IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)
CIVIL APPEAL NO. 01(f) – 2 – 01/2018 (W)

BETWEEN

1. **KOPERAL ZAINAL BIN MOHD ALI**

2. **KOPERAL PILOT LANYE**

3. **INSP MAHEZAL B. MD NOH**

4. **INSP MOHD SAIDON BIN SHAARI**

5. **SAC MOHAN SINGH A/L TARA SINGH**

6. **KETUA POLIS NEGARA**
   (TAN SRI ISMAIL OMAR PADA MASA MATERIAL**)**

7. **KERAJAAN MALAYSIA ... APPELLANTS**

AND

1. **SELVI A/P NARAYAN**
   (NO. K/P: 700430-10-5118)
   (PENTADBIR BERSAMA ESTATE DAN TANGGUNGAN
   CHANDRAN A/L PERUMAL, SI MATI**)**

2. **RITA A/P CHANDRAN**
   (NO. K/P: 930504-01-6198)
   (PENTADBIR BERSAMA ESTATE DAN TANGGUNGAN
   CHANDRAN A/L PERUMAL, SI MATI**) ... RESPONDENTS**

[In The Court Of Appeal Of Malaysia
Civil Appeal No. W-01(NCVC)(W)-36-01/2017

Between

1. Koperal Zainal Bin Mohd Ali
2. Koperal Pilot Lanye
3. Insp Mahezal B. Md Noh

4. Insp. Mohd Saidon Bin Shaari
5. SAC Mohan Singh A/L Tara Singh
6. Ketua Polis Negara
   (Tan Sri Ismail Omar pada masa material)
7. Kerajaan Malaysia ... Appellants

And

1. Selvi A/P Narayan
   (NO. K/p: 700430-10-5118)
   (Pentadbir Bersama Estate Dan Tanggungan
   Chandran A/L Perumal, Si Mati)

2. Rita A/P Chandran
   (NO. K/p: 930504-01-6198)
   (Pentadbir Bersama Estate Dan Tanggungan
   Chandran A/L Perumal, Si Mati) ... Respondents]

[In The High Court Of Malaya At Kuala Lumpur
(Civil Division)
Civil Trial No. 21NCVC-56-09/2015

Between

1. Selvi A/P Narayan
   (NO. K/p: 700430-10-5118)
   (Pentadbir Bersama Estate Dan Tanggungan
   Chandran A/L Perumal, Si Mati)

2. Rita A/P Chandran
   (NO. K/p: 930504-01-6198)
   (Pentadbir Bersama Estate Dan Tanggungan
   Chandran A/L Perumal, Si Mati) ... Plaintiffs

And

1. Koperal Zainal Bin Mohd Ali
2. Koperal Pilot Lanye
3. Insp Mahezal B. Md Noh
4. Insp. Mohd Saidon Bin Shaari
5. SAC Mohan Singh A/L Tara Singh
6. Ketua Polis Negara

(Tan Sri Ismail Omar pada masa material)
7. Kerajaan Malaysia ... Defendants]

Coram: **ROHANA BINTI YUSUF, PCA**
ABANG ISKANDAR BIN ABANG HASHIM, CJSS
NALLINI PATHMANATHAN, FCJ
ABDUL RAHMAN BIN SEBLI, FCJ
ZABARIAH BINTI MOHD. YUSOF, FCJ
HASNAH BINTI DATO' MOHAMMED HASHIM, FCJ
RHODZARIAH BINTI BUJANG, FCJ

JUDGMENT

[1] The appellants in this appeal were sued by the respondents, the joint administrators of the estate of one Chandran a/l Perumal ("the deceased") and who were his wife and daughter, respectively. The suit was filed following his demise on the 5th day whilst in police custody pursuant to his arrest, with three others, on suspicion of kidnapping a newborn baby. As found by a coroner, following an inquest into his death, the deceased died of hypertensive heart disease and the claim put forth by the respondents was for losses suffered by his estate and lawful dependants by reason thereof which they alleged was due to the wrongful acts of the appellants. After a full trial the learned High

Court Judge ("HCJ") found for the respondents and awarded the following damages against the appellants:

(a)	special damages	-	RM3,500.00;
(b)	bereavement	-	RM10,000.00;
(c)	loss of dependency	-	RM144,000.00;
(d)	exemplary damages	-	RM200,000.00; and
(e)	cost	-	RM50,000.00.

