[2025] JMSC Civ 78

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV03320

IN THE MATTER of the Constitution of Jamaica.

AND

IN THE MATTER of the application of George Williams (BNF Pamella Green) alleging that his fundamental rights including those guaranteed to him under the Constitution were contravened in relation to him and for redress in accordance with section 19(1) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011

BETWEEN	**GEORGE WILLIAMS (BY NEXT FRIEND PAMELLA GREEN)**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN CHAMBERS

Mr John Clarke for the Claimant

Ms Taniesha Rowe-Coke instructed by the Director of State Proceedings for the Defendant

Heard: **October 30, 2024 & June 26, 2025**

Constitutional Law – Mentally disordered defendant charged with murder - Found unfit to plead by jury – Detained for some 50 years at Governor General's pleasure

– Whether detention lawful – Periodic reviews not done for some 42 years – No legal assistance provided to claimant during detention

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 13 (3)(a), (e), (f), (g), (h), (i), (j), (o), (p), (r), 13(6), sections 14 (1)(a) 14(5) , 16(1), 16(2), 16(5),16(6)(c), & 16(10)

The Criminal Justice Administration Act, 1960, sections 23A(1) & as amended in 2006, section 25, The Corrections Act, sections 6,10,18, 19,21, 22 & 26, The Mental Hospital Law (repealed), The Mental Health Act, sections 2, 4 , 9 & 31, The Prisons Act (repealed)

WINT-BLAIR, J

BACKGROUND

[1] The claimant, George Williams, is a mentally disordered person. He was arrested on October 28, 1970 and charged with the offence of murder. He was admitted to the then-known General Penitentiary on October 30, 1970. On December 29, 1970, Mr Williams was indicted for the murder of Ian Laurie and on December 31, 1970, he was indicted for malicious damage to property, namely a motor car. Upon his arraignment on March 25, 1971, the issue of his fitness to plead was tried by a jury, which found him unfit to plead. The order of the Court was that Mr Williams be kept in strict custody until the pleasure of the Governor-General be known.

[2] The claimant was released from prison on July 24, 2020, by order of Jackson-Haisley, J in the St Catherine Circuit Court following the entry of a Nolle Prosequi by the Director of Public Prosecutions.

[3] The affidavit of Lt. Colonel (ret'd) Gary Rowe, former Commissioner of Corrections states that a risk and needs assessment was conducted by Ms Renee Williams on June 19, 2020, and that the claimant was released on June 25, 2020. The report of Ms Williams is undated and there is no prison record of the release of the claimant before the Court. The affidavit of Ms Pamella Green, next friend of the claimant, also gives the release date as June 25, 2020.

[4] The learned judge in a written judgment[1] noted that Mr Williams was first brought before her on June 17, 2020. She made certain orders and, consequent upon those orders, Dr Geoffrey Walcott, Consultant Psychiatrist, examined the claimant on June 17, 2020, and Dr Myo Kyaw OO, Consultant Forensic Psychiatrist, examined the claimant on June 18, 2020. The social enquiry report of Mr Mark Morris was dated June 19, 2020. The judgment said that the claimant was brought back to Court on July 24, 2020 and released; this Court will treat June 25, 2020, as the correct date of the claimant's release.

THE CLAIM

[5] The claimant, by next friend, filed a Fixed Date Claim Form[2] under section 19 the Constitution seeking redress in this Court as the guardian of the Constitution and the ultimate protector of the rights and freedoms it guarantees. The Fixed Date Claim Form seeks:

> *(a) "A Declaration that the manner and context of the state's detention of George Williams, a person with intellectual disability, in prison after he was found unfit to plead breached his fundamental rights and freedoms to which he is entitled by virtue of his inherent dignity as a person and a citizen of a free and democratic society including his rights to:*
>
> *i. Liberty and not to be deprived of it except on reasonable grounds and in accordance with fair procedures established by law in the circumstances of his unfitness to plead to a criminal charge.*
>
> *ii. To be treated humanely and with respect for the inherent dignity of his person*
>
> *(b) A declaration that the state's detention of George Williams in prison after he was found unfit to plead due to mental illness, instead of in a mental health facility, is in breach of his right to personal liberty.*
>
> *(c) A declaration that the failure of the material state organs to conduct periodic reviews of George Williams' incarceration to determine whether he has recovered his mental health so as to be fit to plead and stand his trial is in breach of his right to personal liberty, due process and a fair hearing by an independent and impartial Court in a reasonable time.*
>
> *(d) A Declaration that the State's detention of George Williams in prison after being found unfit to plead due to mental illness, without any periodic review for the entire duration of his incarceration to determine whether he had*

[1] [2020] JMSC Crim 8
[2] Filed on July 14, 2021

recovered his mental health so as to be fit to plead and stand for his trial, is in breach of the following rights guaranteed by the constitution/common law including the rights acknowledged and guaranteed by sections 13 (3) (a), (e), (f), (g), (h), (i), (j), (o), (p). (r), Section 13 (6), Sections 14 (I) (a) 14 (5) and section 16 (I), 16 (2), 16 (5), 16 (6) (c), 16 (10) of the Jamaican Constitution.

(e) Damages for breach of his fundamental rights.

(f) Such further order, declaration, writ, direction, and other relief as the Court considers appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the Constitution to the protection of which George Williams, as the person concerned, is entitled.

(g) Costs of this claim to the Claimant to be agreed or taxed."

THE EVIDENCE

[6] Mr Williams gave evidence in an affidavit that he spent almost fifty years in prison without ever standing trial. He was first indicted for a criminal offence on November 29, 1970. He has been intellectually challenged since he was a little boy and used to see the "head doctor" from as far back as he could recall. The first time he went to the Bellevue Hospital was around the 1960s.

[7] No state organ has taken any active steps since 1975 to prosecute his matter, to ascertain if the purported witness is still alive, or to determine whether there is a viable prosecution. He has seen multiple murder convicts serve their time and return to society while he sits in prison.

[8] He received no sustained psychiatric treatment during his incarceration. He believes that he was serving a prison sentence under the cloud of being unfit to plead as he was in the same building, with the same rules, conditions, and arrangements as a convicted prisoner. In his entire time in custody, he received no special privilege or Court visits. His entire life was robbed by the passage of time. He is now at retirement age and has never worked. When he protested that he was not convicted, he was dismissed by warders and authorities as a madman since he was 'convicted.' He was sentenced to indefinite detention without a hearing to go to Court or to the Governor General for his release.

[9] He believed that he was treated as less than a human being due to his mental issues. He was called a mad case by the warders and belonged to the lowest class of prisoners, 'the gays received better treatment than him.' He would be routinely beaten and abused, and when he complained, the officials would dismiss it as the words of a madman. The conditions of his imprisonment were so bad that each day, he prayed that he would be released from hell. He was deprived of sex. He hoped that he would be deemed sane enough to be released.

[10] He was too poor to afford a lawyer, and no one represented his interests. He did not receive visits from the church people who visited the prison. He was essentially in solitary confinement for 23 hours a day, seven days a week, on lockdown. There was no furniture, and a sheet of foam was his bed for the last fifty years. He was more comfortable sleeping on the ground and often did so, as it was better than the foam. There was no proper toilet facility.

[11] He did not have recreation time. He did not play football or any sports. He spent every day hoping that it would be the day he went home. He did not receive regular medical visits. A head doctor would visit him once every 'blue moon.' Very often, he would receive a tablet which would make him sleep, and sometimes he would not want to take it because it made him feel as though he was going to die, and sometimes it made him see 'duppy.' Medical professionals often told him that he was fit to plead and would soon be brought to Court. He felt so good, but every time he was disappointed. He believed his fate may be to die in prison before he ever saw a Courthouse again.

[12] He stated that even if he was convicted, based on the full circumstances, he would have most likely served his time after 15 years and be released either to his family or to an institution. Earl Pratt and Mary Lynch together served a combined 44 years (Pratt served 30 years, Mary Lynch served 14 years) after being convicted of murder. He personally met Earl Pratt at the St. Catherine Prison. He also spoke to him and many other prisoners because he was, in fact, in the same prison as convicted murderers.

[13] His fundamental rights were breached: (1) liberty, (2) he was deprived, as a person charged with a criminal offence, of a fair hearing within a reasonable time, (3) He was subject to cruel and inhumane punishment, (4) he was presumed guilty and subjected to the same institutions, rules and treatment as convicted prisoners, (5) he was deprived of due process, (6) he was deprived of equality before the law, (7) he was deprived of equitable and humane treatment by public authority in the exercise of their function, (8) he was subjected to torture, inhuman or other treatment by virtue of indefinite detention, (9) he was deprived of the security of the person and (10) robbed of freedom of movement.

[14] He was robbed of his dignity as a human by the (in)action of state organs who collectively failed to ensure his fundamental rights were not abrogated, abridged or infringed. He asked this Court to take any action it deems fit and ultimately consider ordering that his rights were breached by his placement in St. Catherine Prison prior to his conviction for the very offence for which he was in custody.

[15] Even if the Court is minded to refuse the relief sought in his Fixed Date Claim Form, he would still want the Court to take any steps available to it to ensure that no other intellectually disabled Jamaican suffers the fate he was forced to endure over more than fifty years simply because he is ‘mad.' He is in the sunset of his life and wants this action to be heard before he dies. He asks that this matter be heard urgently since he is sickly and does not know whether he will die before he is a beneficiary of any relief based on the violations of his fundamental rights.

[16] Pamella Green gave evidence that on the 15th day of September 2020, she was appointed by Nembhard, J as the nearest relative of George Williams and is authorised to bring these and all proceedings on behalf of George Williams. He was also classified as a patient in the formal order. This claim is brought in relation to the breaches of his fundamental rights.

[17] From birth, she was told about her uncle George, who was in prison for being ‘mad.’ He was never convicted of any crime, nor was he committed to a mental

institution for treatment or containment. Many different family members, including her grandmother (George's mother), died before George was released from prison. He was not allowed to attend his mother's funeral as the prison said that could not be accommodated.

[18] The claimant was first committed to custody on or about the 21st day of July 1970. He was released on the 25th day of June 2020. He was first committed to the Bellevue Hospital then taken to Tower Street Adult Correctional Centre and finally placed at the St. Catherine Correctional Centre. Very poor records were kept by the prison authorities in relation to George's imprisonment as a mentally ill prisoner. Medical records are incomplete and absent. There was a record for the year 2016, one entry for 2017 and another entry for 2020.

[19] As a poor family, they were unable to afford legal representation. Ms Green went to the Legal Aid Council on numerous occasions and was advised that legal aid was not possible since he was in custody at the Governor General's pleasure.

[20] She visited many NGOs seeking to get assistance. She spoke to lawyers who tried to assist pro bono, but to no avail. They were only able to get his release after Noel Chambers died in prison, and there was renewed national interest around the plight of the mentally ill in prisons. The family was concerned that George would die and redoubled their efforts to try to obtain assistance.

[21] A Habeas Corpus application was filed. The hearing was set for numerous dates. The Court asked the Office of the Director of Public Prosecutions and the Department of Correctional Services to provide the claimant’s records. Ms Green had previously sought documents from the prison authorities in relation to George Williams's detention and was advised they had committal papers which were not given to her until they were unsealed by the Court.

[22] The Director of Public Prosecutions (“DPP”) attended Court and indicated that she was minded to take a certain course, but she did not want to release George Williams without knowing if the community would receive him, as George had killed

a man. After a favourable social enquiry report, the DPP withdrew the charges and George Williams was found not guilty and released by Jackson-Haisley, J at the St. Catherine Circuit Court on the 25th day of June 2020.

[23] Ms Green has primary responsibility for the claimant's care. He is at the retirement age and has not worked a single day in his life. She is poor with very little disposable income to take care of Mr Williams's financial, emotional and psychological needs/expenses. George Williams had been incarcerated at the Saint Catherine Adult Correctional Institution from 1971 until nearly 50 years later, when he was released from custody in June 2020.

[24] For the defendants, Lieutenant Colonel (Ret'd) Gary Rowe gave evidence that the claimant was admitted to the Tower Street Adult Correctional Centre on October 30, 1970, following a charge of murder.

[25] The claimant has been diagnosed and treated for schizophrenia for over fifty (50) years. The allegations against the claimant are that on or around July 21, 1970, one James Laurie was driving his motor car with his son and wife up Mount Diablo when the claimant threw a rock at the car and shattered the windshield. The driver could not see and the claimant attacked the front passenger, Ian Laurie, through an open window. The claimant stabbed Ian Laurie repeatedly with a dagger and attempted to attack the wife in the back seat, but the injured son fought back and the driver was able to drive off. The claimant held onto the car and was dragged some distance until he fell off. Ian Laurie died later that day from the injuries inflicted by the claimant.

[26] The claimant was arrested and charged with murder. He was examined on February 3, 1971 and found to be suffering from schizophrenia but was in a state of partial remission. On March 25, 1971, he was found unfit to plead and was ordered to be kept in strict custody until the pleasure of the Governor General be known.

[27] The claimant's records were confidential and could not be disclosed without a Court order. The records were released by Court order pursuant to the filing of a writ of habeas corpus. In accordance with the report of the Mental Health (Offenders) Enquiry Committee at page 73, mentally unsound offenders after 1974 were no longer housed at psychiatric facilities due to security and other concerns. The claimant was assessed to determine his fitness to plead by psychiatrists assigned to the Department of Correctional Services on various dates. He was deemed unfit to plead on each occasion.

[28] On June 19, 2020, the claimant was deemed fit to plead by an independent psychiatrist. On June 19, 2020, a risk and needs assessment was conducted by Renee Williams, Risk Assessment Coordinator, pursuant to an order of the Court. It was found that the claimant was a functionally illiterate person who lacked adequate interpersonal skills and was incoherent. He was deemed to require continuous medical treatment and psychosocial therapy in the immediate and long term to prevent a relapse of his chronic schizophrenia.

[29] Following the entry of a Nolle Prosequi by the Director of Public Prosecutions in relation to the charge of Murder, on June 25, 2020, the claimant was taken before St. Catherine Circuit Court and released into the custody of his family by order of Jackson-Haisley, J[3].

[30] Issues

1. **Whether the Claimant’s constitutional rights were breached by his detention in prison as a result of his being unfit to plead.**

2. **What is the effect of periodic reviews on the claimant’s fundamental rights.**

[3] [2020] JMSC Crim 8

3. **Whether the Claimant's rights were breached when he was detained in prison rather than in a psychiatric facility.**

4. **Whether damages should be awarded and the quantum.**

DISCUSSION

How did Jamaica get here?[4]

[31] The laws of Jamaica dealing with the mentally disordered had their genesis in the English legal system, enshrined in our colonial past. The Lunatics (Custody Of And Management Of Their Estates) Act, enacted on March 20, 1873, and the Mental Hospital Law, enacted on August 13, 1873, both allowed the mentally disordered accused and convicted persons to be kept in indefinite detention for treatment and care in custody.

[32] Theories of crime and punishment have existed since early civilisation, as attested by the recordings of human life and times. In the 4th century BC, the Greek philosopher Aristotle, in deliberating upon the circumstances in which a person may not be deemed culpable, defined crime as the act of free will, stimulated by desire. He argued that certain groups, such as children, idiots and the mentally disordered, should not be held responsible for their criminal actions,[5] 'an insane offender is punished sufficiently by his madness.' A variation on this phrase is *furiosus satis ipso furore punitur* translated, 'the madman is sufficiently punished by his madness.'[6] The thinking was that suffering from mental illness was punishment enough for criminal behaviour, and so offenders with mental disorders were granted special treatment under the law.

