th</sup> October 2004) it is reported that in Odemay Bartley v Errol Walters & anr. an award of \$70,000.00 was made in February 2002.

There is however the long-standing guidance from the case of Benham v Gambling [1941] A.C. 157, “that only very moderate sums should be awarded for this head of damages” (McGregor supra.). Indeed, in 1990 the Court of Appeal in Clarendon Parish Council and Stanley Ewan v. Junie Gouldbourne (supra), “for conformity” reduced a first instance award from \$5,000.00 to \$3,000.00, citing the former figure as “abnormal”.

Against this background, I will not emulate the award made in the Elizabeth Morgan case (supra). There the learned judge applied the exchange rate of \$100: £1 to a United Kingdom award of £1,500, to arrive at



the award of \$150,000.00, which figure, the judge found not to be unreasonable.

I am of the view that the sum of \$50,000.00 is more in line with the established principles and the other relatively recent decisions cited above; it reflects the devaluation of the currency while maintaining moderation. I therefore award that sum.

(b) Loss of Earnings

In Davies v. Powell Duffryn & Associated Collieries (No. 2) [1942] 1 All E. R. 657 at p. 665 Lord Wright stipulated in respect of the question of compensation to the deceased's estate for loss of earnings that:

“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...”

The Court of Appeal in the case of G. Dyer & D. Dyer v. Stone (1990) 27 JLR 268 at p. 276 et. seq. outlined in clear terms the method of ascertaining the loss of earnings to the estate of the deceased.

The very first guideline is, “to ascertain from credible evidence what the net income of the deceased was at the date of death” (supra. at p. 276 I). The subsequent steps speak of calculating the net income of the deceased at the dates of death and trial respectively, computing averages from the two, deducting living expenses and arriving at the multiplicand.

Regretfully however the court has been provided with no credible evidence with which to embark on that exercise. All it has been afforded is what Mr. Black charged his friend on a few occasions. I find it impossible to calculate annual earnings on that evidence.

I also find that I cannot make use of the information contained in the JEF Survey. It does not apply to Mr. Black's situation. He was not on the job market, and at 52 years old after an extended period of operating his own business, was not likely to be seeking employment on that market.

Further, it would be pure speculation on the part of the court to assume that he was, as the operator of his own business, earning as much as, or more than his employed counterparts. Similarly, being a talented mechanic as he is said to have been, does not necessarily make him the operator of a profitable business.

In the circumstances I find that I am unable to make an award for loss of earnings.

### **Compensation for breach of the provisions of the Constitution of Jamaica**

Section 25 of the Constitution provides for an individual to apply to the Court for redress in the event that any of the fundamental rights afforded him by it "has been, is being or is likely to be contravened".

One of the rights guaranteed by the Constitution is the right to life.

Section 14(1) stipulates:

“No person shall intentionally be deprived of his life save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.”

Section 14(2) provides certain qualifications to this right but none is relevant in light of the conviction for murder of the three policemen.

A second right relevant to these proceedings is the right to protection from arbitrary arrest or detention. (Section 15).

A third relevant provision is Section 17, the breach of which is deemed admitted by the Attorney General. That section stipulates in part:

“17(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.”

Though the breach of Mr. Black’s rights in these three areas are deemed admitted, Mr. Haisley has submitted that this court ought not to provide redress for these infractions via the vehicle of Section 25. The reason he advances is that the claimant can be adequately compensated within the compass of “the general law of assault and general damages”. He relied on, as authority for this proposition the following passage from the judgment of Patterson J.A. in the Doris Fuller case (supra. at p. 399):

“The clear principle that is established by these cases is, in my judgment, that in every case that an application pursuant to s 25 of the Constitution is made to the Supreme Court alleging a contravention of the protective provisions of ss 14 to 24 of the Constitution, the court may only exercise

its powers of enforcement of the provision if it is satisfied that no other law provides adequate means of redress for such contravention.”

In the Fuller case, the deceased Agana Barrett had suffocated when he was confined to an overcrowded cell in inhumane conditions. The anguished cries of the inmates of the cell for relief from these conditions were met with “callous, oppressive indifference” by their gaolers.

Patterson J.A. stated in the context of those conditions:

“The State contravened the constitutional rights of the deceased and I can think of no other law which, in the circumstances of this case, would provide adequate remedy to redress such a contravention. The common law is deficient in these circumstances. The only remedy is provided by the Constitution...”

Mr. Haisley sought to distinguish the Fuller case on the basis that “in the Fuller case the Court was made aware by the detailed evidence (given with respect) to the conditions of the deceased’s cell”. He submitted that there was “no evidence in this case of the circumstances which led to (Mr. Black’s death)”. Mr. Haisley also submitted that the Post Mortem Report does not assist the court in determining the facts surrounding that death.

Mr. Hogarth submitted that since the court awarded redress in a case where the agents of the State failed to act, it certainly should do likewise “in the case of Mr. Black where, (the agents) beat him severely and dumped his body at sea”.

There are, regrettably, numerous cases of excesses committed by police officers against persons; cases of shootings, beatings and false imprisonments are among them. Although the remedy of Constitutional redress has only fairly recently been the subject of claims in our courts, and are therefore few in number, it was never intended that in every case where such excesses have occurred that constitutional redress would be afforded the victim. (See the comment of Patterson J.A. first quoted above.)

The issue was examined in detail in the judgments of their Lordships in the Fuller case and I will not seek to embark on a similar exercise. It is sufficient to observe that I am impressed, with respect, by the following passage in the judgment of Patterson J.A. at p. 400.

“The claim in the instant case for constitutional redress involves a consideration separate and apart from the tortious liability of the Attorney-General. It involves a liability in the public law of the State....”