[2] The appellants were only dissatisfied with the decision in respect of the award of exemplary damages and filed an appeal to the Court of Appeal in respect of it but which appeal was dismissed. The appellants sought and was granted leave by this court to appeal against the said decision on this sole question of law:

> *"Whether section 8(2) of the Civil Law Act 1956 [Act 67] is an absolute bar to the award of exemplary damages in an estate claim?"*

[3] Given the legal poser before us and the fact that liability was not in dispute before the Court of Appeal and now us, it would not be necessary in this judgment of mine to dwell at length on the circumstances upon which the learned HCJ fastened liability on the appellants, except to say that the demise of the deceased was directly attributable to the failure of his custodians to give him proper medical

care and attention which was warranted by his pre-existing medical condition. It is also stated in the post-mortem report that the deceased had not eaten any food for the pathologist found that his stomach was empty. This is of course another damning evidence in support of the finding of liability against the appellants.

Case Precedents

[4] As submitted by the learned Senior Federal Counsel ("SFC") acting for the appellants, this was not the first time that this court had been tasked to answer this question for in **Ketua Polis Negara & Ors. v Nurasmira Maulat Binti Jaafar & Ors. (minors bringing the action through their legal mother and next friend Abra Binti Sahul Hamid) and other appeals** [2018] 3 MLJ 184 ("the **Kugan's** case"), a similar question in the following words was posed for this court's determination:

> *"Whether section 8(2) of the Civil Law Act 1956 (Act 67) which bars the awarding of exemplary damages in an estate claim is applicable where the death of the deceased is as a result of a breach of his constitutional right to life?" [page 40 of the Kugan's (Appeal No. 52)].*

[5] As stated in the report, Kugan died of acute renal failure after being tortured and beaten to death whilst also in police custody and

the High Court awarded RM300,000.00 against the appellants for exemplary damages which the Court of Appeal affirmed. However that award was set aside by a majority decision of this court penned by Zaharah Ibrahim, FCJ. The minority decision was delivered by Zainun Ali, FCJ.

[6] Before going further into the reasonings of **Kugan** case, it is best that I reproduce the aforesaid section 8 and the relevant sub-sections below:

> *"8. Effect of death on certain causes of action.*
>
> *(1) Subject to this section, on death of any person all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:*
>
> *Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain part from the other or to any claim for damages on the ground of adultery.*
>
> *(2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person –*
>
> *(a) shall not include any exemplary damages, any damages for bereavement made under subsection 7(3A), any damages for loss of expectation of life and any damages for loss of*

earnings in respect of any period after that person's death;

... ...

... ...

(4) Where damages has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section as it applies in relation to other causes of action not expressly excepted from the operation of subsection 91)."

[7] Zaharah Ibrahim, FCJ in Her Ladyship's judgment as did Zainun Ali, FCJ referred to this court's decision in **Sambu Pernas Construction & Anor v. Pitchakkaran** [1982] 1 MLJ 269 which explained the rationale behind the abovementioned sections 7 and 8 at page 270 of the report as follows:

"At common law the death of a person gives rise to two principles. The first is that the death of any person is not a civil wrong. Therefore no action can be founded on it although death may result in pecuniary

losses or damages to the deceased's spouse and children. Lord Ellenborough CJ. in Baker v. Bolton[(3)] ruled that "in a civil court the death of a human being could not be complained of as an injury." The second principle was that when a person died any cause of action which was vested either in his favour or against him at the time of death was buried with him. In other words the cause of action did not survive the death: "actio personalis moritur cum persona". The first principle which regarded death as not giving rise to any cause of action was rectified by section 1 of the Fatal Accidents Acts 1846 to 1959, popularly known as Lord Campbell's Act whilst the second principle which dealt with the non-survival of the cause of action was rectified by the Law Reform (Miscellaneous Provisions) Act, 1934. The provisions of these two UK statutes are now incorporated in sections 7 and 8 of our Civil Law Act, 1956.