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[4] The first part of this discussion has been reproduced from Chapter 1 of the Report of the Mental Health (Offenders) Enquiry Committee, August 2020, with paraphrasing where necessary. The report relied upon in the affidavit of Lt. Colonel (Ret'd) Gary Rowe at paragraph [10] as well as in the submissions of counsel.
[5] Aristotle, *The Nicomachean Ethics. Book III*. (trans D Ross). Oxford: Oxford University Press, 2009, pp.38–42
[6] Attributed to Marcus Aurelius

[33] In England, before the Norman invasion, an accused who was unable to understand the nature of a crime was deemed unable to form the necessary intention required for guilt (*mens rea*), even if he had committed the criminal act (*actus reus*). This category of defendants was usually released to the care of their families rather than punished.[7]

[34] Trial by jury was introduced in England after the Norman Conquest, and by the 13th century, the King's Court had been established. The practice had by then developed whereby accused persons were confronted by their accusers, and a jury was empanelled to determine whether the accused should be held to account.[8] A conviction invariably resulted in punishment to include confiscation of a convict's worldly goods by the Crown. An accused person, when arraigned, was required to answer and to say 'guilty' or 'not guilty' in reply to the indictment. If he could not answer, then he could not be held accountable.

[35] At that early stage in the development of the incompetency doctrine in England, self-representation rather than representation by counsel was the common practice. Indeed, in serious criminal cases, counsel was forbidden, and the law required the defendant to appear before the Court in person and conduct his own defence in his own words. The prohibition against the assistance of counsel continued for centuries in felony and treason cases, and as a result, during the formative period of the incompetency doctrine, a defendant stood unrepresented before the Court. The modus of trial was merely a long argument between the defendant and the counsel for the Crown. So, it was imperative that defendants be competent in order to meet the requirement that they conduct their own defence.

[36] The legality of such trials was called into question,[9] and the Courts had to treat with persons who could not, or would not, enter a plea. Such accused were said

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[7] *Crime and Insanity in England 1. The Historical perspective*. Edinburgh: University Press, 1968, by Nigel Walker.

[8] *Fitness to Plead in in England and Wales*. Hove: Psychology Press, 1996, by Don Grubin

[9] *Moral and Criminal Responsibility: answering and refusing to answer,* by Robert Antony Duff, University of Stirling - Department of Philosophy, 19 Oct 2017. The paper discusses amongst other things the way in which answerability requires us to attend to the capacities of the person whom we hold responsible for crimes, not just at the time of the conduct for which he is now being held responsible, but at the time of the holding.

to ‘stand mute’, and a jury had to find whether they were ‘mute of malice or mute by visitation of God.’[10] An accused who was deemed to stand mute of malice was considered to be malingering, that is, deliberately withholding a plea if it appeared advantageous so to do. Malingerers were subjected to *peine forte et dure* – starved and pressed under heavy stones until they answered or, in many instances, died.[11]

[37] An accused found mute by visitation of God was deemed unable to plead and was absolved from trial and punishment. In the mid-seventeenth century, Blackstone wrote that a defendant who becomes ‘mad' after the commission of an offence should not be arraigned ‘*because he is not able to plead... with the advice and caution that he ought*,’ and should not be tried, for ‘*how can he make his defence?’*[12]

[38] The ban on the trial of an incompetent defendant stems from the common law prohibition on trials in absentia, and from the difficulties the English Courts encountered when defendants frustrated the ritual of the common law trial by remaining mute instead of pleading to charges. Without a plea, the trial could not proceed. In such cases, English Courts were obliged to determine whether a defendant was '*mute by visitation of God’ or ‘mute of malice.’*

[39] Mute by visitation was invariably associated with mental disorders, thought to be caused by either sacred or satanic influences. These terms evolved from that thinking:

i) *Idiot*, referring to persons with a cognitive disorder from birth;

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[10] *What constitutes fitness to plead?* by Don Grubin, Crim LR 1993;748–758.

[11] *Historia Placitorum Coronæ: The History of the Pleas of the Crown,* by Sir Matthew Hale (1800) published posthumously from the Original Manuscripts and with notes by Sollom Emlyn. by E. and R. Nutt, and R. Gosling (the assigns of Edward Sayer), for F. Philadelphia, PA: Robert H. Small, 1847. With Additional Notes and References to Modern Cases Concerning the Pleas of the Crown. By George Wilson. A New Ed. And an Abridgment of the Statutes Relating to Felonies Continued to the Present Time, with Notes and References, by Thomas Dogherty, London: Printed by E. Rider, for T. Payne, H. L. Gardner, W. Otridge, E. and R. Brooke and J. Rider [and seven others in London], OCLC 645127647.

[12] William Blackstone, Commentaries (9th ed. 1783); see also Matthew Hale, The History of the Pleas of the Crown 34-35 (1736).

ii) *insane*, which was a broad description of those who developed madness later in life and;

iii) *lunatic*, which was the term more often used in reference to persons who alternated between madness and lucidity, and

iv) *deaf mute*, who were persons afflicted by speech and hearing impediments, but who were without mental illness.[13]

[40] All these categories were eventually blended into the term insanity, and all such defendants were deemed mute by visitation, and as a result exposed to the possibility of a Court making a finding of 'unfit to plead.'

[41] During the early 18th century, as the adversarial criminal process developed, defendants were allowed to take a more active role in the trial process[14]. This, along with the writings of Sir Matthew Hale,[15] shaped the growth of the fitness-to-plead procedure.

[42] Hale proposed a useful model which focused on what defendants could do rather than on what they could not. He distinguished and categorised the following groupings: the out and out mad, whom he viewed as excepted from criminal responsibility and the partially insane who were not.[16] Hale further compartmentalised deaf-mutism from insanity, submitting that deaf mutes should not be found unfit unless they were also mentally defective. Hale viewed unfitness as temporary rather than a final outcome and suggested that trials be postponed until the insanity abated. Despite his influence, Hale's approach was not initially embraced by the Courts.[17]

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[13] History of insanity as a defence to crime in English criminal law, by Homer D. Crotty, Calif. L Rev. Vol. 12, No. 2 (Jan., 1924), pp. 105-123

[14]The origins of adversary criminal trial, by John H. Langbein, Oxford University Press: (Oxford Studies in Modern Legal History) 1st edition, 2003.

[15] Hale was a 17th-century legal scholar with an innovative understanding of mental disorder. He was acutely interested in the causal nexus of the behaviour caused by mental disorder, and rejected a status-based approach whereby the mere presence of insanity would be enough to render an accused person unfit to plead.

[16] Manifest madness: mental incapacity in the criminal law, by Arlie Loughnan, Oxford: Oxford University Press, 2012.

[17] Fitness to Plead in in England and Wales. Hove: Psychology Press, 1996, by Don Grubin

[43] By the mid-18th century, the Courts began to grasp the full implication that fitness to plead involved far more than merely a defendant's ability to enter a plea when arraigned.[18] Hale's writings gained wider acceptance and importance then. This acceptance was precipitated by a number of cases, which helped to shape the course of the issue of fitness to plead in criminal procedure.

[44] In 1756, **Dyle**[19] was charged with murder, his lawyer was unable to take instructions from him as he appeared incapable of *"attending to the evidence"*. The jury deemed him "not of sound mind and memory" and so his trial did not proceed. **Dyle** was probably one of the earliest cases of being found 'unfit to plead' but the decision was regarded of little consequence until after the passage of legislation in 1800[20]. In 1790, **Firth**[21] was charged with high treason for throwing a stone at a coach conveying the monarch, King George III. In considering Firth's fitness to plead, the Lord Chief Justice declared that '*no man shall be called upon to make his defence at a time when his mind is in that situation as not to appear capable of so doing.'*

[45] The leading cases are that of **R v Dyson**[22] and **R v Pritchard**[23], both deaf-mutes. In the former, Esther Dyson, a deaf mute, was charged with murdering her child. Parke J, being informed by Hale's treatise, instructed the jury that the question was whether the defendant was able *'to conduct her defence with discretion*.' They were also to consider '*if they were satisfied that the prisoner had not then, from the defect of her faculties, intelligence enough to understand the nature of the proceedings against her.'* As Ms. Dyson could neither challenge the jury nor

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[18] *Commentaries on the laws of England in four books. Volume IV*; by William Blackstone and Thomas McIntyre Cooley, Chicago: University of Chicago Press, 2002

[19] *R v Dyle's* (1756) OBSP 271; see Walker op cit, pp 222-3.
Walker, N, Crime and Insanity in England, 1: The Historical Perspective, Edinburgh University Press. (1968), especially Chapter 14.

[20] Criminal Lunatics Act [1800], section 2: "If any person indicted for any offence shall be insane and shall upon arraignment be found so to be by a jury lawfully empanelled for that purpose, so that such person cannot be tried upon such indictment...".

[21] R v Firth (1990)

[22] R v Dyson (1831) 7 C & P 305n; 1 Lewin 64.

[23] R v Pritchard (1836) 7 C & P 303.

understand the proceedings, she was found '*insane'*, spared trial, but detained indefinitely.

[46] In the latter case, Pritchard was indicted for the capital offence of bestiality (as it then was). Due to communication deficits, he did not enter a plea and was found '*mute by visitation'*. Subsequently, when asked to answer to the indictment, he used a sign to indicate 'not guilty.' The jury consequently decided he was now able to plead; however, the judge, Baron Alderson, suggested that simply being *able* to plead did not equate him with being *fit* to plead. Proposing both a status-based and functional test, he asked the jury to first find whether Pritchard was 'sane or not' and then to consider three elements:

> '*First, whether the prisoner is mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence – to know that he might challenge any of you to whom he may object – and to comprehend the details of the evidence.'*

[47] Pritchard's ability to instruct counsel was not considered because access to legal advice was not routinely available at that point. This criterion later arose when **Davies** (1853) was found to be unfit as he could not properly instruct counsel due to mental illness. This criterion was incorporated into the **Pritchard** test.

[48] The **Pritchard** criteria were rapidly and repeatedly adopted as the legal standard for fitness to plead. Although these two cases involved deaf-mutes, Lord Alverstone stated in 1909[24] that to deal with such persons as 'insane' was 'in accordance with common sense and with the proper administration of the criminal law.'

[49] The present procedure and criteria by which defendants are found unfit to plead, or guilty but mentally disordered (the special verdict), have come in for frequent criticism and no less so in Jamaica. Under the Criminal Justice (Administration) Act 1960 ("CJAA"), in most instances, the consequence of a finding of '*unfit to*

[24] R v Governor of Stafford Prison; Ex p Emery [1909] 2 KB 81

plead or stand trial' or a special verdict, has been that the defendant is made subject to a detention order with restrictions and without time limits. The fact is that the effect of such a detention order is that the defendant may be detained indefinitely.

[50] Law 4 of 1873 was enacted on March 20, 1873, to '*vest in the Court of chancery jurisdiction to deal with the custody and management of idiots, lunatics, and persons of unsound mind, and of their estates in the island and to amend the practice in proceedings in lunacy.'*[25] Pursuant to that law, the word *"lunatic"* was given the same meaning as '*idiot'* and '*person of unsound mind.'*[26] There was no distinction between persons with a mental versus physical impediment, and none in relation to those in conflict with the law.

[51] In fact, there were no provisions for the psychiatric care of persons who were committed to the Jamaica Lunatic Asylum, which came into existence in 1861. The extent of the State's responsibility was for '*the Court of chancery to appoint one or more duly registered medical practitioners to inspect and report… upon the care and treatment of any lunatic…at the least twice in each year'*[27]

[52] The Jamaica Lunatic Asylum was renamed the Jamaica Mental Hospital in 1938, and then the Bellevue Hospital in 1946. The Mental Hospital Law of 1873 made provision for '*any constable'* with or without a warrant to arrest persons suspected to be of unsound mind who were '*found wandering at large'* and to take them before a Justice of the Peace. The Justice of the Peace would then make enquiries and call in aid the assistance of a duly registered medical practitioner. Where a person was found to be of unsound mind, for his own good, he was detained in a Mental Hospital.

The legal regime for the mentally disordered in conflict with the law

[25] Jamaica –Law 4 of 1873.
[26] Ibid section 1
[27] Ibid Section 25

[53] The provision was for 'criminal lunatics', that is, defendants against whom a special verdict was returned pursuant to the '*Administration of Criminal Justice Law, or who shall be found to be insane at the time of arraignment, or who, under the authority of* ***any law now or to be in force****, may be committed or removed to a Mental Hospital shall be confined in the Mental Hospital*[28].' (My emphasis.) The words in bold '**any law now or to be in force**' mean that the laws relating to the mentally disordered would change over time.

[54] The law as it stood then was for the care, treatment and custody of the mentally disordered and prescribed a regime under the law. This legal regime, to which I shall continue to refer, began in 1873 and was received into the law of Jamaica by way of the Independence Constitution.

[55] When Law 4 of 1873 and the Mental Hospital Law of 1873 are read with the CJAA, which was itself saved, the clear implication is that there is a prescribed legal regime which was always intended by the legislature to be for the care and custody of the mentally disordered.

[56] The first real effort made to treat and rehabilitate mentally disordered persons was under the 1873 Mental Hospital Law, wherein provisions were made for the engagement *of a duly qualified medical officer, trained and accustomed to the modern treatment of the insane…'*. The 1974 amendment to that statute, for the first time, created the position of mental health officer and gave such an officer the authority to enter '*any premises… for the purpose of making such inspection as he thinks fit'* relative to a reasonable belief that a mentally disordered person was being kept there without proper care. The constable, however, was central in relation to the apprehension of such persons.

[57] The Mental Hospital Act later became the Mental Health Act of 1997 ("the MHA"). Under section 2 of that latter statute, 'mental disorder' means-

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[28] Section 17 of The Mental Hospital Law, 1873

'*(a) a substantial disorder of thought, perception, orientation or memory which grossly impairs a person's behaviour, judgment, capacity to recognise reality or ability to meet the demands of life which renders a person to be of unsound mind; or*

(b) mental retardation where such a condition is associated with abnormally aggressive or seriously irresponsible behaviour, and

'mentally disordered' shall be construed accordingly;'

[58] Further definitions in section 2 include:

'*psychiatric facility' or 'facility' means any clinic, hospital ward, mental nursing home or rehabilitation centre designated as such under section 4 (1);*

'psychiatric hospital' means any place designated as such under section 4 (1);

'psychiatric ward' means the part of a general hospital designated as such under section 4 (1);

'public psychiatric facility' means the Public Psychiatric Hospital and any other psychiatric facility maintained by the Government;'

[59] Pursuant to section 9 of the MHA, the Courts can routinely order the admission of mentally disordered persons to the psychiatric hospital, for the statute provides that:

'*The managers of a public psychiatric hospital or a duly authorised medical officer shall, on the order issued by a Court, admit and detain for treatment in that hospital persons who are –*

(a) found unfit to plead on trial; or

(b) found by a Court to be guilty of an offence but are adjudged by the Court to be suffering from a mental disorder or diminished responsibility.'

[60] The Bellevue Hospital was established in 1861, long before the Mental Health Act of 1997.[29] That MHA repealed both the Lunatics (Custody Of And Management Of Their Estates) Act and the Mental Hospital Act. The Mental Health (Prescribed Forms) Regulations were brought into effect in 2004 and the Mental Health (Public

[29]Gazetted on September 1, 1999

Psychiatric Hospital) (Bellevue Hospital) Management Scheme came into effect in 2013.

[61] It is of significance to state that long before the above regulations and scheme came into effect, the Bellevue Hospital, which initially housed all mentally disordered persons, whether convicted or accused, was closed. As a consequence of that decision, all mentally disordered defendants were transferred to the Tower Street Adult Correctional Centre (formerly the General Penitentiary after 1974 because of security and other concerns).

