



[2022] JMSC Civ 191

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2012 HCV 04746**

<b>BETWEEN</b>	<b>MURIEL FRASER (Administratrix of Estate of Imran Ferguson)</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>ATTORNEY GENERAL OF JAMAICA</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Ms Kimberley Facey instructed by Mr John Clarke, attorney-at-law for the Claimant

Mrs Taneisha Rowe-Coke instructed by the Director of State Proceedings attorney-at-law for the Defendant

May 5, 2022, June 1 - 2, 2022 and October 27, 2022

***Assessment of Damages – False Imprisonment – Fatal Accident Act – Law (Reform Miscellaneous Provision) Act – Lost Years – Loss of Expectation of Life - Personal Injuries - Constitutional right to life – Constitutional right to enjoyment of family – death pre Charter of Fundamental Rights and Freedoms - Aggravated Damages – Exemplary Damages – Vindictory Damages***

**JUSTICE T. MOTT TULLOCH-REID**

**ACKNOWLEDGMENT**

[1] Before I go into the details of this case, I wish to recognise the assistance given to me by my Judicial Clerk, Ms Abigail Leiba. Ms Leiba was very helpful in setting out the issues which the parties asked the Court to consider, summarising the facts

of the cases which the parties relied on in support of their respective positions and pulling out the legal issues that were to be gleaned from them.

## **BACKGROUND**

- [2] On January 10, 2010 Imran Ferguson was taken into custody for hitting the windshield of the motor vehicle being driven by a female. He was arrested and charged for malicious destruction of property. He was held in custody at the Spanish Town lock up where he was held in the holding cell in full view of police officers on duty.
- [3] On January 16, 2010, Mr Ferguson was found ill and unresponsive in his cell and was transported to the Spanish Town Hospital where he was later transferred to the Kingston Public Hospital. He received treatment at the hospital but did not recover as he was pronounced dead on the morning of January 19, 2010, having succumbed to his injuries.

## **THE CLAIM**

- [4] The Claimant, Muriel Fraser, was appointed Administrator in the estate of her deceased son, Mr Ferguson. She is also the sole beneficiary in his estate. On August 30, 2012 the Claimant filed a claim seeking the following:
- a. a declaration that the deceased's right to life, security and integrity of person inter alia was contravened
  - b. vindicatory damages for the contraventions of the provisions of the Charter of Fundamental Rights and Freedoms
  - c. damages for assault, battery and false imprisonment
  - d. damages under the **Fatal Accidents Act** ("FAA")
  - e. damages on behalf of the estate of the deceased, under the Law Reform **(Miscellaneous Provisions) Act** ("LRMPA")
  - f. Interest pursuant to the LRMPA

- g. Disclosure of all files, photographs, final post-mortem reports of Dr Dinesh Rao, investigations and the histology report
  - h. Interim payment
  - i. Exemplary and aggravated damages
  - j. Costs
- [5] An Acknowledgment of Service was filed on behalf of the Defendant on September 7, 2012 stating that the Claim Form and the Particulars of Claim were served on the Defendant on August 30, 2012. The Defendant, however, failed to file a Defence and no attempts were made for an extension of time to file the said Defence. On January 22, 2018, by order of Master R Harris, a default judgment was entered against the Defendant for failure to file a Defence. The Defendant's failure to file a Defence means that liability is not in issue with respect to any of the causes of action raised, those being, false imprisonment, assault, breach of constitutional rights and loss arising under the FAA and the LRMPA and damages under each head, are now left to be determined.
- [6] At the Assessment of Damages hearing, the Claimant made an oral application to amend the Particulars of Claim to include special damages in the amount of \$60,000 paid to Heart at Rest Funeral Home which was used to cover some of the funeral expenses. The amendment was allowed with the consent of counsel for the Defendant.

**Application to strike out aspects of Further Supplemental Witness Statement of Muriel Fraser filed on February 24, 2022**

- [7] Mrs Rowe-Coke made an application for paragraphs 5-7, 10 and 12 of the Further Supplemental Witness Statement of Muriel Fraser to be struck out on the basis that they were prejudicial and also amounted to hearsay. She argued that Ms Fraser had no immediate knowledge of any of those things and should not be allowed to say them.

**[8]** The relevant paragraphs read as follows:

*“5. “It is also clear that my son was not taken to see a Resident Magistrate within twenty-four hours of his detention on 10 January 2010 despite the clear words and effects of the Bail Act.*

*6. On the 16<sup>th</sup> January 2010, he was removed from the Spanish Town Police Station Lock Up to the Spanish Town Hospital. He was then taken to the Kingston Public Hospital. He was at this Hospital from the 16<sup>th</sup> January 2010. He died on the 19 January 2010 at the Kingston Public Hospital around 10:02am.*

*7. I observed Mr Imran Ferguson’s body at the post mortem on the 16<sup>th</sup> February 2010. His skull was bashed in and one of his eyes was knocked out of the skull. I did not see the eye. His right hand was shorten [sic] and was in bandaged [sic]. His lips was [sic] broken it looked like a deflated football....*

*10. On the 13<sup>th</sup> January 2015, I was in court when the Special Coroner’s Jury held that the material police officer(s) should be charged for gross negligence or manslaughter as it concerns Mr Ferguson’s death....*

*12. I believe that my son’s constitutional right to life, due process was violated by the ineffective investigation in relation to the circumstances of my son’s death. It is clear that no one has been held criminally or administratively responsible for the lapses which led to his death. I hope that his constitutional right including right to life, liberty and due process should be vindicated by an appropriate award to ensure that the relevant state organs give due regard to the violated rights.”*

**[9]** Ms Facey in rebuttal said that the statements contained in the paragraphs that Mrs Rowe-Coke was seeking to have struck out were relevant to the determination of the issue of damages. They are facts which arose on the claim and which were not disputed by the Defendant. With respect to paragraph 5, Ms Facey stated that Ms Fraser being the only witness and mother of the deceased was the best person to give evidence to substantiate the pleading. She said the statement contained in paragraph 5 was a fact that arose in the claim that was not disputed by the Defendant and that as such the Court can accept it as it is. With respect to paragraph 6, Ms Facey argued that these are facts that the mother could determine based on her investigations and when she went to the morgue on January 20, 2010 after her son died. She went to the morgue on the day following his death

and she saw the injuries he received. She said the injuries are detailed in agreed documents which are labelled exhibits 1-4.