Had it not been for sections 7 and 8 of the Civil Law Act it is clear that the respondent could not have the right to bring the suit, and having acted under these sections and in particular section 7, his case must stand and fall on the basis of these sections."

[8] Zaharah Ibrahim, FCJ further reiterated that:

"[191] As was explained by this court in Sambu Pernas, causes of action vested in a person survive his death solely due to s 8 of the CLA. Such survival is subject to the conditions set out in that section, one of which is that damages which can be awarded for the benefit of the estate of such deceased person cannot include exemplary damages. As was also stated in Sambu Pernas, the claim of a person claiming on behalf of the estate of a deceased person under s 8 must 'stand and fall' on the basis of that section."

[9] In short, Her Ladyship held that the only law available to a claimant suing on behalf of the estate of a deceased person is the Civil Law Act 1956 ("CLA") and that includes the limitation prescribed by the Act in its section 8. The question posed was therefore answered in the affirmative by Her Ladyship.

[10] Zainun Ali, FCJ, on the other hand expressed her contrary view based on the following main reasons. Firstly, following what was held in **Public Prosecutor v. Gan Boon Ann** [2017] 3 MLJ 12, the phrase '*in accordance with law*' in Article 5(1) includes the common law of England in so far as it is in operation in the Federation or any part thereof and that it is accepted in the said law that a victim of constitutional violation has the right to be compensated by an award of punitive, exemplary or aggravated damages. That right, held Her Ladyship "*translates into a right guaranteed under Art 5(1) of the Federal Constitution..."* and hence, "*... where a wrong is committed by the state or an instrument of the state which has the effect of depriving the victim of his life (in the widest sense as held by this court in Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301, in a manner not in accordance with law, the victim is entitled to an award of exemplary or aggravated damages). Thus as in this appeal, the Respondent is entitled as a matter of right guaranteed to them by the Constitution, to*

exemplary or aggravated damages for the deprivation of the deceased's (Kugan's) life." Her Ladyship's alternative reason for not agreeing with the prohibition on exemplary damages in the said sub-section 8(2) is expressed this way:-

> *"[73] As had been alluded to above, the Civil Law Act 1956 predates the Federal Constitution. Thus it is a pre-Merdeka law or an existing law. It is clear that the section violates the right of the deceased (Kugan) in this case to have, as a matter of constitutional guarantee, an award of exemplary or aggravated damages. Being a pre-Merdeka law and therefore an existing law that is inconsistent with a provision of the Constitution, the duty of this Court is to read it in accordance with art 162(6) of the Federal Constitution to bring it into accord with the latter.*

[11] Her Ladyship then concluded as follows:

> *"[78] Taking the above and acting upon the dictates of art 162(6), I would interpret sub-sub-s 8(2)(a) of the CLA as follows, to bring it into accord with the Federal Constitution.*
>
> *It would thus read:*
>
> > *Section 8(2)*
> > *Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person –*
> >
> > > *(a) Shall not include any exemplary damages <u>save where the cause of action concerns the violation of a right guaranteed by the Federal Constitution</u>, any damages for*

bereavement made under subsection 7(3A), any damage for loss of expectation of life and any damages for loss of expectation of life and any damages for loss of earnings in respect of any period after that person's death;

[79] By reading into para (a) of sub-s 8(2) the emphasised words, the section is brought into accord with the Federal Constitution."