The approach to construction of the Charter

[62] In **Dale Virgo v The AG**[30], the Court of Appeal set down how a Court is to approach its analysis in cases concerning alleged breaches of the fundamental rights provisions of the Charter. There is to be an analysis of the context and evidence presented to the Court using the factors below:

> *"[32] Several principles may be distilled from those decisions and applied to this case. The relevant ones are:*
>
> *a. claims for redress for breaches, or likely breaches, of any of the fundamental rights and freedoms, are to be initiated under section 19 of the Charter (section 19(1));*
>
> *b. "…the burden of establishing that legislation [or State action] derogates from a constitutionally guaranteed right lies on the claimant for redress, whereas the burden of establishing demonstrable justification lies on the State." (para. [26] of AG v Jambar);*
>
> *c. the standard of proof that is placed on the claimant is the civil standard, and the Court should give a generous and purposive interpretation to the provisions of the Charter which protect human rights (para. 35 of Chantelle Day and another v The Governor of the Cayman Islands and another, para. [203] (b) and (d) of Robinson v AG) and para. [88] of Quincy McEwan and others v The Attorney General of Guyana [2018] CCJ 30 (AJ);*

[30] [2024] JMCA CIV 33

d. if a breach of a Charter right is not established, that is the end of the matter, but if it is established, the onus shifts to the party seeking to justify the limitation of that right (para. [203] (i) of Robinson v AG);

e. the standard of proof placed on the party seeking to justify limiting the right is also the civil standard "but at the higher end, closer to the fraud end of the spectrum of proof", as the term "demonstrably justified", which is set out in section 13(2) of the Charter, suggests (para. [203] (h) and (j) of Robinson v AG);

f. the party seeking to justify limiting the right must show, firstly, that the objectives of the law or action "relate to concerns which are pressing and substantial in a free and democratic society" and secondly, that the means chosen to address those objectives "are reasonable and demonstrably justified", in other words, the law or action is proportionate to achieve the objectives (pages 138-139 of Oakes);

g. the two-stage test set out in Oakes was slightly reformulated by Sykes CJ in para. [108] of Robinson v AG:

> *"[a)] the [limiting] law must be directed at a proper purpose that is sufficiently important to warrant overriding fundamental rights or freedoms;*
>
> *[b)] the measures adopted must be carefully designed to achieve the objective in question, that is to say rationally connected to the objective which means that the measures are capable of realising the objective. If they are not so capable then they are arbitrary, unfair or based on irrational considerations;*
>
> *[c)] the means used to achieve the objective must violate the right as little as is reasonably possible;*
>
> *[d)] there must be proportionality between the effects of the measures limiting the right and the objective that has been identified as sufficiently important, that is to say, the benefit arising from the violation must be greater than the harm to right.";*

h. if the law or action falls within a specific constitutional limitation, it will be held to be demonstrably justified in a free and democratic society;

i. if there is a tie between the claimant's assertion of a breach of the Charter right and the State's proclamation that it is demonstrably justified, the claimant must succeed because the violator can only succeed if the violation is clearly justified (para. [203] (t) of Robinson v AG); and

j. the party seeking to limit the right has a duty of candour to provide all relevant information to the Court (para. [203] (u) of Robinson v AG)."

The Right to Liberty

[63] Mr Clarke submitted that sections 13(3)(a), 13(3)(p), 14(1)(a), 14(1)(b), 14(2)(b) and (d), 14(5) (a)(d) have all been breached by the State. The claimant's right to liberty was affected by his placement in a prison when he had not been convicted of any offence. A prison placement is inconsistent with a regime specifically provided in the law for the care and treatment of the claimant's mental illness. He relied on **Anthony Henry v AG of St Lucia**[31] to submit that there was no focus on the claimant's case and no assessment of his overall status and the continued basis for his detention as a result. The physical conditions and arrangements under which the claimant was detained constitute a breach of his right to liberty.

[64] The claimant merely has to prove a deprivation of his liberty rights to trigger a possible breach, which the State will have to demonstrably justify. In this regard, the Warrant of Commitment cannot stand as justification for this breach for two reasons, first, it does not display the jury's verdict and second, it bears a Court date, however there is no evidence that Mr Williams was brought back to Court.

[65] Mr Clarke submitted further that there was no answer from the State as to the role of the Governor General in this case and no evidence that the claimant was imprisoned at the pleasure of His Excellency. On a true construction of the right to liberty, it was the Governor General who had to deprive the claimant of his liberty, as that was the law at the time the order was made. The claimant's detention in prison was therefore unlawful as there was no order from the Governor General placing him there. The State could not produce such an order and relied on the Warrant of Commitment which does not amount to a lawful order from His Excellency.

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[31] [2023] UKSC 41

[66] Mrs Rowe-Coke conceded that indeed some of the breaches have been made out. Restrictions on liberty in Jamaica must be on reasonable grounds and in accordance with fair procedures, established by law. Any deviation from these standards must be demonstrably justified in a free and democratic society to be considered constitutional.

[67] The defendants argue that the Warrant of Commitment issued on September 17, 1973 is proof that the claimant was lawfully detained in a prison. Further, on each court date, he was remanded by the Court. Mrs Rowe-Coke contends that the right to liberty created by sections 13(3)(a) and 14 is a deprivation of liberty and not merely a restriction on liberty. Both sections should be interpreted coterminously and the exceptions that apply to section 14 should apply equally to section 13(3)(a).

[68] It was submitted that the Court in **Anthony Henry** found that the respondents' right to personal liberty was not breached because they were detained in a prison instead of a mental facility. While the MHA in Jamaica enables a judge to order a person who is unfit to plead to be detained in a mental hospital, the Act neither mandates nor requires a judge to do so as is the case in St. Lucia. In contrast, the CJAA empowers a judge to detain a person unfit to plead at the Court's pleasure.

[69] In reliance on **Guzzardi v Italy**[32] it was submitted that the European Court of Human Rights ("ECtHR") had adopted a similar interpretation of the right to liberty created by Article 5(1) of the European Convention on Human Rights ("ECHR"). The Court found that the right contemplated physical liberty of the person and was concerned with deprivation of liberty instead of a mere restriction on liberty. The right to freedom of movement in Article 2 of Protocol No 4 of the ECHR is also similar to section 13(3)(f) of the Charter.

[70] Mrs Rowe-Coke conceded that the claimant's right to liberty was breached in respect of the failure to have considered whether a fair trial was possible as in

[32] Application no 7367/76 (6 November 1980)

those circumstances any authorisation for detention under the Mental Health Act fell away. More will be said on this later.

The nature of the enumerated rights regarding liberty

[71] McDonald-Bishop, JA (as she then was) in **The Jamaican Bar Association The Attorney General and The General Legal Council**,[33] expounded on the liberty rights and made it clear that though they are close each right is separate and distinct and each has to be considered in turn. The various provisions of the Charter relating to the right to liberty guaranteed by section 13(3)(a) are not at all absolute, as limitations may justifiably be placed on them in accordance with the Charter. The rights distilled from Her Ladyship's judgment are set out below:

1. Liberty in our Charter is not restricted to physical restraint of the person; however, this must not be viewed as unconstrained freedom to do whatever one pleases.

2. The rights to liberty are specifically qualified by the Charter. Had that not been so, no one could be detained or arrested prior to conviction for a criminal offence or for any other reason.

3. The right to liberty is guaranteed by section 13(3)(a).

4. The right not to be deprived of one's liberty, is also guaranteed by section 13(3)(a).

5. The right to liberty of the person contemplates the physical liberty of a person.

6. The right to liberty of the person also refers to the classic detention in prison or strict arrest.

[33] [2020] JMCA Civ 37

7. To be placed under actual physical constraint for any length of time is for that period, a deprivation of liberty[34] (see **Engel and others v The Netherlands** (1976) 1 EHRR 647).

8. The right to freedom of the person, is guaranteed by section 13(3)(p).

9. This right to freedom of the person guaranteed by section 13(3)(p) is explicitly made subject to section 14 of the Charter and is a direct "gateway" to section 14, which is directly related to section 13(3)(a).

10. The section 13(3)(a) qualifier "*except in the execution of the sentence of a Court in respect of a criminal offence of which the person has been convicted"* is also listed in section 14 and made subject to the overriding conditionality of *"except on reasonable grounds and in accordance with fair procedures* established *by law".*

11. Section 14(1) states, in part: "14.-(1) ***No person shall be deprived of his liberty*** [*except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances]*" [this is the specific qualifier, it embodies principles of fundamental justice which includes reasonableness, substantive and procedural fairness which are all recognised by the Charter. Restrictions on liberty in Jamaica must be on reasonable grounds and in accordance with fair procedures, established by law.]

12. The underlined portion in bold in the excerpt above shows explicit reference to the right not to be deprived of liberty provided for in section 13(3)(a). Section 14 treats with the right of a person not to be deprived of his liberty as expressed under section 13(3)(a).

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[34] the ECtHR has made it very clear in several cases that a deprivation of liberty is not confined to the classic case of detention following arrest or conviction but may take numerous other forms. The prohibition, it is said, has an autonomous meaning and has fallen to be considered in "a very wide range of factual situations", and so, the absence of certain features of the standard case of imprisonment - for example, locked doors or institutional surroundings - are not essential to the concept of deprivation of liberty.

13. It is in section 14 that the right not to be deprived of one's liberty is reinforced but made subject to additional qualifiers not mentioned in section 13(3)(a). Section 14 states that the rights may be limited on other grounds other than that stated in section 13(3)(a), provided that the grounds for doing so are reasonable and are in accordance with fair procedures laid down by law.

14. The Charter does not expressly provide the basis for the distinction between the liberty rights under section 13(3)(a), and the right to freedom of the person, under section 13(3)(p). Neither does it expressly provide the basis for not making section 13(3)(a) directly subject to section 14, as in the case of section 13(3)(p). That notwithstanding, it is evident, on a reading of section 14, that although section 13(3)(a) is not made directly subject to it, the provisions are intimately connected and should be read in the light of each other. "…[t]he general liberty right stated in section 13(3)(a) receives more detailed articulation in section 14 (dealing with liberty of the subject) and section 16 (dealing with due process)".

15. Sections 14(2) and (3) also provides for certain procedural safeguards to be observed where a person is deprived of his liberty under the prescribed circumstances. Some of the safeguards governing the deprivation of the liberty of a person include: i. the right to communicate with and be visited by specified persons; ii. the right to be informed at the time of arrest or detention or as soon as is reasonably practicable in a language which he understands, the reasons for his arrest or detention; iii. the right to be informed in language which he understands of the nature of the charge; iv. the right to communicate with and retain an attorney-at-law and the entitlements to be tried within a reasonable time; v. the right to be brought before the Court or an officer authorised by law without delay upon detention or as soon as is reasonably

practicable; and vi. the right to be released on bail either unconditionally or upon reasonable conditions.

16. Section 14(5) also states that any person deprived of his liberty shall be treated humanely and with respect for his inherent dignity.

17. There is also section 13(9) of the Charter, which allows for deprivation of liberty in other circumstances, such as during a period of public emergency or public disaster, which are not immediately relevant to this analysis. It is only raised to show that in treating with section 13(3)(a), the Charter must be read as a whole because there are other provisions which affect the right to liberty and the right not to be deprived of liberty and there are qualifiers other than the one specified in section 13(3)(a).

18. To make good sense of the Charter and to give full protection to the rights it seeks to guarantee, while also giving effect to the right of the state to limit these rights, section 13(3)(a) must, of necessity, be read in conjunction with sections 13(3)(p), 14 and 16.

19. Article 5 of the European Convention on Human Rights is, a combination of sections 13(3)(a) and 14 of the Charter. It also reflects the intent of section 13(3)(p), treating with freedom of the person. Article 5 of the ECHR is engaged in the context of house arrests, residence and curfew orders. The circumstances listed in Article 5 in which there may be deprivation of the liberty of a person are similar (if not identical) to those enumerated under section 14(1) of the Charter. The safeguards to be observed under Article 5 are, more or less, similar to those listed in sections 14(2) and (3) of the Charter.[35]

The interaction between the statutes related to the claimant's detention

[35] Article 5 of the Convention provides, among other things, that: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

[72] In the case at bar, a broad, liberal and purposive interpretation, as distinct from a narrow and technical construction, will be given to the interpretation of the relevant provisions of the Charter.

[73] The Court has to consider not only the **Dale Virgo** analysis but also the interaction between the various statutes which are relevant to the question of whether there has been a breach of the rights guaranteed by the Charter. It is plain that there has been a breach of the liberty rights guaranteed by the Charter as conceded by the defendants and for other reasons set out below.

What is meant by "the Governor General's Pleasure"

[74] This term evolved from our colonial ancestry, where persons detained for committing a crime were held for an indefinite period, said to be held at His/Her Majesty's pleasure. This sentence represented a period of detention that was at the discretion of the Crown and would be imposed upon persons found guilty by reason of insanity as well as on juvenile offenders; accordingly, this type of detention can still be found in various Commonwealth countries.

[75] Since 2003, the terminology in Jamaica has been changed by statute, as a result of the Privy Council case of **DPP v Mollison**,[36] which determined that the sentence of *"detention at the Governor-General's pleasure"* was unconstitutional. The Board reasoned that the sentence was unconstitutional as it violated the doctrine of the separation of powers and not that it represented an indefinite period of detention. The Governor-General is a part of the executive and not the judiciary. This led to the ruling that persons detained at the Governor-General's pleasure were now being detained at the Court's pleasure.

[76] Act No. 40 of 1960 entitled the Criminal Justice (Administration)(Amendment) Law, 1960 was brought into force on July 7, 1960. It is to be read and construed as one

[36] [2003] UKPC 6

with the Criminal Justice (Administration) Law also of 1960, ("the principal Act") Act 4 provided that:

> *"23.-(1)* ***If any person is indicted for any offence shall be insane, and shall, upon arraignment, be found so to be by a jury empanelled for that purpose, so that such person cannot be tried upon such indictment****; or if upon the trial of any person so indicted which person shall appear to the jury charged with such indictment to be insane,* ***it shall be lawful for the Court before whom any such person shall be brought to be arraigned or tried as aforesaid, to direct such finding to be recorded; and thereupon to order such person to be kept in strict custody, until the pleasure of the Governor General***[37] ***shall be known;*** *and if any person charged with any offence shall be brought before any Court to be discharged for want of prosecution, such person shall appear to be insane, it shall be lawful for such Court to order a jury to be empanelled, to try the sanity of such person; and if the jury so empanelled shall find such person to be insane, it shall be lawful for such Court to order such person to be kept in strict custody, in such place and in such manner as to such Court shall seem fit, until the pleasure of the Governor General shall be known,* ***and in all cases of insanity so found it shall be lawful for the Governor General to give such order for the safe custody of such person so found to be insane, during his pleasure, in such place and in such manner as to the Governor General shall seem fit****."* (Emphasis added.)

[77] This section sets out the law concerning the three orders to be made in the claimant's case after the jury returned its verdict. The first was the order that the finding of the jury be recorded on the indictment. The second order was that he be kept in strict custody until the pleasure of the Governor General shall be known.[38] The third order was that in all cases where a person is found to be insane, the Governor General, in the exercise of his powers, is to issue such orders as may be necessary for the care and safe custody of the said person. Such detention in custody shall continue at the pleasure of the Governor General and may be carried out in such place and manner he deems appropriate for the protection of the public interest and the individual.

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[37] The addition of the word General was made by way of an amendment to section 4(2) of the principal Act on August 11, 1962.

[38] In accordance with section 68(2) of the Constitution, 1962

[78] The evidence is not in dispute that the first two orders were made by the Court. It cannot be disputed that there is no evidence that the Senior Medical or a Consultant Psychiatrist had ever issued a certificate to the Governor General, nor that the Governor General made any orders in the exercise of his powers, in relation to Mr Williams.

[79] Depending on the circumstances, in a small country like Jamaica with limited resources, there might be justification for continuing detention in prison for a short time while suitable arrangements are made for care and custody. The Governor General is entitled to consider the case presented to him before making any orders. However, there has to be evidence which, upon judicial assessment constitutes such justification.

[80] In the present case, the claimant was found to have been suffering from schizophrenia, which was partially in remission in 1971. He has exhibited a letter written by the then Crown Counsel, the late Mrs Velma Hylton-Gayle, for the Director of Public Prosecutions to the Commissioner of Corrections. It is torn and only legible in part. It states that having been found unfit to plead, the defendant was ordered to be kept in strict custody 'until the pleasure of the Governor General be known.' That letter was copied to His Lordship, Mr Justice Parnell and the Superintendent of the St. Catherine District Prison. There is no dispute that the claimant was initially held at Bellevue and not in a prison. This letter constitutes the unchallenged evidence of the orders made by the Court when Mr Williams was arraigned.