[10] Ms Facey also argued that with respect to paragraph 7, these were observations that Ms Fraser made. This is first hand evidence of what she witnessed at the post mortem. They are neither prejudicial nor hearsay. Although the post mortem exists it does not preclude Ms Fraser from speaking to it and the court must consider the consistency in the evidence in its totality. As it relates to paragraph 10 she argues that Ms Fraser was in attendance at the Special Coroner's Court. The evidence from that court is that there was gross negligence/manslaughter and the fact that nobody was ever charged goes to constitutional redress. With respect to paragraph 12 Ms Facey argues that the Claimant is the administratrix of Mr Ferguson's estate and his mother. She can therefore make the statement, which is not prejudicial, as the Claimant is merely advancing a claim on behalf of the estate.

[11] Having heard the submissions of both counsel with respect to the issue I made the orders and gave my reasons as follows:

*"Paragraph 5 is struck out as it is hearsay and not within the immediate knowledge of the Claimant. In addition, the reference to the **Bail Act** is not evidence but submission. Paragraph 6 except for the last sentence is struck out as being hearsay. Paragraphs 7 and 10 are not struck out and Paragraph 12 is struck out as it is not evidence but a submission."*

[12] I will also say that Lisa Palmer-Hamilton J had also made an order striking out paragraphs 30 and 31 of the Further Witness Statement filed on June 24, 2019.

### **The Evidence**

[13] The following documents were agreed and form a part of the evidence:

- a. Cell diary, St. Catherine Division, Spanish Town Station dated January 15, 2010 (Exhibit 1)
- b. South East Regional Medical data dated January 17, 2010 (Exhibit 2)
- c. Post Mortem Exam Report dated February 16, 2010 (Exhibit 3)

- d. National Public Health Lab report dated February 16, 2010 (Exhibit 4)
- e. Post Mortem Examination Report dated July 26, 2011 (Exhibit 5)
- f. Grant of Administration dated March 16, 2011 (Exhibit 6)
- g. Letter from the Office of the Prime Minister dated June 28, 2010 (Exhibit 7)
- h. Receipt in the amount of \$60,000 from Heart at Rest Funeral Home dated February 22, 2010 (Exhibit 8)
- i. Receipt in the amount of \$200 for registered mail to Owen Ellington, Commissioner of Police, dated July 6, 2020 (Exhibit 9).

#### **Examination of Ms Monique Russell Clerk of Court Special Coroner's Court**

- [14] Ms Monique Russell, Clerk of Court in the Special Coroner's Court was summoned to give evidence. She was not the Clerk of Court at the time of the coroner's inquest and indicated that Mr Leary Phillips who was the clerk at the time was no longer at the Special Coroner's Court but had been transferred to another court. Ms Russell said upon receiving the summons she did her investigations and found that the finding of the court as it relates to Mr Ferguson's incident was that there was gross negligence/manslaughter. Upon being asked whether she could identify the document relating to the findings of the Special Coroner's Court she said yes she could because Mr Imran Ferguson's name was on it and the verdict of gross negligence/manslaughter was also on it.
- [15] Mrs Rowe-Coke objected to the document being admitted into evidence as she said it was not relevant in quantifying damages. It is a hearsay document and there was no reason Mr Phillips could not have been called since he created the document. She also said that it was known that Mr Ferguson met his demise while in the custody of the state but she said we did not know that it was at the hand of state agents. Ms Facey responded by saying that the document was relevant because the verdict was important in assessing damages. There is no defence before the court and as such the Defendant is taken to have admitted to the claim.

Further, counsel for the Defendant can cross-examine Ms Russell. In addition, the summons that brought Ms Russell to Court was not personal to her but to her office. She came to court as the Clerk of Court. She has told the court that upon being summoned she became familiar with the file and can assist the court.

[16] Mrs Rowe-Coke's objection was overruled. The inquest was done. Many years have passed since and it is reasonable to conclude that changes would have been made at the Special Coroner's Court. Ms Russell is now the Clerk of Court and the keeper of the Records. She, being an officer of the Court, can identify the document, which I believe is relevant to determining the issue of quantum. It was not a question of who caused his death at this stage but rather a question of how he came to die in the custody of police officers who had a duty to keep him safe and the damages which should be awarded as a result of the officers' failure to carry out their duty with care. The letter from the Special Coroner's Court to the Director of Public Prosecutions dated January 24, 2019 was admitted into evidence as Exhibit 10.

[17] Mrs Rowe-Coke in cross examination asked what the verdict of gross negligence or manslaughter meant but Ms Russell could not assist as she said only His Honour Mr Campbell could answer the question since it was he who gave the verdict.

#### **Examination of Ms Melonie Domville attorney-at-law at INDECOM**

[18] Ms Domville was also brought to Court by way of a witness summons which was issued. Her evidence is that she was working at INDECOM in 2016 and is familiar with the circumstances surrounding the death of Mr Ferguson. She said that a report was prepared in relation to Mr Ferguson by the senior legal officer at the time but she co-signed it as her supervisor. Ms Domville's evidence is that one investigator was assigned to investigate the matter. She said the Bureau of Special Investigations ("BSI") had conducted an investigation which was then

handed over to INDECOM. BSI was the predecessor to INDECOM. She was able to identify the document she co-signed because her signature is on it.