[12] What was held by Her Ladyship above is consistent with what had been said earlier by the Court of Appeal when hearing the appeal respecting Kugan's death (see **Datuk Seri Khalid Abu Bakar & Ors v. N Indra P. Nallathamby & Anor Appeal** [2014] 9 CLJ 15) where David Wong Dak Wah, JCA (as His Lordship then was) followed the approach taken by the House of Lords in **Ashley v Chief Constable of Sussex Police** [2008] 2 WLR 975 in interpreting a similar provision to our section 8. That provision is section 1(1) of the Law Reform (Miscellaneous Provision) Act 1934 and the claim of the appellant in the cited case was brought under section 1 of the Fatal Accidents Act 1976 which section is similar with our section 7 of the CLA. As noted by this court in **Sambu Pernas's** case, which I now reiterate, the aforesaid statutory provision is to mitigate the twin principles in common law, which is, firstly, that the death of a person is not a civil wrong and that no action can be founded on it even though his death would have resulted in pecuniary losses or damages to his

dependants. Secondly, when a person dies, the cause of action is buried with him: *'actio personalis moritur cum persona.*' The House of Lords, despite the said prohibition, awarded damages for vindication arising from the death of the unarmed victim, caused by a shot fired by the police during a raid. After reproducing the relevant part of the said judgment, David Wong Dak Wah, JCA concluded, inter alia, as follows:

> *"[72] From the grounds of Their Lordships, it is quite clear that they saw no impediment in awarding exemplary damages despite the express prohibition of awarding exemplary damages in an estate claim when they consider that prohibition in the light of fact that the claim of the Ashleys was for damages stemming from a breach of a right provided for in the Human Rights Act 1998 which Act is the consequence of the European Convention for the Protection of Human Rights and Fundamental Freedoms. His Lordship equated that statutory right to be a constitutional right by virtue of the connection or link between the Human Rights Act and European Convention for the Protection of Human Rights and Fundamental Freedoms. And such equation was done despite the fact that there is no written Constitution in England which practises Parliamentary supremacy.*
>
> *[73] As stated earlier, this country practises Constitutional Supremacy and thus any breach of any constitutional right must be jealously guarded by the courts and protected with the severity as it justly deserves. A constitution so to speak is the heart of a country and the blood vessels of the heart are the entrenched rights of every citizen of the country. Any mutilation of those blood vessels must be attended*

to immediately and with the appropriate measures as any failure to do so would lead to the obvious diagnosis of a weak heart.

[74] That said, we see no reason why we should not adopt the approach of the House of Lords in the circumstances of this case. Accordingly we find that where there is a breach of a constitutional right by a public authority, s. 8(2) of the Civil Law Act does not apply and the courts cannot be barred from awarding exemplary damages. Our view is fortified by the fact that in 1956, the year in which the Civil Law Act was legislated, there was no Federal Constitution.

[75] We further say that the public tort of public misfeasance had not been developed yet in 1956 and it can be said that when the Civil Law Act was enacted, it was only in respect of private tortious actions. Hence we are of the view that s. 8 of the Civil Law Act only applies to private torts in so far as the prohibition of awarding exemplary damages." (emphasis added)

[13] Certain points in the above dissenting judgment of Zainun Ali, FCJ have been quoted with approval by this court in **Hassan Bin Marsom & Ors. v Mohd Hady Ya'akop** [2018] 5 MLJ 141. Paragraph 125 of the judgment of Balia Yusof Wahi, FCJ reproduced the very same paragraphs 69 and 71 of Zainun Ali, FCJ's judgment which I had done earlier and His Lordship stated clearly in his judgment at paragraph 125 thereof that the court subscribes to the same quoted views of Her Ladyship. It is to be noted, however that **Hassan's** case (supra) does not involve an estate or dependant's claim but rather a personal one by the respondent who was assaulted whilst in police

custody following his arrest over an alleged involvement in a fight with a policeman which occurred earlier. Both general and specific damages as well as exemplary and/or aggravated damages were claimed by him arising therefrom and he succeeded in his claim in all tiers of the court.