[81] It is admitted as it states in that letter, that the claimant escaped from the Bellevue Hospital on April 26, 1972. He was recaptured by the police. Mrs Hylton-Gayle expressed that the claimant's name should not be on the gaol delivery list as the committal order stated:

> "…(illegible)… *"the pleasure of the Governor General be known i.e. until such time as the Senior Medical or other Consultant Psychiatrist advises*

the Governor General that he is fit to stand and take his trial and the Governor General issues the necessary directions.

The matter was raised with the Superintendent of the Saint Catherine District Prison from 3rd September 1975 but the name still appears term by term on the Gaol Delivery List.

It appears, having regard to paragraph 5 above that Williams is wrongly in custody of the Saint Catherine District Prison and ought to be returned to the Bellevue Hospital from whence he escaped.

Williams – seems to me, though I am a layman in matters Psychiatric, to be in need of Psychiatric Treatment and so I refer the matter to you in the hope that you will ensure his return to the Bellevue Hospital and consequently the removal of his name from the Gaol Delivery List."

[82] The Warrant of Commitment dated September 17, 1973 commanded the police to deliver the claimant to the Keeper of the St Catherine District Prison and thereafter to the Circuit Court at Spanish Town. More importantly, the letter notified the prison authorities as well as the Court, that the detention of the claimant required attention and review. While the letter does not have the last two digits of the year (it reads "19—"), it is otherwise dated January 11. At that date, the Bellevue Hospital was not yet closed.

[83] Further and even more striking is the letter from P.M. Geohagen for the Commissioner of Corrections to the Superintendent of the St Catherine District Prison dated May 25, 1978, enclosing the penal record of Mr Williams. It reads:

Prisoner is to be examined by a Psychiatrist, this information has been passed on to Mrs Brenda Grey of the Probation Office, 18 West Kings House Road, to make the necessary preparation.

The prisoner's name is to be removed from current and subsequent Gaol Deliveries as indicated on document numbered 234 from the Office of the Director of Public Prosecutions. Documents returned are as follows:

(a) Penal Record – one (with enclosures)

(b) Warrant of Commitments – three

(c) Gaol Delivery list – one

(d) Letter from Office of Director of Public Prosecutions #234-5

[84] This letter is from the Commissioner of Corrections, and it constitutes undisputed evidence that Mr Williams remained at the then-named St Catherine District prison after May 25, 1978, for he was released from that institution in 2020. It also bolsters the evidence that there is no evidence that Mr Williams was ever taken back to court after that date, his name having been removed from the gaol delivery list. In other words, what happened next? That question was answered when the claimant was released.

[85] In the decidedly instructive case of **Anthony Henry**, the Board discussed the rights of two appellants charged with serious criminal offences but found unfit to plead at trial and detained in prison until the Governor General's pleasure should be known. Mr Henry was arrested on September 26, 1995 and charged with two counts of murder. He was remanded until his arraignment on February 7, 2000, when he was found unfit to plead.

[86] Mr Henry was mentally ill for most of his life and diagnosed with psychosis, schizophrenia, bipolar affective disorder and anti-social personality disorder by visiting consultant psychiatrists. He was evaluated on 103 occasions from 2003 until he was released in 2019 by way of an unconditional discharge by the High Court. He was medicated throughout the period of his detention and remained in prison based on the medical records before the court. He was not admitted to a mental health facility, nor was he subject to periodic reviews to decide whether his mental health had improved such that he might be fit to stand trial.

[87] Mr Henry was detained in a prison where there was a medical unit and remained there until his discharge. There is no evidence in the form of medical notes regarding what (if any) psychiatric attention was received by him prior to 2003.

[88] Mr Noel was arrested and charged on December 13, 1987, with causing grievous bodily harm. He was remanded at the Royal Gaol. At his trial on November 21, 1991, the jury found that he was not fit to plead. He was detained in prison until the Governor General's pleasure shall be known. Mr Noel was seen by visiting

psychiatrists some 89 times between 2003 and the date of his release on October 24, 2019. Like Mr Henry, Mr Noel suffered from mental illness for most of his life. He was diagnosed as being delusional, schizophrenic and occasionally psychotic. He too was medicated and remained in prison rather than being admitted to a mental health facility. He too was not subject to periodic reviews.

[89] As with Mr Henry, there is no evidence in the form of medical notes regarding what (if any) psychiatric attention was received by him prior to 2003. Mr Noel has also suffered from mental illness for most of his life. He was given medication for these conditions in the period covered by the medical records.

[90] The appellants complained that they had been detained in prison rather than in a mental hospital as they should have been, and that there had been no proper review of whether their continued detention remained appropriate throughout 24 and 32 years' detention respectively. They maintained that if they had been, they would have been released much earlier, possibly after trial on the charges against them once they were fit to plead. They claim damages for breach of their rights to personal liberty and to protection from inhuman and degrading treatment as set out in the Constitution of St Lucia at sections 3(1) and section 5, respectively. The case also discussed the implied repeal of inconsistent statutory provisions by subsequent constitutional and legislative enactments.

[91] The Privy Council held that the appellants' detention in prison was unlawful from the outset. The Criminal Code of St Lucia provided for detention at the Governor-General's pleasure but not in a prison. Section 31 of the Mental Health Act required that the appellants be detained in a designated mental hospital. The absence of periodic judicial review compounded the illegal detention and constituted a breach of the constitutional right to liberty under section 3(1) of the Constitution of St Lucia.

[92] The Board did not find that the conditions under which they had been held rose to the threshold of inhuman or degrading treatment, as the evidence showed that they had received regular psychiatric evaluations and medical treatment.

[93] On implied repeal, it was held that where a later statute or constitutional provision conflicts with an earlier one, the earlier provision may be implicitly repealed or modified. Thus, to the extent that the Criminal Code permitted prison detention without review, it had been overtaken by the requirements for legality in conformity with the Constitution and the subsequent mental health legislation.

[94] Damages on a fixed day rate were held to be inappropriate. The Board said compensation must reflect the gravity, context and personal impact of the breach. The case was remitted to the High Court for a reassessment of damages in accordance with the principles of **Takitota v Attorney General**[39] and **Ngumi v Attorney General of Bahamas**.[40]

[95] In Jamaica, Law 4 of 1873 is similar to the 1888 version of the Criminal Code in St Lucia. Law 4 was designed to deal with the management of the estates of the mentally disordered. The Criminal Justice (Amendment) Law, 1960, was amended on July 2, 1960, to provide for a committee to deal with "any criminal lunatic." The amendment granted the Minister the power to discharge such persons conditionally by way of warrant.

[96] Under the repealed Mental Hospital Act, section 18 stated:

> *"All persons with regard to whom a special verdict is returned under section 25 of the Criminal Justice (Administration) Act, or who in accordance with the provisions of that section shall be* ***found to be insane at the time of arraignment*** *or in respect of whom the Minister has made an order under section 26 (1) of the Corrections Act, or who, under the authority of any enactment now or to be in force,* ***may be committed or removed to***

[39] [2009] UKPC 11
[40] [2023] UKPC 12

> ***a mental hospital shall be confined in Bellevue Hospital.****"*(Emphasis added.)

[97] The MHA, by section 9, with some variation, restates the policy imperative that the mentally disordered are to be hospitalised:

> *"The managers of a public psychiatric hospital or a duly authorised medical officer shall, on the warrant of the Governor-General, admit and detain for treatment in that hospital persons who are -*
>
> *(a) found unfit to plead on trial; or*
>
> *(b) found by a Court to be guilty of an offence but are adjudged by the Court to be suffering from a mental disorder or diminished responsibility."*

[98] The Corrections Act in section 26(1) provides:

> *"Where an inmate or a person detained in a lockup or remand centre appears to the Minister on the certificate of a registered medical practitioner to be of unsound mind* ***the Minister may, by order in writing setting out the grounds of belief that the inmate or person detained is of unsound mind, direct his removal to any public psychiatric facility within the Island, where he shall be kept and treated as if he had been ordered to be detained in the public psychiatric facility under the Mental Health Act and subject to section 27, until the senior medical officer or the mental hospital certifies that such inmate or person detained has ceased to require treatment in that institution****."*

[99] The relevant Minister was also empowered to make a referral for the removal of the claimant to the Bellevue Hospital. Section 27 qualifies section 26(1) of the Corrections Act, it provides:

> *"Where an inmate or person detained in a lock-up or remand centre is removed to a mental hospital* ***by order of the Minister*** *under subsection (1) of section 26 or to any institution specified in an order made by the Minister under subsection (2) of that section, the Superintendent or, as the case may be, the person in charge of the lock-up or remand centre shall give written notification either to the senior medical officer of the mental hospital or to the person in charge of the institution, as the case may require, of the date on which such inmate or person detained would be entitled to be released from the adult correctional*

> *centre, lock-up or remand centre. and as from that date, the inmate or person detained shall no longer be regarded as being in legal custody by virtue of this Act and no steps shall be taken to prevent his escape by reason only that he had been an inmate or a person detained in a lock-up or remand centre."*

[100] The law therefore gives the Minister the discretion to deal with those of unsound mind, after consideration of the seriousness of the offence with which they are charged, the nature of their mental illness and the extent of any threat to the public. This is the same power that the Governor General had in 1960 before the Criminal Justice Administration Law was further amended.

[101] This is underscored by the wide power that the Minister has under section 4 of the MHA upon an application to designate any place to be a psychiatric facility. The Minister is empowered, pursuant to section 4 of the MHA to:

> *"…designate as a psychiatric facility for the reception, care and treatment of mentally disordered persons-*
>
> *(a) the whole or any part of a building, house or other place, with any yard, garden, grounds or premises belonging thereto;*
>
> *(b) any part of a general hospital;*
>
> *(c) the whole or any part of a nursing home registered under the Nursing Homes Registration Act as a mental nursing home;*
>
> *(d) the whole or any part of a clinic; or*
>
> *(e) the whole or any part of a rehabilitation centre.*(Emphasis added.)

[102] There is no evidence before this Court that in so far as the mentally disordered defendant is concerned, the relevant Minister, pursuant to section 4 of the MHA, has ever designated any part of any of the correctional centres as a psychiatric facility. There is also no evidence that any other psychiatric facility was ever provided to house Mr Williams. Presently, as there is no evidence to the contrary, all mentally disordered defendants, including Mr Williams, while he was in custody, remain housed in and managed by the correctional institutions.

[103] However, this power conferred upon the Minister is on the certificate of a registered medical practitioner. Under the Corrections Act, the Chief Medical Officer shall appoint a Medical Officer. The Medical Officer shall, in section 10(b), perform the duties set out in the Corrections Act or Correctional Institution (Adult Correctional Centre) Rules, 1991 at paragraphs 25 to 46.

[104] It is therefore clear that the State cannot circumvent the placement of a person who is unfit to stand trial and who was admitted to a mental hospital by directing or ordering that such a person be detained in a prison, since the Medical Officer would be under a duty to inform the Minister who in turn would be obliged to re-direct such a defendant to a mental hospital.

[105] The Minister may, by order, appoint a prison to be a psychiatric facility (if this is justified by the need to contain a risk to the public posed by the detainee). It is implicit in the legislation that if a place which is not already a psychiatric facility is to be designated as such, it should be a place where suitable arrangements have been put in place for the treatment of the detainee's mental illness. Otherwise, it could not be described as a "psychiatric facility" within the meaning of the MHA at all.

[106] The Mental Health (Public Psychiatric Hospital) (Bellevue Hospital) Management Scheme 2013, in article 18(1) states persons being found unfit to plead by a Court: *"'...shall be attended to at the Public Psychiatric Hospital in the presence of a police constable or correctional officer.'* This legislative and policy disharmony moved the issue from being one of health to one of corrections. This Court notes the defendant's reliance on the Mental Health Committee's report, in which this statement was made, which has not been refuted.

[107] Further, the word "*may*" in section 4 of the MHA imports an obligation on the Minister to make a designation if a mentally disordered defendant is to be placed in a correctional centre and to remain there, having regard to the legal regime and the general object of the MHA to make suitable provision for the care and treatment

of defendants who are mentally disordered. It would be incongruous to interpret the discretion in the CJAA as conferring a wide power to place a person who is mentally disordered anywhere other than in a mental hospital, if the law also requires, at the same time, his placement in a mental hospital.

[108] The interaction between the various statutes, i.e. the Criminal Justice (Administration) Law as amended, the Mental Hospital Law (repealed) the Mental Health Act, and the Corrections Act and Rules tends to show that the specific question of the mentally disordered in conflict with the law is not inconsistent with the legal regime established for the care, treatment and custody of the mentally disordered. The MHA is also specific legislation enacted after the general power was first set out in the principal legislation, the CJAA.

[109] In this legislative context, there is an inference that the legislature intended that the MHA should neither be overridden nor repealed by implication in the various amendments to the CJAA. Rather, the legal position regarding the interaction between the statutes was already settled at the time the CJAA was further amended to reflect its current form.

[110] The inference from all this is that it was intended by the legislature that there was a continuing need for a legal regime to deal with the mentally disordered defendant. This legal regime, which is geared to both care and custody, has not been changed in any way, and the enactment of the MHA, only enhanced this intention. The operation of the criminal legal process likewise did not change after the passage of the MHA.

[111] The legislature has also given no indication that the appropriate interaction between the legal regime involving the mentally disordered in conflict with the law and the criminal legal process has been changed to become more restrictive; in fact, the opposite is true. The CJAA, now provides for comprehensive judicial oversight by way of section 25.

Facts Found

[112] These facts have been established. Mr Williams was first committed to and was being properly housed and treated in a mental hospital as prescribed by law. He escaped and was recaptured. He was being housed at the then St Catherine District Prison and was being taken before the St Catherine Circuit Court. Each time he was returned to the prison, it was on remand by Court order. Up to 1975, this was the position as was indicated in the letter from the late Mrs Hylton-Gayle, Crown Counsel (as she then was). There are no records from either the Office of the Director of Public Prosecutions or the Court in this regard; however, this much can be inferred from her letter.

[113] The chronology of events in this case shows that the date of the Warrant of Commitment was September 17, 1973. The letter from Crown Counsel was dated January 11, 19-- (without a year), it said that the matter of Mr Williams was raised with the Superintendent of the St Catherine District Prison "*from September 3, 1975*." The inference can be drawn that Mr Williams was before the St Catherine Circuit Court as his name appeared on the gaol delivery list after September 17, 1973 and still appeared on the gaol delivery list as at December 21, 1977.

[114] Mr Clarke argues that there is no order from His Excellency and that this means that the detention was unlawful. This submission does not seem to account for the fact that Mr Williams had absconded from Bellevue Hospital on April 26, 1972 and was recaptured by the police. Having escaped lawful custody, he was brought back before the St. Catherine Circuit Court. That means after April 26, 1972, the Governor General's pleasure was no longer in issue. The claimant was remanded on each court date by order of the Court. Up to December 21, 1977, as indicated by Crown counsel, Mr Williams was on the gaol delivery list for the St Catherine Circuit. Even though he should not have been on that list, he faced the Court, and this means any remand was by Court order and cannot be said to be without lawful authority.

[115] In my view, Mr Clarke's stronger argument is regarding a breach of the claimant's liberty rights. A claimant who advances a breach of the right to life, liberty and security of the person under section 13(3)(a) of the Charter would have to prove that he has been deprived only one of these rights, and not all three, in order to establish a breach under this section; that is sufficient to bring a claim. Though the rights are listed together in section 13(3)(a) of the Charter, the respective nature of these rights allows for the breach of either one or all to form the basis of a claim.

A Court has the power to detain the mentally disordered in a correctional centre

[116] When first enacted, Law 4 of 1873 referred to laws concerning the 'care and custody of persons of unsound mind.' This 'care and custody of persons of unsound mind' in the original version of the CJAA and in its current version seems to me to mean that the legal regime to which I have referred, was intended by the legislature to be for **both care and custody** of the mentally disordered.