Compensation for the act of a police officer wrongfully arresting, or indeed beating a person, is the subject of frequent civil litigation before our courts. A claim for constitutional redress in those fact situations would therefore require specific evidence to show that the wrongful action of the agents of the State was such that a particular case fell outside of the categories afforded by the law of tort and of the damages that flow from a tortious act.

I find however that the same reasoning does not apply to the unlawful deprivation of life, where the cause of death is not some “inadvertence and indifference and lacking in a duty of care”, but is in fact a “calculated and deliberate act.” (Judgment of Harrison J.A. in Fuller at p. 419).

The act of beating a man to death must involve a high degree of personal involvement and connection in the mind of the actor; a ‘malice aforethought’, to meet the requirement of being a “deliberate and calculated act”. The jury’s finding in respect of these three policemen necessarily confirms that situation. I cannot therefore agree with Mr. Haisley’s submission that more specific evidence is required to bring such an act within the scope of Section 25 of the Constitution.

Having decided that Mr. Black’s estate is entitled to constitutional redress, and upon ascertaining that there is no procedural bar to the claim imposed by the Judicature (Constitutional Redress) Rules, 2000, the next question is what is the quantum of the compensation to be awarded.

In the majority verdict, their Lordships in Fuller awarded the sum of \$1,000,000.00. This award was made on October 16, 1998. Harrison J.A. (at p. 422) indicated that there was a dearth of comparable cases in this jurisdiction to provide guidance for compensation levels. When the award in

Fuller is updated to today's money using the April 2005, CPI of 2100.3 the result is \$1,792,064.85.

I find that that level is not unreasonable and I would round it up and award \$1,800,000.00 for constitutional redress.

### **Aggravated Damages**

Patterson J.A. in Fuller said that compensation for constitutional redress is to be considered in isolation from the issue of damages for any tort that may also have been committed by the servant of the Crown. He said at p. 403:

“I am not unmindful of the award of general damages which I considered earlier on in this judgment, but I do not think that I should take it into account when considering the quantum of the compensation for constitutional redress. The liability of the Crown for the torts of its servants is vicarious, but in the case of constitutional redress the State is primarily liable. The award should be made (in accordance with s 25(1)) without prejudice to any other award in any other action with respect to the same matter.

That learned Judge of Appeal, at p. 392, also made it clear that there was no obligation on a trial judge to specify the amounts under the various heads of damages.

Mr. Haisley on this point once again submitted that there was no evidence of any suffering that would justify an award for damages. He cited the case of Rhona Hibbert (Administratrix of the estate of Matthew Maxe Morgan, deceased) v. The Attorney General of Jamaica (1988) 25 JLR 429

as authority for the proposition that there must be evidence of suffering before death ensued. In that case a boy aged 13 years was shot by a police officer and succumbed to his injuries. Gordon J. (as he then was) at p. 432 H of the report said:

“The evidence indicates the deceased was injured and was aware of his injury at about 8 p.m. on the 29<sup>th</sup> September 1981 he was admitted to hospital and he died about 2 p.m. on the 30<sup>th</sup> September 1981. There is no evidence of how long he remained conscious after injury and before death but it is reasonable to assume he must have suffered before death supervened.”

Again I reject Mr. Haisley’s reasoning and adopt that of Gordon J. in the context of the instant case. I find that Mr. Black must have suffered before he died from the beating inflicted by his attackers. The Attorney General is also deemed to have admitted this by virtue of the failure to contest the contents of paragraph 4 of the Statement of Claim (cited above).

The fact that he had been wrongfully set upon by police officers to whom he would normally turn for protection, must have caused Mr. Black anguish. This would justify an award for aggravated damages. I cannot however accept Mr. Hogarth’s submission that the level of compensation should be similar to that awarded in the Fuller case, when updated. Those damages would now be \$174,191.62 for assault and battery and \$261,287.43 for Aggravated Damages. The evidence in Fuller showed that Mr. Barrett



was subjected to the conditions of the cell for about thirty-six hours. There is no evidence of the duration of Mr. Black's suffering.

In the Rhona Hibbert case the award on 17<sup>th</sup> November 1988 for pain and suffering was \$5,000.00. That converts to almost \$100,000.00 today.

Approaching the matter globally, I am of the view that the sum of \$300,000.00 for pain and suffering, false imprisonment and aggravated damages, would be an appropriate award, and I award that sum.

### **Exemplary Damages**

Though the Statement of Claim included a prayer for exemplary damages, this was not pursued by the claimant and correctly so. Section 2(2) of the Law Reform (Miscellaneous Provisions) Act stipulates that the survival action does not extend to claims for exemplary damages.

### **Special Damages**

Mr. Hogarth submitted that \$100,000.00 should be awarded as compensation for funeral expenses. However, nothing may be properly awarded, as there was neither pleading nor any proof in respect of this item.

### **Conclusion**

The sparse evidence provided in this exercise was insufficient to allow for any award for loss of earnings under the Law Reform (Miscellaneous Provisions) Act. However the very nature of the death wrongfully meted out

to Mr. Black and the fact that the Attorney General is deemed to have admitted the wrongs of the servants and agents of the Crown, allowed for awards of compensation as follows:

(a) Damages for loss of expectation of life	\$50,000.00
(b) General Damages for Pain and Suffering, False Imprisonment and Aggravated Damages	\$300,000.00
(c) Compensation by way of Constitutional Redress	\$1,800,000.00

Interest is awarded on the sum of \$50,000.00 at the rate of 6% p.a. from 14<sup>th</sup> September 1995 to 20<sup>th</sup> May 2005.

Interest is awarded on the sum of \$300,000.00 at the rate of 6% p.a. from 25<sup>th</sup> September 2001 to 20<sup>th</sup> May 2005.

Costs of \$60,000.00 to the claimant.