- [19] Mrs Rowe-Coke objected to the document being admitted into evidence on the basis that it is hearsay. She argued that the last paragraph i.e. paragraph 19 speaks to recommendation as indicative of the fact that the report does not attribute any intentional act at all to the state. Ms Fraser, she said, has done exactly what INDECOM has recommended and is pursuing her civil remedies. The content of the report is more prejudicial than probative.
- [20] Ms Facey did not agree. She said the document was filed pursuant to section 31E of the **Evidence Act**. There are two signatures on the document one of which belongs to Ms Domville. The Defendant objected to Ms Domville's evidence and as such she was summoned to Court. She gave her evidence. The findings of INDECOM is material in assessing damages for constitutional redress. There is no defence to the claim and one cannot now be raised. If the Court is to properly assess whether there should be aggravated, exemplary or vindictory damages which speak to the excess of police officers in carrying out their duties and to prevent them from acting in that way in the future, then the Court can have regard to and ascribe weight to the findings made by government agencies appointed to carry out investigations concerning the incident.
- [21] Mrs Rowe-Coke said if the INDECOM report is to help in determining aggravated, exemplary and vindictory damages then it is not helpful.
- [22] Mrs Rowe-Coke's objection was overruled in part. The order made on the objection was that the INDECOM report was admitted into evidence in part from pages 3-4, and 14-19, which set out INDECOM's findings on their own investigations and the Court would at the appropriate time determine what weight, if any, would be given to the part of the document admitted, when the evidence is analysed in its entirety. Pages 3-4 and 14 – 19 of the INDECOM report dated October 10, 2016 is admitted into evidence as Exhibit 11.

[23] Ms Domville was not cross-examined.

### **The Evidence of Muriel Fraser**

[24] The Claimant's evidence is contained in her witness statements filed on July 31, 2018, Further Witness Statement filed on June 24, 2019 (except for paragraphs 30 and 31), and Further Supplemental Witness Statement filed on February 24, 2022 except for paragraphs 5, the first 3 sentences in paragraph 6 and paragraph 12.

[25] At paragraph 3 of the July 31, 2018 statement, Ms Ferguson stated that she has 3 children, one of whom was Imran Ferguson. At paragraph 5, she said she introduced her son to one Kareem Anderson. Both Kareem Anderson and Clive Nelson work at a funeral parlour. She said that on January 19, 2010, Clive Nelson came to her at her shop and made inquiries of her as to when she had last seen her son, Imran. He also informed her that he had just put her son in the "fridge". She did not believe Mr Nelson but went with Mr Anderson to the funeral parlour on January 20, 2010 and there saw her son, Mr Ferguson. He was tagged as being "Roy Ferguson" but she said at paragraph 19 of the said statement that he was never known as Roy Ferguson.

[26] In her Further Witness Statement filed on June 24, 2019, Ms Fraser said her son was born on May 9, 1988 and was 21 years old at the time of his death. He worked as a farmer and labourer. He earned a minimum wage of \$5,400 per week. He fed and clothed himself and assisted her with ground provisions monthly. She said the provision of ground provision saved her \$15,000 per month. She said that Ministry of Justice helped to finance Mr Ferguson's burial to the tune of \$120,000 but she had an outstanding balance of \$60,000 which she paid through a loan from her daughter. She said she never knew her son was in police custody or in the hospital. She did not receive a call from either the police or the hospital staff to that effect. She said the police lied on the label placed on her son's body as

nobody had power of attorney over him. She said her son was beaten for no reason and was beaten to death, misnamed and hidden from her by the police.

[27] In the Further Supplemental Witness Statement of Muriel Fraser filed on February 24, 2022, Ms Fraser says that her son was a former student of St Catherine High School and that he wanted to become a soldier. She said Mr Ferguson was taken into police custody in good condition and was kept there from 9:30am on January 10, 2010 to 6:30pm on January 16, 2010. She was never contacted to try to bail her son and to the best of her information, knowledge and belief no other family member was contacted by the police to bail him. She said she observed her son's body at the post mortem which was performed on February 16, 2010 and his skull was bashed in and one of his eyes was knocked out of the skull. She did not see the eye. His right hand was shortened and in a bandage. His lips were swollen and looked like a deflated football. She said her son's body was battered and swollen from waist straight to his head. She said that 5 state organs carried out extensive examination into how her son received his injuries while in police custody and that she was present at the Special Coroner's Court held on January 13, 2015 wherein it was held that the material police officers should be charged with gross negligence or manslaughter concerning Mr Ferguson's death. She said to the best of her knowledge none of the police officers was every charged nor was any administrative action taken against any of them.

### **Cross Examination Muriel Fraser**

[28] In cross-examination Mrs Rowe- Coke asked Ms Fraser whether she remembered in the Particulars of Claim at paragraph 24x saying that her son was "*vulnerable and needed special attention*". Ms Fraser said she did not give those instructions to her attorneys because nothing was wrong with her son. When pressed further she said that she had not read over the Particulars of Claim before signing it and as such she was not aware of everything that was contained in it. She was adamant that her son was not mentally unstable.

[29] When it was suggested to her that it was she who gave money to her son and not her son who provided her, she also disagreed. Although in her evidence she said she gave him money to cut his hair, she said that she did that because he would not cut his hair and so she gave the money to the barber and told him to find Mr Ferguson and cut his hair when he next saw him. She said that did not amount to her taking care of Mr Ferguson but that Mr Ferguson took care of her. She said she saw Mr Ferguson every month but not in December. The last time she saw him was in November but although she did not see him in December she spoke to him on the phone.