[117] This means that in Jamaica, as opposed to St Lucia, a Court has always had the power to make an order detaining someone who is mentally disordered in a prison. Section 6(1) of the Corrections Act provides that the purpose or reason for which adult correctional centres exist is 'for the imprisonment or detention of persons in custody.' The prison system, while far from the ideal place for persons with any form of mental disorder, may be where a defendant is placed by a Court, as each case must be decided on its own particular facts.

[118] Section 31 of the Prisons Law, enacted on November 17, 1947, was later replaced by section 26 of the Corrections Act. The Mental Hospital Law, repealed and replaced by the MHA, all fall within the legal regime. The Prisons Law was amended in 1964 to grant the power to the Minister, now reflected in section 26 of the Corrections Act. Therefore, insofar as it concerns the obligation on the Minister and the Court, these statutes as explained, all governed the detention of the claimant throughout his time in custody.

[119] In the absence of the Bellevue Hospital or any designated or like psychiatric facility, whenever an order was made by the Court for the detention of the mentally disordered, it was made pursuant to the Corrections Act, which provides that:

> *"18. The Superintendents appointed under this Act and the persons in charge of lock-ups and remand centres are hereby authorised and required to keep and detain all persons duly committed to their custody by any Court. Judge, Resident Magistrate, Justice, Coroner, or other public officer lawfully exercising civil or criminal jurisdiction according to the terms of any writ, warrant, or order, by which such person has been committed, or until such person is discharged in due course of law.*
>
> *19. Every person charged with any offence and remanded in custody to any adult correctional centre, lock-up or remand centre by any Court, Judge, Resident Magistrate, Justice or Coroner, shall be delivered to the Superintendent of such centre or to the person in charge of such lock-up or remand centre, as the case may be, together with the warrant of commitment, and the Superintendent, or person in charge, as the case may be, shall detain that person according to the terms of the warrant, and shall cause such person to be delivered to the Court, Judge, Resident Magistrate, Justice or Coroner, or shall discharge him at the time named in the warrant and according to the terms thereof…*
>
> *22(1) Where the presence of any person confined in an adult correctional centre, lock-up or remand centre is required in any Court of civil or criminal jurisdiction, such Court may issue an order in writing addressed to the Superintendent or, as the case may be, the person in charge of the lock-up or remand centre, requiring the production before the Court of such person in proper custody at the time and place to be named in such order, and such Superintendent, or person in charge, as the case may be, shall cause the person named in the order to be brought up as directed, and shall provide for his safe custody during his absence from the adult correctional centre, lock-up or remand centre; and every such Court may, by endorsement on such order, require the person named therein to be again brought up at any time to which the matter in respect of which the person is required may be adjourned.*
>
> *(2) Every such order issued from the Supreme Court may be signed by a Registrar of the Court, and if issued by any other Court shall be signed by the Judge, Resident Magistrate or Coroner, as the case may be…"*

[120] The Commissioner of Corrections is by law obliged to accept and keep in safe custody all persons who are detained by the order of a Court. This includes the mentally disordered.

[121] In **Anthony Henry**, the statutory position in St Lucia was that detention was ordered by the Court, and the Governor General determined the place in which that detention was spent. In Jamaica, the position was changed from the Governor-General's pleasure to the Court's pleasure with the Court retaining the discretion as to placement.

[122] This is apparent from the fact that a medical officer under the Prisons Law and Corrections Act has to issue a certificate to the Minister to have a mentally disordered defendant removed to a psychiatric facility if the prison has none, or has not been so designated. This means there can be such a placement by the Court. While the legal regime under the law is for a psychiatric facility it is not unlawful for placement in a prison to be made by a Court. Section 9 of the MHA provides that a Court may also make a placement in a public psychiatric hospital; the placement is a matter of discretion.

[123] The words '*safe custody of such person so found to be insane, during his pleasure, in such place and in such manner as to the Governor-General shall seem fit',* appear in the CJAA as amended in 1960. In **Anthony Henry**, the words '*be detained in safe custody, in such place and manner as the Court thinks fit'* was interpreted by the Privy Council to mean that the Court has the power and in Jamaica, both the Governor-General and the Minister have the power, to direct detention in a place designated a psychiatric facility, psychiatric hospital or a public psychiatric facility within the meaning of the MHA.

[124] There was a manifest failure on the part of the various State actors to exercise the power of detention in accordance with the law set down in section 23(1) of the CJAA, 1960 when read with section 18 of the Mental Hospital Law (now repealed), but which governed the claimant's detention until the passage of the MHA. Section 31 of the now repealed Prisons Law also applied at the time the claimant was detained. Section 4(1)(a) of the MHA, and sections 26 and 27 of the Corrections Act related to and applied to the claimant upon the enactment of those statutes.

[125] The claimant was simply detained upon his recapture and held in prison despite being put on notice by Mrs Hylton-Gayle that a review of Mr Williams' detention was needed. What is plain is that the Court did not order the return of the claimant to Bellevue Hospital while it was open, and for obvious reasons, the claimant was capable of escaping from Bellevue. There was a statutory duty on the medical officer to report the presence of Mr Williams in the prison to the Minister by way of medical certificate; however, there is no such evidence.

[126] That the claimant was unlawfully detained in prison is not simply a matter of detention in the wrong physical location. It also involved a failure to ensure that the legal regime directed specifically to providing the care and treatment in custody of the claimant's mental disorder was put in place, and there is no evidence that it was. There is also no evidence of a periodic review of his case by a Court to determine the basis for his continued detention.

[127] The claimant's liberty rights were engaged when he was removed from the gaol delivery list and breached when he came to the notice of Crown counsel and the Commissioner of Corrections, but despite their instructions, remained in prison without periodic review. After May 25, 1978, he would no longer have been taken to Court as he was to be removed from the gaol delivery list. By that point, all mentally disordered defendants had already been transferred to the Tower Street Adult Correctional Centre (formerly the General Penitentiary) after 1974 because the Bellevue Hospital was closed.

[128] The claimant having established an infringement of the guaranteed rights to liberty, what, if anything does the State need to justify? This Court applies the guidance provided by the Canadian Supreme Court decision in **R v Oakes**[41] in relation to the similarly worded provision in the Canadian Charter of Rights and Freedoms.[42]

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[41] [1986] 1 SCR 103

[42] (Section 1 prescribes such rights and freedoms are guaranteed subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").

[129] It is for the defendants to show that the policy decision to close the Bellevue Hospital while designating no place as a psychiatric facility is justified, as that is the impugned State action. In other words, what pressing and substantial concerns were being addressed by this decision? Was the action taken to do so proportionate to achieve the objectives?

[130] The Commissioner of Corrections relied on the report of the Mental (Offenders) Health Enquiry Committee[43] to state that, after 1974 mentally unsound offenders were no longer housed at psychiatric facilities due to security and other concerns. This included the claimant, who was moved to the Tower Street prison for the duration of his detention. The report states that:

1. *"Prior to 1974, persons deemed mentally disordered or unfit to plead in the criminal justice system were sent to Bellevue Hospital which is the Public Psychiatric Facility designated under the Regulations pursuant to the Mental Health Act. However, due to security and other concerns, a decision was taken to close the forensic ward at the Bellevue Hospital where such mentally disordered offenders were normally housed. This decision officially ended the Bellevue Hospital's role as an admitting forensic mental health facility and resulted in the relocation of approximately four hundred (400) mentally challenged criminal offenders to the Tower Street Adult Correctional Centre (then called General Penitentiary). At the time of the passing of the Corrections Act in 1985, section 26 was ineffective as there was no psychiatric facility to which inmates of correctional centres who appeared to be of unsound mind could be transferred to for treatment. It also resulted in there being no forensic facility to which a Parish Judge could order the detention of an inmate in need of treatment pursuant to Section 15(3) of the Mental Health Act.*

2. *It should be noted that Section 6(1) of the Corrections Act provides that the purpose or reason for which adult correctional centres exist is "for the imprisonment or detention of persons in custody." With the closure of the forensic ward at Bellevue, however, the Department of Correctional Services ("DCS") was forced to not only accept these vulnerable persons who were remanded by the Courts and to continue to house those inmates who appeared to be of unsound mind but also now had the responsibility to provide care for these persons though unequipped to do so. This brings us to the structure of the DCS.*

[43] Page 73

3. *The Department of Correctional Services is a paramilitary organization which falls under the auspices of the Ministry of National Security (MNS). The core function of the DCS is to manage offenders involved in both non-custodial and custodial programmes as well as to craft systems which nurture the rehabilitation and reintegration of accused persons back into general society. The Department is comprised of six (6) Adult Correctional Centres, one (1) Adult Remand Centre, four (4) Juvenile Centres and seventeen (17) Probation offices with approximately 3,555 persons in custody as at July 16, 2020.*

4. *Two (2) of these correctional centres house the vast majority of the mentally disordered inmates and both have surpassed their ideal capacities and are now overcrowded. These facilities were not constructed with a focus being placed on the therapeutic environment required for the rehabilitation of this vulnerable group.*

5. *For instance, the mentally disordered inmates located at the Tower Street Adult Correctional Centre are housed in an area referred to as the George Davis Centre (GDC) which is located towards the back of the building. This makes it more difficult to monitor those in need of direct supervision and also makes it possible for other inmates to locate and abuse those deemed mentally disordered. Though this section is currently being refurbished it is our respectful submission that the finished product will still not be conducive to a therapeutic environment. Due to the lack of qualified health professionals, adequate psychiatric care is not generally provided and it is of particular concern that the DCS does not have a full time psychiatrist on staff.*

6. *The DCS is currently required to provide psychiatric services to the following:*
    - *Persons before the Courts who have been deemed unfit to plead;*
    - *Convicted persons deemed mentally disordered at the time of the commission of an offence; and*
    - *Convicted persons who become mentally disordered after incarceration.*

7. *The DCS has a responsibility to the Courts in relation to cases involving the mentally disordered. At the request of the Court, the DCS is required to carry-out psychiatric evaluations for accused persons and to submit certificates indicating their fitness to plead. In some instances, a more detailed evaluation of their mental state may be required and this can guide judges as to whether the accused understands the charges so that the case can proceed. The evaluation can also guide the Court in determining the appropriate sentence to be delivered after conviction.*

8. *The Department of Correctional Services has a responsibility to the Courts in relation to cases involving the mentally disordered. At the request of the Court, the DCS is required to carry-out psychiatric evaluations for accused persons and to submit certificates indicating their fitness to plead. In some instances, a more detailed evaluation of their mental state may be required and this can guide judges as to whether the accused understands the charges so that the case can proceed. The evaluation can also guide the Court in determining the appropriate sentence to be delivered after conviction.*

9. *Unfortunately, it is this period that marks the commencement of indefinite incarceration for some accused persons who are deemed unfit to plead. In the past, although evaluations were completed, they were not delivered to the Courts and this contributed to these inmates remaining incarcerated for prolonged periods of time. These persons usually have numerous Court dates to facilitate the Court monitoring their mental condition with the hope that lucidity returns so that they can understand the charges for which they are before the Courts and participate in their defence. A number of these individuals are prone to violence and have no family or support structure. As such, they are usually remanded in custody for their own safety, the safety of the wider society and to ensure they are placed on a treatment plan to address their mental condition. The desired outcome should be that in a structured therapeutic environment they can receive the psychiatric treatment necessary to facilitate their recovery.*

10. *There are also those for whom the prognosis for improvement is not good, with the medical opinion being that there is little chance that their mental disorder will ever change. Such persons who also fall into the category of being violent and/or with no support structure are often remanded in custody for very lengthy periods and hence become prone to being 'lost' in the system."*

[131] There is no justification on the part of the defendant in the evidence of the former Commissioner of Corrections. The plain fact is that the policy decision to close Bellevue Hospital and to hold the claimant in a prison, was compounded by the absence of any orders from the Minister to designate any place as a psychiatric facility to treat the claimant. The detention of the claimant became unlawful once he remained in the prison, which was not a psychiatric facility and without periodic reviews after May 25, 1978.

[132] This breach of his liberty rights means that there was no opportunity for Mr Williams to return to face the Court for any directions to be made in his case. This leads to the issue of periodic reviews.

Periodic Reviews

[133] Periodic reviews are required by law in order for a Court to decide whether the mental health of a defendant detained in custody has improved such that he might be fit to stand trial. This is against the background of the legal regime, which I have explained for both care and custody of the mentally disordered in custody. It is my view that the requirement for periodic reviews is implied in any order for detention under the legal regime as outlined above.

[134] The law provides for a general system of checks and balances for the regular monitoring of detainees to ensure that relevant information as to their mental and physical condition is brought to the attention of the Court as well as the Minister in a timely fashion. The Minister is entitled to rely on the medical officers to fulfil their duties and to inform him of that which is relevant with respect to the prison population.

[135] There came a point at which the claimant was no longer taken to Court. The failure to conduct periodic reviews of the criminal case of the claimant is a conceded breach of the right to liberty. The absence of such reviews was brought about by the failure to operate the correct legal regime in the first place. It is significant that the legal regime for the treatment of Mr Williams as a mentally disordered defendant found unfit to stand trial was not brought properly into operation at all for several reasons.

[136] There is a clear statutory requirement that his progress and development in custody should have been periodically reviewed by a Judge so that a determination could be made when it would be appropriate to return him to Court for his trial. Also, whether having regard to the safety of the public and the welfare of the defendant, he could be released.

[137] In **Seepersad and Roodal v The AG of Trinidad and Tobago**[44] the Privy Council said:

> *"The wording of a sentence of detention during the State's pleasure indicates that the progress and development of the detainee, as well as the requirements of punishment, must be kept under continuous review throughout the sentence. The continuing review must extend to the duration of the detention as well as to the place where and the conditions under which the detainee is being kept, even if a minimum term for the detention has been set by the judiciary."*

[138] The instant claimant was not serving a sentence, and therefore, the dicta in **Seepersad** was even more applicable. Under the principal Act, as amended in 2006, where proceedings are conducted in the Circuit Court and a verdict of unfitness has been returned by a jury, under section 25C, the Court may make any of the following orders which are endorsed at "sentence" on the back of the indictment:

> *"that the defendant be remanded in custody at the Court's pleasure; or*
>
> *that in accordance with the Fifth Schedule, the defendant be admitted to a named psychiatric facility to be held at the Court's pleasure; or*
>
> *in accordance with the Sixth Schedule, make a supervision and treatment order in respect of the defendant; or*
>
> *in accordance with the Seventh Schedule, make a guardianship order in respect of the defendant."*

[139] When a defendant has been remanded in custody at the Court's pleasure, following proceedings in the Circuit Court, the Registrar of the Supreme Court shall keep a register which ought to contain the following, the name of the person detained, the type of order made by the Court and a summary of each report received from the Commissioner of Corrections. (See the Practice Note of Wolfe, C.J. dated 5th March 2001)[45]

[140] A Detention Order once made by the Court shall also include a requirement that the Commissioner of Corrections submit to the Court once every calendar month,

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[44] [2012] UKPC 4

[45] Appendix 1

a report on the condition of a defendant.[46] These reports include a report from the psychiatrist as to whether the defendant is fit to plead or not.

[141] The Judge must review these reports once received and give directions as the Court deems fit.[47] The Registrar must inform the Judge within seven (7) days after the expiration of the time allowed for submission of any failure to submit a report.[48] If the Commissioner of Corrections fails to submit a report, then the Judge can subpoena the Commissioner and, on oath or affirmation, elicit evidence and consider his reason for failure.[49] The Court may issue such directions as it deems fit to secure the submission of the report. It is to be noted that the statute does not contain a provision for sanctions for a failure to comply. However, contempt proceedings are not excluded.

Are there any re-entry provisions to the Court system

[142] The present statutory framework does not allow for the absolute discharge of a mentally disordered defendant unless he was tried and found not guilty. Technically, however, the Court's power to absolutely discharge a defendant is only permissible, following a trial where the defendant is acquitted or where the prosecution offers no evidence/no further evidence or where the prosecution fails to make out a prima facie case on their evidence.