The Appeal Before Us

[14] The long and short of the submission of the learned SFC before us is that the words of section 8(2) must be given their ordinary meaning as held by this court in the cases cited by him, such as, **Chin Choy & Ors. v Collector of Stamps Duties** [1979] 1 MLJ 69 and the Supreme Court in **Tan Kim Chuan & Anor v Chanda Nair Krishna Nair** [1991] 1 CLJ (Rep) 441. Based on what the House of Lords said in **Thompson v Goold & Co.** [1910] AC 409 as quoted by the Supreme Court in **Vengadasalam v Khor Soon Weng & Ors** [1985] 2 MLJ 449, the learned SFC submitted that we should not read words into an Act of Parliament unless there exist a clear reason to do so as found within the four corners of the Act itself.

[15] The learned SFC submitted further that the High Court's general jurisdiction and powers is defined in Article 121 of the Federal Court and its specific ones are in the Courts of Judicature Act 1965. For civil

matters, it is sections 23 to 25 thereof and section 25 specifically provides that it has *"... such other powers as may be vested in it by any written law in force within its local jurisdiction."* Therefore, he submitted, in granting damages, the exercise of the court's powers is only within the four corners of the CLA, meaning to say that the prohibition against the award of exemplary damages must be adhered to.

[16] Learned counsel for the respondents, on the other hand contended, before quoting at length the Court of Appeal's decision in **Kugan's** and **Nurasmira's** cases (supra) which, in essence reiterated the stand on this issue as held by Zainun Ali, FCJ and which I have reproduced above, that:

> *"Quite apart from that, if Section 8(2) of the Civil Law Act 1953 is read to prohibit exemplary damages for breaches of constitutional rights and public misfeasance causing death, we are faced with a bizarre situation. The worst possible case, i.e. death, would entitle the wrongdoer to escape liability for exemplary damages. In other words, the law would appear to be sending an outrageous message to those who disregard constitutional right to life – it is better to kill then to just injure. This goes directly against the rationale for maintaining exemplary damages."* (emphasis added)

[17] Before going further into the merits of the arguments canvassed before us, it behoves upon us to point out, with respect, that the

statement of learned counsel as emphasised above is a reflection of the law prior to the enactment of section 8 and not post such enactment because section 8 is a mitigation of the rigidity of the dual common law principles which I have stated earlier.

[18] It would not be out of place to state now that our section 8(2) is not unique for there are other jurisdictions which contained a similar prohibition in their written law. That of United Kingdom I had already mentioned . Closer to home is section 10(3) of Singapore's Civil Law Act (Chapter 43, Revised Edition 1999). Then there is section 3(2) of New Zealand's Law Reform Act 1936 and those of the States in Australia such as section 16(2) of Australian Capital Territory's Civil Law (Wrongs) Act 2002 and section 6(1)(a) of Northern Territory of Australia's Law Reform (Miscellaneous Provisions) Act 1956. It is also pertinent, in the interest of the law, to also mention that, as advocated by the learned author of **McGregor on Damages, Nineteenth Edition,** an effort has been made by the Law Commission of United Kingdom for the said statutory prohibition on exclusion of exemplary damages to be repealed but this was rejected by the Government. The rationale behind the move to do away with the prohibition is because it is contrary to the aim of exemplary damages, which is to punish the wrongdoer but who escapes that punishment just because his victim

has died. This is of course more so when the wrongdoer is a public servant for as stated by Lord Devlin in the celebrated case of **Rookes v Barnard And Others** [1964] AC 1129, unlike ordinary damages whose purpose is to compensate, that of exemplary damages is to punish and deter, and there are two categories of cases when it should be awarded, viz:

(i) oppressive, arbitrary or unconstitutional action by the servants of government;

(ii) the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.