[30] Ms Fraser also said in cross examination that Mr Ferguson did not have a farm but he had a place beside her uncle where he and his friends planted crops and it was one of her friends who lived nearby in Green Acres who would bring the ground provisions over to her in Kingston. She said Mr Ferguson was living in Golden Acres on Wickham Avenue at the time of his death. Mr Ferguson used to live at 41 Fairfield Road but he went to live in Wickham when she returned to Kingston. He moved to Green Acres when he was about 20 years old. Ms Fraser did not agree that Mr Ferguson was not earning an income when he died.

[31] It was put to Ms Fraser that Mr Ferguson was not earning minimum wage of \$5,400 per week as that was not the minimum wage in 2009. Ms Fraser disagreed. It was also put to her that the \$60,000 that that was used to assist in burying Mr Ferguson was not a loan from her daughter but was her daughter's contribution to Mr Ferguson's funeral expenses. Ms Fraser disagreed. She said that it was a loan which she had to repay and which she repaid by throwing partner.

#### **Re-examination of Muriel Fraser**

[32] Ms Fraser in re-examination said that that Mr Ferguson sent her money and ground provisions like yam, banana, callaloo and pumpkin which came from the farm that he and his friends maintained. She said she did not read over the

Particulars of Claim. She said her lawyers gave her a document, told her to sign it and she signed it without reading it over.

### **The details as set out in the exhibits**

[33] The Cell diary which is exhibit 1 reads that on January 10, 2010, a complaint was received concerning an instance of malicious destruction of property. The investigation of the complaint resulted in Mr Ferguson being arrested at 12 mid-day. The notation on January 10, 2010 at 12 mid-day is as follows:

*“Lloyd Ferguson, 23 years old, DOB 8/8/1986 of 44 Wickham Drive, Golden Acres for the offence of malicious destruction of property committed on 10-01-2010 about 9:30am along Golden Acres Drive. Golden Acres, Spanish Town, St Catherine. Alleged that accused man used his hand to hit complainant’s ... motor vehicle windscreen breaking same on the left side. **He can be bailed to appear in court on 19-01-2010 at Spanish Town RM**” (my emphasis)*

On January 16, 2010 at 6:00p.m., the cell diary reads as follows:

*“Took over duties of cell supervisor from Corporal Wright with seventy-six (76) prisoners in safe custody their properties and Government [word illegible] intact as mentioned in D/E 47 afore.”*

On January 16, 2010 at 6:05pm, the cell diary reads as follows:

*“Male prisoner Roy Ferguson was taken to the Spanish Town Hospital for treatment in ... driven by .... escorted by ....”*

### **Submissions and Analysis of Evidence**

#### ***Damages under the LRMPA***

#### ***Lost Years***

[34] Lord Scarman in **Gammell v Wilson [1981] 1 All ER 578** said:

*“There is no room for a ‘conventional’ award in a case of alleged loss of earnings of the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty,*

*the court must make the best estimate it can. In civil litigation it is the balance of probabilities that matters. ... No estimate being possible, no award, not even a 'conventional' award should ordinarily be made... In the case of a young man, already in employment..., one would expect to find evidence on which a fair estimate of loss can be made."*

[35] In the case of **Elizabeth Morgan v Enid Foreman and Owen Moss 2003 HCV 0427** the judgment of Sinclair-Haynes J (Ag) as she then was delivered on October 15, 2004, Kemar Watson a 16-year old boy was killed in a motor vehicle accident. There was evidence from not only his parents, but also from his school principal as to his level of industry. The court took the evidence in its totality in coming to a decision that on a balance of probabilities, had Kemar lived, "*he would have been a useful young man*".

[36] Ms Fraser's evidence is that Mr Ferguson was a construction worker earning \$5,400 per week as minimum wage. He also farmed and gave her produce valued at \$15,000 each month. There is no evidence as to what income he generated from his farming. There was no proof of his earnings as a farmer or as a construction worker. There was no letter from any of his previous employers to say he worked with them and in what capacity. There was no evidence to say where he sold his produce as a farmer and the income that was generated from the sale. I have no evidence from Ms Fraser as to how much yam and bananas she got per month so that it could be of a value of \$15,000 in 2010. The figure seems high to me as at 2010 rates and without any oral or documentary proof to detail how the sums were arrived at, I am unable to accept Ms Fraser's evidence and will make no award for loss of earnings/lost years as based on the evidence before me I am not of the view that Mr Ferguson was working at the time of his death or that he contributed to his mother's financial well-being. There are not sufficient facts established on the evidence to enable me to avoid the fancies of speculation and make the best estimate that I can.

### ***Special Damages***

[37] Special damages in the amount of \$60,000 representing costs of funeral expenses is allowed. I accept Ms Fraser's evidence that the sum she obtained from her daughter to assist with the funeral expenses was a loan only and that she had to repay it.

### ***Loss of Expectation of Life***

[38] Imran died at 21 years old. The Court of Appeal decision of **Attorney General of Jamaica v Devon Bryan (Administrator estate Ian Bryan) [2013] JMCA Civ 3** is instructive in calculating the award payable under this head. The Court of Appeal reduced an award from \$250,000 to \$120,000 for loss of expectation of life. The sum of \$120,000 updates to \$198,875.50. The Claimant has suggested the sum of \$240,000 and the Defendant has indicated the sum is a reasonable amount. I agree.