[143] To a limited extent, a judicial discharge of a defendant is possible pursuant to section 25E (7) (c) of the CJAA following an initial detention at the Court's pleasure where a special verdict was rendered at trial. Here, after considering a report submitted by the DCS *'under sub-section (5), and hearing the Director of Public Prosecutions and any representations made by or on behalf of the defendant, the*

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[46] S. 25D CJAA

[47] The CJAA provides for periodic reports to be sent to the Court regarding a defendant's status. The Court is obliged to review the report and:"(a) in the case of the Supreme Court, a Judge of the Supreme Court; [who] shall give such directions as he thinks fit having regard to the contents of the report, supplied."

[48] S.25D(3) CJAA

[49] S.25D(4) CJAA

court may… revoke the order made under subsection (3) and discharge the defendant.'

[144] In particular, an outright discharge of a mentally disordered defendant does not obtain where a detention order is made relative to a determination of unfitness. Even where there is evidence that the defendant will never be fit to plead and stand his trial, there is no provision as to how the Court is to dispose of the matter in a determinative way.

[145] There is no bar to a defendant who has been found unfit to plead or to be tried being placed on trial once he has recovered his sanity. There is a specific provision in section 25C(3) of the CJAA that, *"[A] verdict of unfit to stand trial shall not prevent the defendant from being tried subsequently if he becomes fit"*.

[146] In the decision of **Richard Brown v R**[50] an appeal to the Privy Council from Jamaica. Lord Toulson stated:

> *"If a defendant recovered his sanity, there was nothing in the Act to prohibit the Crown from sending the defendant back to the Court with a view to his arraignment and trial. Otherwise, an innocent defendant who had been found unfit to plead and had then recovered his health would have no possibility of acquittal, but would remain liable to executive detention for the rest of his life. The appellant's argument was a misinterpretation of s 25 of the Act."*

[147] The prosecution, at its election, will have to determine whether it will proceed to trial if a defendant is found fit to plead. This right is not restricted by the length of time spent in custody awaiting a return to fitness. This decision will be subject to the Court's abuse of process jurisdiction.

[148] Significantly, while the statute makes no explicit provision for defendants to be brought back to Court, the Court is not powerless, and in making such orders as the Court deems fit, can demand the appearance of the defendant before it by utilising the provisions of the Corrections Act at sections 19 and 22. The 'order in

[50] [2016] 3 LRC 355/[2016] UKPC 6

writing' referred to in section 22(1) above is a writ of habeas corpus ad respondendum.

[149] Notwithstanding that a defendant is detained at the Court's pleasure, there is nothing to preclude re-entry of such a person before the Court as the Court deems fit. In that vein, the Court must fashion its own schedule for review, taking account of whether an accused was tried and convicted but found to be insane or suffering from diminished responsibility, or whether he was merely detained after being found to be unfit to plead.[51]

[150] All of this means that in the case of Mr Williams, this mechanism ought to have been employed to ensure his return to Court, as this power set down in the CJAA was always available to the Circuit Court. The defendant cannot successfully contend that this could be otherwise. There is a clear breach of the claimant's liberty rights in that there is no evidence that he was taken to Court for periodic reviews after 1978.

Due Process Rights

[151] The claimant pleaded breaches of sections 14(1)(a), 16(1), (2) and (6)(c). There are no pleadings in relation to section 14(3), though Mr Clarke filed written submissions on this section. Section 14(3) is therefore not being discussed here.

[152] Mr Clarke submitted that detention for 50 years without trial is an unquestionable breach of the right to a fair hearing within a reasonable time. This breach was compounded by the inexplicable failure to demonstrate that there had been periodic reviews and that at all material times the claimant was unfit to plead. The fitness to plead certificates could not be relied upon as conclusive. There was an

[51] Part 75 of the Civil Procedure Rule ("CPR") allows for an application for review, to be made by "inmates" held at the Court's pleasure. It is to be noted that there is no indication whether those held at the Governor General's pleasure can utilize this procedure, albeit that law was struck down as being unconstitutional. There is, however, no indication that inmates previously so detained had been regularized to the extent that there was any automatic transferal to detention at the Court's pleasure nor has there been any Court appearance of these individuals for such purposes.

abdication of function to the Court to the prison doctors and this led to third parties being unable to review the claimant's case.

[153] Further, section 16(2) was breached in that the fitness to plead certificates were never placed before the Court for directions to be given regarding his case. Also, distinctions between the findings of different psychiatrists should have been brought to the attention of the Court.

[154] Mrs Rowe-Coke, in oral submissions, addressed sections 13(3)(r) and section 16(1), arguing that they should be viewed together. Section 16(1) deals with a person charged criminally, and no breach has been established under this section. Counsel contended that when a person, upon arraignment, is found to be insane, he cannot be tried on the indictment. The trial for the purposes of section 16(1) is in abeyance on account of the verdict of insanity. It cannot be said that the right to due process is breached in circumstances where the offender is unfit to plead. She conceded in written submissions that the due process rights and the right to a fair trial within a reasonable time were breached in that a fair trial would not have been possible after detention for 50 years without trial.

[155] In **Anthony Henry**, the Board held that the detention of the appellants was because they were accused of committing acts of violence. They were indicted to stand trial, detained on grounds of mental illness, treated and assessed during the period of detention.

[156] Counsel submitted that the claimant was not criminalised for his mental illness as the purpose of the periodic reviews was to ascertain whether he was fit to plead and then stand his trial. The due process rights remain in abeyance until then. Over the period of detention, the claimant remained unfit to plead. In reliance on paragraph 54 of **Anthony Henry**, it was argued that the Board said that when a defendant is found to be insane, the criminal process is postponed for the period in which he is mentally unwell:

> *"[54]…Such mental ill-health is treated as a supervening impediment to being tried in the usual way, and if and when it is removed the usual process of justice can resume. Detention pursuant to those provisions is a form of preventive detention directed to serving the legitimate aim of providing appropriate treatment for a person suffering with severe mental illness. During the period of such detention, the person concerned is removed from the criminal process and made subject to the regime for treatment of severe mental ill-health."*

[157] It was submitted that the Privy Council found that there was a breach of the right to liberty, as the proper procedure was not followed, and once a fair trial was no longer possible, the authorisation for detention under the MHA fell away. The claimant was being held in preventive detention and could be brought back for trial. The focus was on the fair trial and not merely the period of detention. Mrs Rowe-Coke conceded that the claimant's liberty rights were breached in these circumstances, but not his due process rights, which had not been engaged.

[158] Regarding section 16(6)(c) of the Charter, Mr Clarke cited no authority for the scope of the right. What he did submit was that a legal aid attorney would have been a safeguard against the breach of the claimant's rights. He noted that the claimant was released after a habeas corpus application. It was submitted that the detention of the claimant for 50 years, without a trial, legal aid or state assistance, is an unquestionable breach of this right.

[159] It was argued that if the mentally disordered person in conflict with the law had received adequate facilities to prepare his defence, an assigned attorney would have provided legal assistance which could have ultimately secured an earlier release for Mr Williams.

[160] Mrs Rowe-Coke contended that section 16(6)(c) was among those rights that were not engaged on the evidence before the Court and cannot be said to have been breached.

[161] In interpreting the nature of the due process rights, in **Gibson v Attorney General of Barbados**, it was said that '*a fair trial is not one that is fair only to the accused. It is a trial that is fair to all*.'[52]

[162] I will summarily dispose of the allegation that there was a breach of section 16(6)(c). This right is embodied in the right to due process as stated in section 13(3)(r) of the Charter. There is no evidence that Mr Williams was ever afforded legal assistance. The use of the word "shall" in the text imports a mandatory obligation on the State to ensure that when someone is charged with a criminal offence and is of greater means, that person shall not be treated more favourably as a result of being able to afford legal representation.

[163] Section 16(6)(c) levels the playing field and really is an issue of access to justice. The evidence of the claimant is that he was too poor to afford a lawyer, and no one represented his interests. This evidence has not been answered by the defendants. The removal of the claimant from the criminal trial process for treatment did not remove the obligation on the State for periodic reviews of his criminal case. That obligation raised the due process rights which are in issue in this claim. While the right to legal assistance when charged with a criminal offence. is not absolute; each case is to be viewed on its own facts. In this case, Mr Williams was also functionally illiterate and in all the circumstances of this case, I find that this right was breached by the State.

[164] Interpreting and applying sections 13(3)(r), sections 16(1) and (2) as creating three distinct rights affords the most generous interpretation and the widest protection guaranteed by the Charter. The reasonable time requirement in the Charter is a stand-alone provision. In the former section 20(1), the three guaranteed rights of, a fair hearing within a reasonable time by an impartial Court established by law, were encapsulated in one protected right. While the rights are separate and distinct they are related, in that, the reasonable time guarantee is also related to

[52]Gibson v A-G of Barbados [2010] CCJ 3 (AJ) (BB), (2010) 76 WIR 137; [44]

fairness, to impartiality and to independence. Therefore, in relation to the reasonable time requirement, both fairness and reasonableness can 'form part of one embracing form of protection afforded to the individual.'[53]

[165] Delay will make it less likely that a fair trial is possible, depending on the circumstances. The longer the delay in any particular case, the less likely it is that the defendant can still be afforded a fair trial. This is, of course, subject to further consideration. Delay was raised but not pursued beyond the length of the claimant's detention by Mr Clarke.

[166] The contention of Mr Clarke is along the lines of the duty of the State to ensure that periodic reviews are done and to bring before the Court, anyone being held unlawfully or without just cause. This means that it is the State which, having had primary responsibility for the detention of the applicant, should have ensured he was not lost in the system. The State failed to have him brought back to Court for periodic reviews. The failure to do so breached the claimant's constitutional right to a fair hearing within a reasonable time guaranteed to him by sections 13(3)(r) and 16(1) and (2) of the Constitution. As a consequence, these rights have been infringed. This submission finds favour with the Court.

[167] The due process rights were engaged after Mr Williams stopped being taken to Court in 1978, as there is no evidence that after that, there were any periodic reviews by the Court to decide whether his mental health had improved such that he might be fit to stand trial.

[168] The Privy Council in **Anthony Henry** said that lengthy detention in appropriate conditions was justifiable on the basis of mental ill-health as long as a fair trial remained possible. In other words, the claimant's mental disorder having remained for some 50 years, did not obviate the need for the legal regime to be

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[53] See Flowers v R (2000) 57 WIR 310 (JM PC) at 332-334 (Lord Hutton), and Bell v DPP [1985] AC 937 (JM PC) at 950-951 (Lord Templeman), 'the three elements of section 20, namely a fair hearing within a reasonable time by an independent and impartial Court established by law, form part of one embracing form of protection afforded to the individual.'

followed and for there to have been not just executive reviews of the claimant's mental health but judicial directions concerning the claimant's criminal case. I would wish to state that I am not saying that the claimant would have been released had he been taken to Court sooner, as any release was dependent on several factors to include an assessment of risk and the safety of the public.

[169] In this case, the rights having been engaged, after 1978, there was nothing to suggest that Mr Williams's case moved beyond medical examinations, and it is here that I find that the absence of medical records does not mean there were no medical evaluations.

[170] However, there was no judicial scrutiny by a Court such that the effect of the claimant's mental health on the trial process could have been taken into account. Medical reviews are not the same as periodic reviews by the Court on the issue of whether or not a fair trial was possible.

[171] Therefore, it is not the detention of Mr Williams at the Governor General's pleasure, nor how long he was in custody, that breached these rights. As the Charter guarantees the right to a trial within a reasonable time, the tremendous delay in returning the claimant to Court means no decision was made in his criminal case until 2020, when a nolle prosequi was entered.

[172] Delay can have adverse and prejudicial effects on a defendant and can adversely affect the preparation and presentation of a defence. There is no doubt that there will be physiological, psychological and financial impacts on a defendant who is presumed innocent until proven guilty and more so for a defendant who is in custody during this period. Mr Williams has given evidence of the suffering, anxiety and hopelessness he felt at never facing a Court in order to know his fate.

[173] However, whether delay is unconstitutional involves a more complex analysis and an assessment of the surrounding circumstances. The perspective of the defendant or perpetrator of a crime is but one point of view. While it is an important one and it is one protected by constitutional values and standards, the Constitution

protects all and therefore other perspectives also matter. This involves the balancing of the individual rights against the public interest as to whether a fair trial remains possible. It is this balancing and weighing process that incorporates the principle of proportionality in the assessment of time for its constitutionality.

[174] A defendant charged with a criminal offence enjoys three constitutional rights by virtue of section 16(1). These are the rights to (a) a fair hearing; (b) by an independent and impartial Court established by law; and (c) within a reasonable time: **Porter and another v Magill**[54]; **Attorney General's Reference (No 2 of 2001)**[55]; **Mervin Cameron v R**[56].

[175] In **Julian Brown v R**[57], based on section 13(2) and the dicta in the cases of **Flowers v The Queen**[58] and **Bell v The Director of Public Prosecutions("Bell")**,[59] McDonald-Bishop JA (as she then was) stated that inordinate delay by itself could not establish that there had been a breach of section 16(1). The relevant circumstances of each case had to be investigated. The length of the delay had to be assessed along with considerations of (i) whether the defendant had asserted and established that, prima facie, the State was responsible for the delay, and if so, (ii) whether there was any demonstrably justified reason for that delay established by the State. If the defendant satisfies (i) and the State does not satisfy (ii), it is only then that the constitutional breach would be established, and the issue of the appropriate remedy for that breach falls to be determined.

[176] Section 16(1) delay necessarily involves whole-system considerations and therefore requires a balancing and weighing of all contextually relevant factors. Where there is an unjustified breach of these rights, an appropriate remedy should be afforded to the claimant, because of the complex realities that inform delay and

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[54] [2002] 1 All ER 465
[55] [2004] 2 AC 72
[56] [2018] JMFC FULL 1
[57] [2020] JMCA Crim 42
[58] (2000) 57 WIR 310
[59] [1985] AC 937

the distinctions between timeliness and delay, and their potential impact on fairness and/or reasonableness.

[177] In **Bell**, the Board acknowledged the relevance and importance of these factors, stating that the weight to be attached to each factor must, however, vary from jurisdiction to jurisdiction and from case to case.

[178] In cases involving pre-trial delay, the assertion of the right to trial within a reasonable time is much more important. The defendant has asserted and established that, prima facie, the State was responsible for the delay. In the absence of affidavit evidence from the witness for the defendants on the issue of delay, there was no demonstrably justified reason for that delay, as indicated by the State. This Court takes the view that the delay was solely attributable to the defendants. The length of the delay can be characterised as so manifestly excessive as to be oppressive and ipso facto unfair (without proof of overt prejudice).

[179] The prejudice to the defendant is of paramount importance in the instant case. In **Bell**, quoting from **Barker v Wingo**,[60] the Board outlined the considerations regarding prejudice to the defendant in these terms: '*Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last*…'

[180] In **Bell**, as in this case, *'*no *prejudice was articulated on behalf of the claimant and none was necessary to establish a breach of the trial within a reasonable time guarantee. If none was required to be shown where the liberty of the subject was in jeopardy, a fortiori, it is not required to establish a breach of a hearing within a*

[60] 407 US 514 (1972)

reasonable time guarantee under section 16 (2).' [61] I adopt these words and apply them to the case at bar.

[181] Section 16(2) mirrors Article 14(3)(c) of the International Covenant on Civil and Political Rights, to which Jamaica is a party with a date of ratification of October 3, 1975. The criminal trial process and all of the parties concerned with the administration of its apparatus, failed to ensure that Mr Williams having been removed from the trial process for treatment and care in custody was receiving not just periodic medical reviews in respect of the issue of fitness to plead, rather, that these medical evaluations were being placed before a Court for an assessment of his criminal case. The right to a fair trial involves an assessment of whether or not a viable prosecution could have been advanced.