### **Pain and Suffering occasioned from Assault and Battery**

[39] South East Regional Health Authority medical data dated October 15, 2013 noted the following:

#### **History**

*Victim found unresponsive in cell*

*Victim of multiple blunt trauma*

#### **Findings on Examination**

*Multiple bruises to face, upper limbs and back*

*Depressed conscious level – GCS 5T/15. Patient intubated from Spanish Town Hospital.*

**Diagnosis**

*Depressed left parietal skull fracture with intracranial haematoma*

*Right ulnar fracture*

**Treatment**

*Admission to ICU*

*Oxygen, Dilantin, cast to upper limb*

*Planned trachesostomy*

**Disposal**

*Deceased 19/1/2010 at 10:02am*

- [40] The post mortem examination report, Exhibit 3, notes the results of the examination as follows:

**External Injuries**

1. *Diffuse swelling present over the dorsum of both hand, left periorbital region. The surface of the skin is darkened.*
2. *Two parallel line contusion present over the lateral aspect of left midarm each measuring 6cm x 4mm separated by a distance of 4mm, the intermediary skin showed abrasions, bluish black colour contusion.*
3. *Two parallel line contusion present over the left epicondyle each measuring 6cms v 4 mm separated by a distance of 4mm, the intermediary skin showed abrasions... bluish black colour contusion*
4. *Nearly oblique Abrasion present 6cms behind injury no 2 measured 6cms x 2mm*
5. *The left lower lip showed mucosal tear measuring 1cm x 5mm.*

- [41] Other injuries were noted in the post mortem report including fracture to the skull, contusion to the brain, haematomas and contusions to his arms, leg and inner

thighs and right wrist. The provisional report of the Consultant Forensic Pathologist reads as follows:

*“The deceased sustained multiple blunt force impact to the extremities and head. The injury over the head is by hard and heavy blunt weapon with small striking surface.”*

The post mortem examination report dated July 26, 2011 reports the same thing that Exhibit 3 reported.

- [42] The **Elizabeth Morgan case** is also instructive with respect to how personal injuries of a victim who later dies are to be dealt with. Justice Sinclair-Haynes said in that case that the deceased’s personal representatives were entitled to recover damages for the injuries he sustained prior to his death. They were only entitled to recover nominal damages since he only survived for less than two days.
- [43] The evidence is limited with respect to when Mr Ferguson was injured. He was found in an unconscious state in his cell and had the injuries noted in paragraphs 40-42 above. There is no evidence as to what pain he suffered prior to being taken to the hospital so that period cannot be taken into account. All we know is that he was taken to the hospital in an unconscious state. There is no evidence that he ever gained consciousness.
- [44] Ms Facey submits that the sum of \$6M for pain and suffering and loss of amenities should be awarded to the Claimant. She relies on the case of **Hugh Douglas v Morris Warp and ors reported at Khans Vol 4 page 210**. Mrs Rowe-Coke responded by relying on the **Elizabeth Morgan case, Angela Brooks-Grant v Western Regional Health Authority and Attorney General [2016] JMSC Civ 240** and the **Devon Bryan case**.
- [45] In the **Elizabeth Morgan case**, Justice Sinclair-Haynes referred to the case of **Rose v Ford [1935] 1 KB 99**. In that case, the Court of Appeal reduced the award that was given for pain and suffering by the trial judge on the basis that the award

should only take into account the period for which the victim had suffered before her death. The Court of Appeal made it clear that the figure awarded could not be more than a nominal amount. Taking that into consideration, Sinclair-Haynes J awarded Elizabeth Morgan the nominal amount of \$50,000 for his severe head injury, two lacerations to the scalp, frontal area of vertex and left parietal. In addition, he had several abrasions over his body. He lived for one day. The \$50,000 updates to \$197,763.50.

[46] In the case of **Angela Brooks-Grant**, Mr Grant felt ill, he went to the Cornwall Regional Hospital, was treated and released, still did not feel well so returned the next day. He was admitted for a surgery to be done but it was not done so he checked himself out with the intention of returning to the United Kingdom from whence he had come. He however died *en route*. Justice Brown-Beckford took into account the fact that Mr Grant would have suffered prior to attending on the hospital as it was his symptoms which prompted him to visit the hospital and there was no evidence of him being misdiagnosed. She awarded him \$250,000 which updates to \$352,908.

[47] In the **Devon Bryan case**, Mr Ian Bryan was shot in his head and died 3 to 4 hours after being shot. He appears to have been conscious as the evidence is that he spoke to two persons up to the point in time that he arrived at the hospital. The Claimant was awarded the sum of \$130,000 which updates to \$215,448.50 for the three hours that he was alive.

[48] I do not find the **Hugh Douglas case** helpful as it concerns a person who continued to live and the damages awarded would take into account the fact that the plaintiff in that case would have continued to suffer for the duration of his life. The cases relied on by Mrs Rowe-Coke were more helpful. However, the difference between those cases and the case before me, as Mrs Rowe-Coke submits, is that Mr Ferguson was unconscious up to his death. There is no evidence to the contrary. Mrs Rowe-Coke argues that because he was unconscious he could feel no pain and as such no award should be made for his pain and suffering.

[49] The Court of Appeal in the case of **Wise v Kaye [1962] 1 QB 638** did not agree with that position not did the House of Lords in the case of **H West & Son Ltd v Shephard [1964] AC 326**. In both cases, the plaintiffs had brain damage and were in a vegetative state and were therefore not able to appreciate their loss. Lord Morris in **H West & Son Ltd v Shephard** had this to say on the issue:

*“An unconscious person will be spared pain and suffering and will not experience mental anguish which may result from knowledge of what has in life been lost or from knowledge of what has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads or elements of damages which can only exist by being felt or thought or experienced. **The fact of unconsciousness, does not, however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury.**” (my emphasis)*

[50] It is true that the position is strongly criticised and Lords Devlin and Reid dissented on the basis that if a person cannot feel distress or loss of happiness, which is what damages are intended to compensate for, then no damages should be awarded. I acknowledge that the decisions are not binding on me but I am persuaded by the majority position as although Mr Ferguson could not feel anything by virtue of the unconscious state he was in, he was injured and it was the extent of his injuries which put him into a state of unconsciousness for which he should be compensated. Mr Ferguson had a fracture to his skull and elbow. His arm was in a cast. He also had injuries all over his body. This was his state from January 16, 2010 in the afternoon when he was found until January 19, 2010 at approximately 10am when he died. That was a total of approximately 2 ½ days.

[51] I have paid attention to the post mortem report and medical report which have been admitted into evidence. They both set out the injuries that Mr Ferguson sustained. Neither says he was missing an eye, as Ms Fraser’s evidence indicates. That would have been a significant injury which it would be unlikely that the doctors would have neglected to include in their reports. The injuries I have taken into account are therefore the left skull fracture, the fracture of the ulna and the multiple

contusions and soft tissue injuries that appeared on different parts of his body. I also take into account the fact that he had to be intubated as that would have happened as a part of his treatment. On the Glasgow Coma Scale he ranged 5/15 which indicates a severe head injury. I know then that for approximately 3 days he suffered from serious injuries. I have taken guidance from the cases relied on by Mrs Rowe-Coke, in particular the case of **Elizabeth Morgan** who also had severe head injury and lived for one day. I have also considered that because he was in an unconscious state his pain and suffering would not be as significant as that of a conscious person with similar injuries. I am of the view that in this case, the sum of \$600,000.00 would be reasonable to compensate Mr Ferguson for the loss that he experienced as a result of the assault and battery which he suffered.

#### **Damages under the FAA**

[52] Any claim under this head would also fail as I have concluded that I am not satisfied on the evidence that Mr Ferguson was working at the time of his death.

#### **Damages for False Imprisonment**

[53] Mr Ferguson was arrested on January 10, 2010. The station diary records that he was given station bail on the same evening. He however did not take up the bail. Notwithstanding that, the Defendant failed to file a Defence and in failing to do so is to be seen as having admitted liability on the issue of false imprisonment. I am supported in this position by the ruling of Brooks J (as he then was) in the case of **The Administrator General of Jamaica (Administrator est Eric David Black, deceased, aka David E A Black) v The Attorney General of Jamaica CL 2001/A073** wherein he said:

*“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 paragraph of the Statement of Claim, which deal with liability...”*

- [54] Whether Mr Ferguson was falsely imprisoned is not a matter for me to determine. I am to determine damages payable to his estate for his false imprisonment. **John Crossfield v The Attorney General of Jamaica and Corporal Ethel Halliman [2016] JMCA Civ 40** is helpful. In that case, the Claimant who was a security guard was arrested for among other things dealing with cocaine and breaking and attempting to enter a warehouse. He was found to be falsely imprisoned for a period of 4 days. Morrison P awarded Mr Crossfield the sum of \$600,000 for the period of his false imprisonment. That amounts to \$150,000 per day. When the per day amount is updated using August's CPI of 123.8, the daily rate would be approximately \$208,000.
- [55] In the **Crossfield case**, Mr Crossfield describes his time in custody in a very detailed manner. He asserts that he was handcuffed and placed in lock-up while still in his security guard uniform, he was afraid as other persons in the lock up referred to him as an informer, he was slapped in the face by one of the persons who called him an informer, he was embarrassed because people came to the lock up and saw him there, he shared a crowded cell with persons he described as "murderers" and "gunmen". He reports that the cell in which he was placed was a "filthy dirty hole with rats, roaches and every imaginable insect". The floor and walls were covered with urine and faeces, the other occupants would urinate and defecate on the floor even though buckets were provided to dispose of their waste. He developed a skin fungus, slept on the concrete floor or on a cardboard box when he had access to one. His life in prison was from his account very uncomfortable.
- [56] I do not have any details with respect to circumstances of Mr Ferguson's false imprisonment. It is however clear that while he was in the custody of the police he was beaten to the point of unconsciousness. It is true, as Mrs Rowe-Coke argues that we do not know who inflicted Mr Ferguson's injuries, but those are responses that should have been put into a defence. In any event, the police officers had a duty at common law and through a policy established by the Jamaica Constabulary Force to ensure that persons held in their custody were safe. That harm came to

Mr Ferguson while in custody, means that the duty was breached and the policy was not complied with.

- [57] Mrs Rowe-Coke said the period of false imprisonment was 9 days. Ms Facey says 10 days. On my count, the period of false imprisonment was 9 days and approximately 10 hours. As I am without evidence as to the circumstances of his imprisonment, the award given in **Crossfield** must be discounted as it is fair to conclude that Morrison JA in coming to his decision took into account Mr Crossfield's ordeal. I am of the view that \$130,000 per day would be reasonable for false imprisonment and as such \$1,225,000 is awarded under this head.

### **Aggravated Damages and Exemplary Damages**

- [58] The case of **Rookes v Barnard [1964] AC 1129** sets out the bases on which an award of exemplary damages is to be made. There are 3 bases. The one which is relevant to these proceedings is where there is oppressive, arbitrary or unconstitutional conduct on the part of servants of the government. Government servants include police officers and over the years, there have been several cases where exemplary damages are awarded against the state and police officers because the actions of the police officers in the course of carrying out their duties were seen as an abuse of police power at the expense of the rights guaranteed to citizens.
- [59] Exemplary damages are at the discretion of the Court. The sum awarded should be sufficient to punish the Defendant and set an example for others. While the LRMPA does not permit an estate to claim exemplary damages (see section 2(2)), there is no such prohibition in the FAA or at common law. This claim was brought under several heads of damages. The policy of the Jamaica Constabulary Force, as set out at page 17 of the INDECOM Report (Exhibit 11) is that:

*“a. The Divisional Commander has a responsibility to ensure the safety and security of prisoners and persons in custody;*

*b. Divisional Commanders are to ensure that all lock-ups and cells are inspected at least once every 24 hours and a record made in the station diary as to the physical condition of the prisoners and the structure of the lock-up/cell;*

...