[182] There are clear violations of the section 16(2) right in that, Mr Williams was denied the opportunity to have a hearing before a Court. In the instant case, the fact that the State is responsible for the delay is not in issue. There is no justification for these breaches on the evidence, and the State bears the responsibility for the systemic failure on the part of the various stakeholders.

[183] It is now settled law that where there is a breach of a defendant's constitutional right to a fair hearing within a reasonable time caused by excessive delay, that defendant is entitled to appropriate redress, as the Charter guarantees fairness and timeliness in both criminal and civil proceedings.

[184] In **Ernest Smith & Ors v The AG**,[62] the Full Court found that there was a clear breach of section 16(2) as a result of the seven-year delay between the hearing of the claim and the date of judgment. The unexplained delay was without legal or constitutional justification. The breach was regarded as the responsibility of the State. The Full Court applied section 19 of the Charter to grant the declarations sought, to award vindicatory damages of $1,500,000 as compensation for

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[61] Ernest Smith & Co. (A Firm) et al Consolidated with Hugh Thompson et al v The AG [2020] JMFC Full 7, per E. Brown, J(as he then was) at [23]
[62] [2020] JMFC Full 7

pecuniary loss and to vindicate the breach, affirming the importance of the right in so doing.

[185] In the instant case, the claimant will never have a trial. He has, therefore, lost the protection of the law.[63]

The right to equality before the law - section 13(3)(g)

The right to equitable and humane treatment by any public authority in the exercise of any function -13(3)(h)

The right to protection from torture, or inhuman or degrading punishment or other treatment as provided in subsections (6) and (7) - section 13(3)(o)

[186] Counsel for the claimant conflated these rights in his submissions; however, they are separate and distinct rights. Mr Clarke did not argue section 13(3)(g) specifically; he focused on section 13(3)(h), submitting that the claimant was detained without trial for 50 years in a prison without periodic review. This was compounded by the failure of the defendants to demonstrate the reason for the absence of records for the period of review, to demonstrate that at all material times the claimant was unfit for trial.

[187] Mrs Rowe-Coke argued that these rights have not been engaged as the claimant has not shown that he has been treated differently from those in similar circumstances. Further, the claimant has not shown that he has been treated differently because of his colour, creed, sex, religion, etc. Counsel relied on paragraph 10 of the affidavit of Lt. Col. Rowe(ret'd) which referred to the Mental Health (Offenders) Enquiry Committee's report at page 73.

[188] The nature of the rights in section 13(3)(g) was set out in **Julian Robinson v The AG**,[64] in which the Court held that persons should be treated uniformly unless there

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[63] Boodhoo and Another v Attorney General [2004] UKPC 17 at para. 12).

[64] [2019] JMCC Full 5

was some valid reason to treat them differently, and this was an enforceable right under the Charter.

[189] However, the law is as stated in **Dale Virgo** by the Full Court,[65] as this aspect of the decision was not overturned on appeal:

> '*Therefore, what does it mean to have 'equality before the law'?*
>
> *In answering this question, the Court in Rural Transit sought guidance, on the interpretation of section 13(3)(g), from the Privy Council case of Central Broadcasting Services Limited and Another v Attorney General [2007] 2 LRC, where a similar provision under section 4 of the Trinidad and Tobago Constitution was being considered. McDonald, J posited:*
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> > *[169] In Central Broadcasting Services Limited and Another v Attorney General (2007) 2 LRC, the Judicial Committee of the Privy Council offered guidance on the interpretation of the following similar provisions under Section 4 of the Trinidad and Tobago Constitution. "(b) the right of the individual to equality before the law and the protection of the law..... (d) the right of the individual to equality of treatment from any public authority in the exercise of any functions....."*
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> > *[170] In Central Broadcasting Services Ltd. Lord Mance noted at paragraph 20:*
> >
> > > *"The Board has, however, one observation to make on the treatment in the Courts below of inequality. In both Courts it was assumed that the unequal treatment which was established justified a breach both of s 4 (b) and s 4 (d) of the Constitution. The Board does not consider this to be correct. Section 4 (d) is the provision covering circumstances such as the present. Section 4 (b) is, in the Board's view directed to equal protection as a matter of law in itself and its administration in the Courts" - 35 –*
> >
> > *[171] I find that Section 13 (3) (g) of the Jamaica Constitution may be interpreted in the same way as Section 4(b) of the Trinidadian Constitution having regard to the similarity of the provisions. (Emphasis mine) [97] This case illustrates that for the right under section 13 (3) (g) to be engaged the alleged breach must be a law. The Constitution defines 'law' in section 1 (1) of the Constitution, it*

[65] [2020] JMFC Full 6

> *states: "1 (i) 'law' includes any instrument having the force of law and any unwritten rule of law.'*
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> …

[98] We can deduce from this definition that the Constitution, when referring to 'any instrument having force of law', is describing legislation and any subsidiary laws such as regulations. The Constitution does not specify what can fall within the term 'unwritten rule of law' leaving the Court to make its own interpretation. In the case of Arthur Baugh v Curtis et al (unreported) Supreme Court, Claim No. CL B 099 of 1997, judgment delivered 6 October 2006, Sykes J considered what is included in the term 'unwritten rule of law'. He states:

> *"From these passages unwritten law must include the common law. If it were not so then what we would have had is the possibility of the common law prevailing over the constitution – a possibility inconsistent with the position that the Constitution is the supreme law of Jamaica. The effect of Lord Hope's analysis is that the authority of Nasralla has been severely weakened. What was not so vividly expressed in the majority was made plain by the concurring minority."*

[99] McDonald, J in Ruyal[sic] Transit in her analysis of the right to equality before the law, having considered the content, nature and meaning of the right, determined that the right cannot include policy, even if it is a policy of a government entity as a policy does not have force of law. She posits in paragraph 188:

> *So having regard to the definition contained in Section 1(1) of the Constitution of 'law', and the manner in which the Court has interpreted that section, I find that it could not be seen as including a policy that has been made, or a directive that has been given which does not have the force of law as contemplated by these authorities. I would respectfully adopt the observation of my learned colleague Mr. Justice Frank Williams when he states that "the difficultly that the Claimant faces in light of the definition of law in Section 1 of the Constitution and the general undertaking of the scope of section 13 (3)(9)," is that the Defendants have all described the creation of the exclusive bus lane as a policy or project and there has been no instrument having the force of law put before the Court or any reference made to any rule of the common law which the Court might consider as the source of the constituted breaches being complained of.'*

[190] Mr Clarke relied on the same argument, which was rejected by the **Board in Central Broadcasting Services Ltd.**[66] These rights cannot be conflated and the source of the breach must be identified by the claimant. The right to equality before the law has therefore not been engaged on the evidence.

[191] The nature of the rights in section 13(3)(h) were set down in **Dale Virgo v Board of Management of Kensington Primary School and others**[67]

> *"[132] The Concise Oxford English Dictionary, Eleventh Edition, defines "equitable" as "fair and impartial". It defines "humane" as "compassionate or benevolent". A definition of "fair" given by the same text connotes an element of equality. It states "treating people equally".*
>
> *[133] The concepts of equitable treatment and inhumane treatment cannot be considered as being inextricably linked. Treatment can be inequitable without being inhumane. Mr Hylton is correct that whereas the right to equitable and humane treatment are listed together in section 13(3)(h) of the Charter, the respective nature of these rights allows for the breach of either one or both.*
>
> *[134] In Rural Transit Association Limited v Jamaica Urban Transit Company Limited and others a different interpretation of "equitable" was pronounced. McDonald J, at para. [197] stated that the words "equitable and inhumane" are to be read conjunctively. She further stated that "equitable" means "fair/just" and expressly pronounced that it does not mean equal. F Williams J, as he then was, in para. [274], examined the definition for the words "equitable" and "humane" and explained that, to determine what is fairness, one must consider the facts and circumstances of the case. He said:*
>
> > *"…It is useful to state at this juncture as well that, as I understand the word 'equitable', it means: 'fair'. I accept the submission made on behalf of [Jamaica Urban Transit Company Limited] that it does not mean 'equal'. And fairness is a concept that must be decided having regard to all the facts and circumstances of a particular case. 'Inhumane' means 'without compassion for misery or suffering; cruel'."*
>
> *[135] He also agreed with McDonald J that the right is conjunctive (see para. [275]).*

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[66] Central Broadcasting Services Limited and Another v Attorney General [2007] 2 LRC

[67] [2024] JMCA Civ 33

> *[136] Based on the definitions taken from the Oxford Concise Dictionary, and the cases cited below, it must, however, be said that whereas "equitable" is not synonymous with "equal", it does include the element of equality.*
>
> *…*
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> *[143] The Privy Council held that a claimant who claims inequality of treatment must show that they have been treated or would have been treated differently from a person in a similar circumstance. Lord Carswell stated, in part, in para. [18] of the Board's judgment:*
>
> > *"A claimant who alleges inequality of treatment or its synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] 2 All ER 26 at para 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other…."*

[192] The evidence adduced by the defendants relies on the Mental Health (Offender's) Committee's report, which clearly states that the mentally disordered should not be housed in a prison, that the prison is ill equipped to care for and treat them and that the potential for abuse exists as their location within the prison itself is unsuitable. This all resulted from the policy to close the Bellevue Hospital. The evidence on this aspect has been set out above in full.

[193] Having failed to follow the prescribed legal regime for the treatment in custody of the mentally disordered, and with the clear admission that this is so from the Correctional services. The claimant's evidence is that he was called 'madman" and his case referred to as a "mad case" and that when he complained of being beaten and abused, he was dismissed by prison warders as a madman since he had been convicted. He was 'essentially in solitary confinement for 23 hours a day for seven days a week.' The inference I draw from this is that, as a result of what Mr Williams described as routine abuse, he was placed on lockdown to prevent that from happening. Mr Williams has not established that he was the subject of

discriminatory treatment at the hands of the State. There was no evidence that there were other persons in a similar position to that of Mr Williams, who were being treated differently, and so he has failed to prove that this right has been engaged.

[194] Mr Clarke argues that the detention in prison rather than in a mental hospital amounted to criminalisation of the mentally ill, without respect for human dignity; and, in the absence of periodic reviews of his fitness to stand trial, this amounted to subjecting Mr Williams to inhuman and degrading treatment. Mr Williams was given treatment which amounted to punishment, even though he was not convicted of any crime because he was mentally disordered and could not stand trial.

[195] The presumption of innocence was denied to him as a result of the mental disorder from which Mr Williams suffered, and this too amounted to criminalisation of the mentally ill. Further, that in this claim, the period of detention for the offence for which he was indicted was pre-trial. Mr Clarke argued that had he been tried and sentenced for murder, the likely sentence that would have been imposed upon conviction (in the normal course of sentencing) would have been spent and the claimant released.

[196] Mrs Rowe-Coke argued in reliance on **Anthony Henry** that this breach does not automatically follow from the fact that the claimant's detention was not reviewed as was required. Further, torture and inhuman or degrading punishment or other treatment are distinct rights. Relying on the judgment of Harrison, J in **Doris Fuller v Attorney General**.[68]

[197] In **The State v Williams**,[69] the Constitutional Court of South Africa, in para. [27], defined the term "inhuman treatment". The Court said:

> *"The European Commission of Human Rights…described inhuman treatment as that which 'causes severe suffering, mental [or] physical which in the particular situation is unjustifiable…' The European Court of Human*

[68] SUPREME COURT CIVIL APPEAL 91/95
[69] (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) (9 June 1995)

Rights …categorised degrading conduct as that which aroused in its victims feelings of fear, anguish and inferiority leading to humiliation and debasement and possible breaking of their physical and moral resistance. (Italics as in original)"

[198] Medical examinations in a case such as this are closely related to the decision to continue detention; as such, these examinations may well reveal independent, corroborating evidence that the person examined has been so injured by the confinement that he is no longer suitable for continued detention. Degrading conduct would have to be established. Such conduct would lead to humiliation, suffering, debasement and the breaking of physical or moral resistance.

[199] The absence of records related to medical treatment is an aggravating feature of this case. The Court has no medical or psychiatric evaluation report before 2008; however, the claimant gave affidavit evidence that very often he would receive tablets that would make him sleep. This is some evidence that medical treatment was being administered to Mr Williams despite the absence of the records, for which there has been no explanation.

[200] The Correctional Institution Adult Correctional Centre Rules, 1991 states that there is to be a Senior Medical Officer and medical officers are to maintain records. There is nothing before the Court to inform the first thirty years of the claimant's detention in custody. After 2008, there are psychiatric records. The claimant was then receiving treatment and evaluation. These evaluations do not state that the claimant could be released from custody; in other words, they did not entitle the claimant to release from institutionalisation, they merely point to detention in another type of facility.

[201] The evidence shows that Mr Williams was seen in 2008 by Dr Clayton Sewell, Consultant Psychiatrist and by Dr Myo Kyaw OO, Consultant Psychiatrist in 2014, 2015, 2016, 2017, 2018, 2019, 2020. A psychiatric assessment by Dr OO dated June 19, 2020, ordered by the St Catherine Circuit Court, stated that he saw Mr Williams a total of 22 times since 2014 at the St Catherine Adult Correctional Centre. Under the history of psychiatric illness, Dr OO said Mr Williams was a

patient at the Bellevue Hospital in 1965, 1969 and on February 3, 1971, he was assessed as schizophrenic. The evidence is that the claimant absconded from Bellevue Hospital on April 26, 1972.

[202] Mr Clarke submits that there is no documentary evidence to challenge the claimant's assertion that he received no psychiatric treatment while in custody before 2014. Mrs Rowe-Coke does not concede that there were no evaluations or treatment; she submits that there is no documentary evidence before the Court in that regard. She gave no explanation for their absence, and there is no evidence as to record-keeping in the prisons. Counsel submitted that it was not that there was no treatment, rather that the documents to demonstrate the treatment received by the claimant are not before the Court. She admits that what has been produced commenced in 2008.

[203] I do not agree that the evidence in this case rises to the inhuman and degrading treatment, nor does it rise to the legal definition of torture. Mr Williams allegedly committed a murder; he was initially remanded on that charge and indicted to stand trial on the index charge in respect of the allegations involving levels of extreme violence. He was detained by law on the grounds of a mental disorder. He was admitted to Bellevue Hospital, from which he escaped lawful custody and was committed to prison upon recapture.

[204] I wish to state here that the use of the word "*remand*" in the current principal act does not change the fact that detention in the criminal justice regime under the CJAA is not the same as punishment. It is preventive in nature and character. The order to detain is not a sentence as is known to the criminal law, but a detention order. The order is not detention on remand in the bail sense, which is justified by the need to hold a defendant in custody in anticipation of the possibility of a finding of guilt at trial and a likely sentence of imprisonment. A detention order, therefore, cannot be described as a term of imprisonment as there has been no trial on the allegations before the Court and no conviction. It therefore cannot be successfully argued that the Court has punished or sentenced the claimant who was a detainee.

Mr Williams' detention cannot therefore be considered criminalisation because of his mental illness or punishment without a conviction as was the affidavit evidence and argument of Mr Clarke.

[205] The claimant was subject to an excessively extended pre-trial detention on remand which was commenced by Court order but which was not converted (as it should have been) into detention in a psychiatric facility as a matter of law. Since the mental health of Mr Williams was in fact reviewed by psychiatrists and he in fact received medical treatment in custody by his own admission, the mere fact that the place of his detention was a prison rather than a psychiatric facility cannot convert his detention into inhuman or degrading treatment as a matter of fact or law.

[206] Since the Minister has the power to designate a prison a psychiatric facility, provided that there are facilities for appropriate medical examinations and treatment, then a prison, once so designated, could be a place in which a mentally disordered defendant who is unfit to plead could be confined. The failure to make this designation could not change the place of confinement to one which is said to meet the legal definition of 'inhuman and degrading.'

[207] The evidence of treatment by psychiatrists in 2008 indicates that the mental disorder continued throughout his time in prison. It was not suggested to this Court that Mr Williams' mental condition had been significantly different during the earlier period of his detention than in the later periods when he remained unfit to plead. There is some evidence that the claimant had been receiving medical treatment for his mental disorder long before he was ever detained on his own admission.