*d. The Station Officer or sub-Officer in charge of lock-ups is to deploy staff at all times to ensure that physical control is exercised over prisoners in custody; i.e. they are seen and observed during each tour of duty;*

*e. Frequent visits are made to cells and all prisoners observed to be custody and in apparent good health; and all such visits to be recorded in the appropriate register.”*

[60] The cell diary suggests that there had been several inspections of the lock up throughout the day. In fact, the record suggests that at 6:00pm on January 16, 2010 all 76 prisoners were in “safe custody”. The report 5 minutes later is that Mr Ferguson was taken to the Spanish Town Hospital. The evidence before me is that he was found on the floor in an unconscious state. I am not sure that the wounds that the post mortem states were said to have been inflicted on Mr Ferguson could have been so inflicted in the space of 5 minutes. The police officers were not as careful as they should have been in carrying out their duties. Their failure to realise that Mr Ferguson had been injured and needed medical assistance in a timely manner affected the circumstances which led to Mr Ferguson’s death. An award for exemplary damages ought to be made to punish the behaviour and set an example so that an occurrence such as this does not happen in the future.

[61] Ms Facey relied on the case of **Roderick Cunningham v Attorney General for Jamaica and ors [2014] JMSC Civ 30**. In that case Edwards J (as she then was) made an order of \$1M for exemplary damages which updates to \$1.5M. This is the sum which Ms Facey asks for on behalf of her client. Mrs Rowe-Coke was of the view that no award should be made as there is no evidence that the police officers acted in a high handed or oppressive manner. I do not agree with Mrs Rowe-Coke. At paragraph 37 of her judgment, Edwards J said

*“The purpose of exemplary damages is to punish wrongdoers for conduct, which, in some cases, is referred to as a contumelious or highhanded disregard of a claimant’s rights or behavior described as arrogant, flagrant, oppressive or outrageous. It is also made to act as deterrence against potential offenders.”*

I find the police officers disregarded Mr Ferguson’s rights and their behaviour was flagrant. I note also that the Special Coroner found their behaviour to be “*grossly negligent*” and even considered manslaughter as a possible charge. That being said, I do not find that the police officers on duty acted in an as offensive, outrageous and oppressive manner as did the police officers in the **Roderick Cunningham case**. In that case, Mr Cunningham was shot, put into the trunk of a police vehicle with another man who appeared to be dead and the trunk locked. He was taken to the hospital where he was handcuffed to a bed. He suffered other things, the details of which I will not get into but already his case is more serious than Mr Ferguson’s.

[62] The police officers in Mr Ferguson’s case were “grossly negligent”, careless in how they carried out their duties. Those words do not characterise the actions of the police officers in Mr Cunningham’s case. Mr Cunningham did nothing to be put into the position he was put, Mr Ferguson came into the sight of the police officers because a complaint was made against him for maliciously destroying someone’s property. The award for exemplary damages cannot be the same in the circumstances. Mr Cunningham’s award has to be discounted. I am of the view that the sum of \$750,000 would be an appropriate sum in the circumstances.

[63] In the case of **Delia Burke v Deputy Superintendent Carol McKenzie and the Attorney General of Jamaica [2014] JMSC 139** at paragraph 73, McDonald-Bishop J as she then was said:

*“It is settled as a matter of law that aggravated damages are compensatory in nature and are awarded to a claimant for the mental distress, which he suffered owing to the manner in which the defendant has committed the tort, or his motive in so doing, or his conduct subsequent to the tort.”*

There is no evidence that Mr Ferguson suffered mental distress because of the manner in which the Defendant committed the tort. There being no evidence, I cannot make an assessment without speculating. I am not allowed to speculate on circumstances. No award is made under this head.

### **Constitutional redress and vindicatory damages**

**[64]** Ms Facey submitted that the Claimant is entitled to redress for breach of the constitutional rights of the deceased. She referred in particular to the breach of Mr Ferguson's rights pursuant to Section 14(1) and section 17(1) of the Constitution. (See paragraphs 46 and 47 of written submissions filed on January 11, 2019). Section 14(1) of the Constitution reads as follows:

*"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. (my emphasis)"*

Section 17(1) has this to say

*"No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."*

**[65]** The Claimant has set out several other constitutional rights which she alleges have been contravened, including:

- I. fundamental right to the protection of private family life
- II. right to liberty
- III. right to protection of law; and
- IV. right to due process.