[208] On the occasions on which Mr Williams said he was found fit to plead, it was contended that the psychiatric evaluations did not lead to the recommencement of the criminal process. At paragraph 14 of his affidavit, the claimant stated that many times, 'medical people' would tell him that he was fit to plead and would soon be brought to Court. Counsel for the claimant submitted orally that further, there is no answer to the assertion that the claimant was deemed fit to plead on multiple

occasions. There are no psychiatric evaluation records before the Court to show that the claimant was, in fact, fit to plead as was asserted. Were this the case it would have been supported by evidence. This position was not advanced with any stridency.

[209] There was no evidence that there was a policy in place preventing the claimant's re-entry to the Circuit Court. It was therefore through administrative inadvertence rather than deliberate policy of the State that the periodic reviews of the wider legal issues affecting the case of Mr Williams were not done, and I so find.

[210] Further, it cannot be said that the mental disorder lasting as long as 50 years and which kept the claimant out of the criminal process lasted longer than the maximum sentence he would have served for the index charge, as he was not sentenced, neither was he punished. He was removed by the Court from the criminal justice system in order for the legal regime to be brought to bear on his case. He was detained pursuant to this process, and this time in detention could not have been taken into account on sentencing on the index charge, no matter its length. This reasoning that the claimant was detained longer than he could have been sentenced was employed by the Court of Appeal in **Anthony Henry** and rejected by the Privy Council. In these circumstances, I do not find these rights to have been made out on the evidence.

Respect for and protection of private and family life and privacy of the home – section 13(3)(j)(ii)

[211] Section 13(3)(j)(ii) of the Constitution speaks to 'respect for and protection of private and family life, and privacy of the home.' There is no evidence of an invasion of or intrusion into the claimant's private sphere or family life. There is no engagement of this right on the evidence.

[212] In respect of the other sections of the Charter said to have been engaged, Mr Clarke simply makes the blanket submission asking the Court to find that they have been breached without more. I have considered all of the pleadings, including

those relating to the sections of the Charter cited but actively pursued; however, this decision is confined to the rights identified previously.

Remedies

[213] It is well established that the power to give redress under section 14 of the Constitution for a contravention of the applicant's constitutional rights is discretionary.[70] The effect of section 19(3) of the Charter of Fundamental Rights and Freedoms ("the Charter") was raised, however, this issue need not detain the Court as it is trite that in claims brought under section 19(1) of the Charter, the Court has the power to hear the case and if it does and the claimant succeeds, to craft a remedy appropriate to the circumstances of the particular claim under section 19(3). There were no submissions on a specific remedy appropriate to the claim under section 19(3) by Mr Clarke.

[214] There is no constitutional right to damages. In some cases, a declaration that there has been a violation of the constitutional right may be sufficient satisfaction for what has happened.[71] As Lord Kerr said in **James v Attorney General of Trinidad and Tobago**,[72] to treat entitlement to monetary compensation as automatic where the violation of a constitutional right has occurred would undermine the discretion that is invested in the Court by section 19. It will all depend on the circumstances of each case.

[215] The liberty rights as violated attract a declaration, however, the Court, in the exercise of its constitutional jurisdiction, is very much concerned with upholding and vindicating these rights and emphasizing their importance. The Court is therefore prepared to award compensatory damages and to go further to add vindicatory damages in order to right the wrong that was done to Mr Williams.

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[70] Surratt v Attorney General of Trinidad and Tobago [2008] UKPC 38, para 13, per Lord Brown of Eaton-under Heywood.
[71] Inniss v Attorney General of St Christopher and Nevis [2008] UKPC 42, para 21; James v Attorney General of Trinidad and Tobago [2010] UKPC 23, para 37.
[72] para 36

Factors for the award of vindicatory damages

[216] A vindicatory award is needed along the lines of the dicta in **Takitota**[73] citing **Ramanoop**:

> *"82. It is well-established that an award of compensation will go some distance towards vindicating a breach of constitutional rights but may not always suffice. The fact that the rights that were violated involved one or more constitutional rights adds an extra dimension to the wrong. In those circumstances, an additional award may be necessary to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches: see Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15, [2006] 1 AC 328 per Lord Nicholls of Birkenhead at para 19. The additional award is not punitive. It is designed to vindicate the important constitutional rights engaged, and to compensate for their breach."*

[217] I bear in mind the guidance of the Board in **Inniss v Attorney General of Saint Christopher & Nevis (Saint Christopher & Nevis)**[74] to demonstrate the importance of the constitutional right to liberty, the gravity of the breach, to reflect public outrage for and to deter future breaches of this nature. This additional award is made within the discretion of the Court to redress the breach and is designed to allow Mr Williams to carry on the remainder of his life in peace, with the ability to obtain medical care and the necessities of life.

[218] The appropriate sum is contingent upon the nature of the breaches identified in this decision, which, as I have explained, was a deprivation of the care which the law required that he receive as a detainee in the custody of the State and the failure to employ the legal regime in that regard. Coupled with the systemic failure to ensure periodic reviews of the claimant's case, these actions or inactions led to the identified breaches of his fundamental rights to liberty and due process.

[219] The vindicatory award is a sum that is discretionary. This discretion is to be exercised judicially. Policy decisions and resource constraints are not factors

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[73] At [82]
[74] [2008] UKPC 42

which can reduce an award made to vindicate the infringement of a protected right. These breaches carry both an emotional cost to the claimant and can carry a significant financial cost for the State, which is ultimately responsible.

[220] The loss of access to justice, coupled with the deplorable conditions in which Mr Williams remained in prison, are also factors to be taken into account. In **Ernest Smith**, vindicatory damages were awarded in the sum of $1,500,000 for breach of the right to a trial within a reasonable time. This case is far more serious, and the consequences of the breaches identified infinitely more grave.

[221] This case demands a far greater award, and the sum of $1,000,000 per year in custody is an appropriate figure for the loss of liberty over 42 years. The sum of $42,000,000 is awarded to Mr Williams as a vindication of the breach of the right to liberty in order to express how valuable the liberty rights are.

Assessment of Damages

[222] **Takitota v AG**[75] it was held that firstly, damages are to be tapered when dealing with an extended period of unlawful imprisonment. Secondly, an award representing future financial loss or loss of amenities is to reflect in the calculation that the claimant will receive an immediate capital sum, being the present value of future annual losses, which is materially less than their total. When the award represents past loss or damage, full restitution for the loss sustained should ordinarily be awarded, and there is no basis for reducing it on the ground that the claimant will receive a capital sum.[76]

[223] In awarding compensatory damages, the Court may take account of an element of aggravation and for example, may increase the award in case of unlawful detention to a higher figure than it would have for the deprivation of liberty to reflect such matters as indignity and humiliation arising from the circumstances of the arrest or the conditions in which the claimant was held. The rationale for the inclusion of

[75] [2009] UKPC 12
[76][2009]LRC 807 at 813-814

such an element is that the claimant would not receive sufficient compensation for the wrong sustained if the damages were restricted to a basic award.

[224] This position was echoed in the case of **Douglas Ngumi v. The Attorney-General of the Bahamas & Others**[77] where the Board observed:

> *"75. The Board emphasises however, the importance in every case of the first instance judge setting out the factors taken into account in making the assessment of damages for unlawful detention. The conditions, treatment and length of the detention will be of prime relevance. There may be other features of the detention that cause particular harm or suffering that are regarded as relevant to the level of damages awarded. If so, they should be identified."*

[225] The starting point in the present case is along the lines of the sum of $6,837,444.00 awarded for the tort of false imprisonment in **Charles Montique v Constable Audrey Smith**,[78] a case in which the claimant was denied bail for about three years and held at various police stations and remand centres, and ultimately released after the charges were dismissed, the Crown having offered no evidence.

[226] The starting point, in the instant case, has to reflect the length of time in detention without periodic review, and the final award shall be a global sum as opposed to a daily rate requiring tapering in accordance with **Takitota**. This case does not merit a figure for initial shock as the claimant had been remanded in custody after apprehension. His detention was therefore inevitable. I rely on paragraph 17 of **Takitota** as set out here:

> *"17. The court should determine what they consider to be an appropriate figure to reflect compensation for the long period of wrongful detention of the appellant, taking into account any element of aggravation they think proper, reflecting the conditions of his detention and, in their own words, the misery which he endured. In assessing the proper figure for compensation for such long-term detention, they should take into account that any figure they might regard as appropriate for an initial short period, if extrapolated, should ordinarily be tapered, as their Lordships have pointed out in para 9 above. The final figure for compensatory damages should therefore amount*

[77] [2023] UKPC 12
[78][2024] JMSC Civ. 117

to an overall sum representing appropriate compensation for the period of over eight years' detention, taking account of the inhumane conditions and the misery and distress suffered by the appellant."

[227] The starting point is $65,924,900.45. The Claimant has suffered loss over a continuous period of forty-eight (48) years, commencing in 1978 and continuing through to 2025. The value of this financial loss is assessed using **Charles Montique**, in which Thomas, J made an award of $6,837,444.00 which divided over three years, is J$2,266,670 per annum. This latter sum reflects the loss in present-day monetary terms but does not take into account the diminished value of the Jamaican dollar over the preceding decades. In order to accurately reflect the true value of the claimant's past losses, the figure has to be adjusted for inflation using the Consumer Price Index (CPI).

[228] In 1978, the CPI was approximately 4.9, in 2024, (at the time of the award by Thomas, J), it had risen to 141.3. The rise in CPI over this period reflects an approximate 28.96-fold increase in price levels. The adjusted total, when all yearly losses from 1978 to 2025 are expressed in 2024 terms and aggregated, amounts to: $65,648,173.53.

[229] This aggregated total represents the full financial impact on the claimant, adjusted for economic conditions prevailing in Jamaica as indicated by the CPI and inflation over the period. The approach taken in this assessment is consistent with the reasoning in **Merson v Cartwright & Anor**[79] in which the Privy Council held that awards for constitutional breaches must reflect the full measure of the harm done, including economic loss.

[230] The Claimant's losses, when adjusted using a ratio of each of the years indicated using the CPI between 1978 and 2025, update to J$65,924,900.45 in 2025. For ease of calculation, I will round this figure to $66,000,000.

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[79] [2005] UKPC 38

[231] The aggravating features of Mr Williams' case, which increase the award are that he was held in the same building, under the same rules, conditions, and arrangements as a convicted prisoner. While a prison can be designated as a psychiatric facility, DCS indicates that a separate part of the prison was being provided for the mentally disordered, and that is to be expected. That there was no separation of the claimant from the main prison population is an aggravating factor.

[232] He is now at retirement age and has never worked. He was dismissed by warders as a madman and called a mad case by the warders. He would be routinely beaten and abused, and when he complained, the officials would dismiss it as the words of a madman.

[233] The conditions of his imprisonment were so bad that each day, he prayed that he would be released from hell. He was deprived of sex. He hoped that he would be deemed sane enough to be released from this prison sentence. He was too poor to afford a lawyer, and no one represented his interests. He did not receive any visits from the church people who visited the prison. He was on lockdown for virtually 23 hours a day. There was no furniture, and a sheet of foam was his bed for the last fifty years. He was more comfortable sleeping on the ground and often did so, as it was better than the foam. There was no proper toilet facility. He did not have recreation time. He spent every day hoping that it would be the day he went home.

[234] The absence of records related to medical treatment is also an aggravating feature of this case. The Court has no medical or psychiatric evaluation reports before 2008. There was no evidence as to the reason for their absence. There is no indication in the reports before the Court or any evidence to show that any consideration was given at any point as to how long it would be appropriate for the claimant to be detained or to his progress and development in custody. He was given no reason to think that his detention would not continue indefinitely. The

possibility that the breaches of his constitutional rights have had a significant effect on him cannot be entirely ruled out.

[235] I bear in mind that for 42 years, the executive did not meet the relevant statutory requirements concerning the safe custody and care of the claimant, which included the consideration of his mental health and well-being as a detainee in custody. There was no consideration of his criminal case and the continued detention as a result of his mental disorder. There was a denial of his access to justice, which no Court can overlook.

[236] The fact that all of his life to include his declining years, the claimant was subject to routine direction by prison staff, had his daily life and (though there is no evidence he had visits), any visits were subjected to the correctional regime or at least under some degree of control. These are all the real consequences of being in confinement. In addition, he was subjected to 23 hours of isolation and lockdown.

[237] The guidelines in **Merson v Cartwright**[80] makes clear that ordinarily separate awards for separate torts should be made. It imposes some discipline on the assessment and enables the parties to understand how the award is calculated, allowing for better scrutiny at the appellate level.

[238] I take into account the fact that as a result of these failures, the claimant's liberty rights were infringed for the greater part of his life, as less intrusive options of accommodation and care which could have been afforded, were not considered or made available to him. Any restriction on his freedom of movement was in light of the fact that there were no other residential options ever employed or presented to him.

[239] The conditions of imprisonment were over an extraordinarily long time in custody and included isolation, being beaten, and called madman by warders. His evidence

[80] [2005] UKPC 38

that he was kept in deplorable conditions remained uncontroverted. He was finally released after 42 years. There was neither evidence nor submissions on loss of earnings, the only evidence is that he was a labourer; however, he had never worked.

[240] The good intentions and benign motives of the executive pale in comparison to these violations and could offer no consolation to the claimant in these circumstances.

[241] The aggravating factors of this case increase the award to $76,000,000. A tapered award means the benefit amount decreases as income increases. There is no evidence of earnings or income that could be considered excess income. There is no evidence of a decreasing need for medical treatment as the claimant ages. A global award appears to be more appropriate in all the circumstances of this case.

[242] The due process rights breached are also considered under this head of damages. The anxiety, distress and suffering clearly experienced by Mr Williams at never hearing a direction from the Court as to his detention, is plain and obvious on the facts before the Court. The physical and mental suffering and loss of hope of release in that the claimant was not brought back to Court for 42 years is a significant factor.

[243] **AG v Clifford James**[81] cited by Mrs Rowe-Coke is distinguishable on the facts. In **Seepersad**, the Board concluded that the appellants' rights under certain provisions of the Constitution of the Republic of Trinidad and Tobago were breached by the failure to review their sentences and detention during the period while they were detained at the State's pleasure. On those facts, the Board was of the view that monetary compensation was appropriate, and the order of the judge at first instance that there be an assessment of damages was restored.

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[81] [2023] JMCA Civ 6

[244] In **Talbert Smith v AG**,[82] the right to a fair trial and to a fair trial within a reasonable time pursuant to section 16(2) of the Charter had been breached due to the failure of the trial judge to deliver the judgment in the matter. The appellant's original claim was never set down for retrial. The Court of Appeal held that $2,650,000.00 was sufficient to compensate the breach. All of these cases are distinguishable on their facts. However, the denial of justice in the case of **Talbert Smith** is instructive.

[245] In all the circumstances of this case, the Court would additionally compensate the claimant in the sum of $2,638,907.00 updated as at May 2025[83] for breach of his due process rights.

[246] ORDERS

1. It is hereby declared by this Court that the manner of detaining George Williams, a person with a mental disorder, breached his rights to liberty, to which he is entitled by virtue of his being a citizen of a free and democratic society.

2. It is hereby declared by this Court that the failure of the material state organs to conduct periodic reviews of George Williams' incarceration to determine whether he had recovered his mental health so as to be fit to plead and stand his trial was in breach of his rights to liberty, to due process and his right to a fair hearing by an independent and impartial Court within a reasonable time.

3. Vindicatory damages are awarded to the Claimant in the sum of $42,000,000.00.

4. Compensatory damages are awarded to the Claimant in the sum of $78,638,907.00.

5. Subject to any contrary written submissions and authorities by the parties filed and exchanged within 14 days of the delivery of this judgment, the Attorney General is ordered to pay the claimant's costs of and incidental to this trial to be agreed or taxed.

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Wint-Blair, J

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[82] [2024] JMCA Civ 39

[83] CPI of 141.3