Ms Facey argued that as a result of the contravention of these rights which are guaranteed under the **Charter of Fundamental Rights and Freedoms** (the "Charter"), the Claimant is entitled to vindicatory damages in the amount of \$20M. She argued that there was no investigation into how Mr Ferguson met his demise and this she said went directly to the deprivation of his right to life which also

includes a right to *thorough, prompt and impartial investigation into the circumstances which led to his death* as held by the Inter-American Commission on Human Rights in the case of **Michael Gayle v Jamaica report 92/05 (October 24, 2005)** (see paragraph 18 of Skeleton Submissions filed on March 17, 2022). She submitted that the purpose of vindictory damages is to make an award for breach of fundamental rights and due to the nature of this case “*effective relief*” would be reasonable to protect “*the most sacred protected constitutional right.*”

- [66] She relied on several cases some of which are set out in paragraph 23 of the Skeleton Submissions contained in the Bundle filed on March 17, 2022. I will consider the cases I found useful in my analysis of the issue.
- [67] Mr Rowe-Coke was not of the view than any award should be made under this head. She was of this view because the death of Mr Ferguson took place in January 2010 and therefore happened before the Charter came into effect. The Charter, she argued, does not operate retroactively and as such any right guaranteed under the Charter would not be relevant to Mr Ferguson or by extension, his estate. It is the pre-Charter Constitution which she says should guide the judge in coming to her conclusion.
- [68] Mrs Rowe-Coke also argued that the Claimant had failed to conform with the requirements of CPR 56.9(3)(c) in that she failed to set out the provision of the Constitution which she alleges had been breached. I can say immediately, that I do not agree with that submission. Although the Claimant has not stated the section of the Constitution which she says has been contravened, she does in fact specify what right both Mr Ferguson and his estate have been deprived of. Mrs Rowe-Coke also submitted further that the Claimant had not established any evidence to suggest that there was a breach of any of the deceased’s constitutional rights. All these factors together, would negate an award for vindictory damages.

**Analysis on the issue of breach of constitutional rights and vindicatory damages**

[69] 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, 137** (page 3-4 **The Administrator General of Jamaica (Administrator est Eric David Black aka David E A Black) v The Attorney General of Jamaica CL 2001/A073 decision of Brooks J as he then was on May 30, 2005.**

[70] I am of the view that the Charter came into effect in 2011 and therefore any constitutional rights which the Claimant in 2010 had when he died, would have been based on the 1962 Constitution which appears to have codified the common law. In that regard I am guided by the relevant sections of the Constitution and these in my view would be sections 14 and 17.

[71] Patterson JA in the case of **Doris Fuller v Attorney General of Jamaica Civil Appeal 91/95** delivered on October 16 1998 at page 89 said:

*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 **Fuller**, Agana Barrett was found to have been kept in inhuman conditions. The circumstances in which he and other persons who were being held came out very clearly in the evidence of one of the other persons who was arrested with Mr Barrett. The evidence was clear and detailed. The court held that the State had contravened the constitutional rights of Mr Barrett and that the awards given for assault and battery and false imprisonment were not sufficient to cover the breach of his constitutional rights to life and not to be held in inhuman conditions.

[72] This was not the case for the evidence before me. There was no one who could say how Mr Ferguson met his demise. Ms Facey relied on the **est David Black**

**case.** I do not find it helpful for in that case, the evidence was that Mr Black was beaten to death by police officers then his body discarded. His decomposed corpse was found later at sea in a horrific state. The police officers were charged and convicted. I do not have any evidence before me that Mr Ferguson was **intentionally** beaten to death by police officers or any person at all. Section 14(1) speaks specifically to the intention to deprive. In the **est David Black case** intention was found to exist. There is no evidence that there was any intention on the part of any police officer to cause Mr Ferguson's death. Albeit the circumstances of Mr Ferguson's death are regrettable, I cannot speculate as to who caused it or how it came about.

[73] There is also no evidence before me that Mr Ferguson was kept in inhuman conditions. In **Fuller** the evidence set out the state of the lock up conditions. It set out the number of men being held in the small cell. It set out the air flow available, the water on the floor, the intense heat the men suffered, the lack of water and food. The conditions were indeed deplorable and inhuman. I have no evidence of the conditions in which Mr Ferguson was held and can therefore make no decision as to whether or not they were inhuman.

[74] Although liability is admitted, I must find on a balance of probabilities that the allegations made by the Claimant in her Particulars of Claim have been proved. This can only be done with the use of evidence.

[75] With respect to the issue of constitutional redress, the **Fuller case** was particularly helpful. Like the case before me, there was no evidence that Mr Barrett's death was caused by intentional actions of the police officers on duty. The Court in the **Fuller case** found that the conduct of the police officers could best be described as "*inadvertence and indifference and lacking in a duty of care, as opposed to a calculated and deliberate act.*" (page 419 paragraph b of the judgment). I would describe the actions of the police officers in the case before me in a similar manner. The Special Coroner has described it as "gross negligence/manslaughter". Neither of those terms connote "intention".

[76] Sykes J (as he then was) in the case of **Sharon Greenwood-Henry v The Attorney General of Jamaica CLG 116 of 1999** judgment delivered on October 26, 2005 said at paragraph 17:

*“There is now a beckoning finger that invites victims who have suffered abuse of their constitutional rights to claim what could now be called constitutional damages or as the Board says, vindicatory damages.”*

This might be so. However, in order to succeed, the Claimant must provide evidence that a constitutional right has been contravened. Ms Fraser has failed to do so in this case and so she cannot succeed in her claim for constitutional/vindicatory damages.

## ORDERS

[77] In light of the above, I now order as follows:

- a. Damages are assessed in favour of the Claimant against the Defendant who is to pay the Claimant
  - i. Special Damages in the amount of \$60,000 plus interest at 3% per annum from January 16, 2010 to October 27, 2022.
  - ii. Damages for Loss of Expectation of Life in the amount of \$240,000.
  - iii. Damages for Pain and Suffering in the amount of \$600,000 plus interest at 3% per annum from August 30, 2012 to October 27, 2022.
  - iv. Damages for False Imprisonment in the amount of \$1,225,000 plus interest at 3% from January 10, 2010 to October 27, 2022.
  - v. Exemplary Damages in the amount of \$750,000.
  - vi. Costs in the claim which are to be taxed if not agreed.
  
- b. The Claimant's attorney-at-law is to file and serve the Judgment.