That prohibition also produced a reverse effect, in that if it is the wrongdoer who died, the victim can claim exemplary damages against his estate which according to the Law Commission's report at paragraph 1.277 would result in unfairness since "*the retributive goal of a punitive award cannot be achieved: only the 'innocent' heirs are punished."*

[19] Stating the obvious, our task in this appeal is simple enough, which is, interpreting section 8(2) whose words are plain and

unambiguous. The process of that interpretation, however is not equally so, for as elucidated by Zainun Ali, FCJ in **Kugan's** case, our CLA is a pre-Merdeka law, which means that constitutional right to life under Article 5(1) of the Federal Constitution was not in the contemplation of the legislature when the CLA, specifically when section 8(2) was enacted. Nevertheless, the legal principle governing statutory interpretation is well settled in that where the words of the statute is clear and unambiguous, the court must give effect to its natural and ordinary meaning. The often quoted statement of Lord Reid in **Pinner v Everet** [1969] 1 WLR 1266 at page 1273 on that principle is reproduced below:

> *"In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of the word or phrase in its context in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase."*

[20] However, as held by the House of Lords in **Nothman v Barnet Council** [1978] 1 WLR 220 at page 228, the court is permitted to depart from that strict canon of construction when such an interpretation gives rise to an absurd or unjust situation whereupon, the judge can use his "*good sense to remedy it – by reading words in,*

if necessary, so as to do what Parliament would have done, had they had the situation in mind".

[21] This advice is to be read with a caution expressed in **Halsbury's Laws Statutes** in Volume 44(1) at paragraph 1487 (Reissue) which was quoted in **Tenaga Nasional Berhad v Pearl Island Resort Development Sdn Bhd** [2017] 9 CLJ 199, that is:

> *"If there is nothing to modify, alter or qualify the language which a statute contain, the words and sentences must be construed in their ordinary and natural meaning."*

[22] As was decided by this court in **Palm Oil Research and Development Board Malaysia & Anor. v Premium Vegetable Oils Sdn. Bhd.** [2005] 3 MLJ 97 giving effect to the intention of Parliament is equally advocated in discharging our interpretative task with a further caution that we must not do so in any way which would produce a result opposite to the legislative intention for that would constitute unauthorised judicial legislation and a breach of the doctrine of separation of powers.

[23] Equally important, if not more so in this case given the fact that the CLA is a pre-Merdeka law, is Article 162(6) of the Federal Constitution which provides:

> *"**Article 162. Existing laws**.*
>
> *...*
>
> *(6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution."*
>
> (emphasis added)

[24] Article 162(7) defines modification to include amendment, adaptation and repeal. That is the express power given to the court when it comes to pre-Merdeka law, that is to modify the same when there exist a conflict between the two. To me the invocation of the said power is only when there is an existence of such a conflict is because of the clear intention expressed in the words of the said provision which I have emphasised above for in the absence of such a conflict, there is no reason at all to 'bring it into accord' with our constitutional provisions. In other words, there is a presupposition from the clear wordings of Article 162 on the existence of the said conflict before the court's power to modify the existing law can be invoked. Hence the invocation of the said power is only justified when that conflict exists.

The decision of the Privy Council in **B Surinder Singh Kanda v The Government of the Federation of Malaya** [1962] 1 MLJ 169 is also supportive of our view above when Lord Denning held as follows:

> *"In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution."* (emphasis added)

[25] An example of such a conflict is seen in **Assa Singh v Menteri Besar, Johor** [1969] 2 MLJ 30 where the appellant challenged the constitutionality of the Restricted Residence Enactment 1933, a pre-Merdeka law which the Federal Court held to be inconsistent with Article 5(3) and (4) for there was no provision in the Enactment on the rights of a person arrested and detained under it. This moved this court to modify it and read into the Enactment the right of an arrested person to, inter alia, be informed of his grounds of arrest within a reasonable time, be produced before magistrate within 24 hours of such arrest and be defended by a legal practitioner of his choice.

[26] Another example of that conflict is seen in **Kerajaan Negeri Selangor & Ors. v Sagong Tasi & Ors** [2005] 6 MLJ 289 where the Court of Appeal held that the word 'may' in section 12 of the Aboriginal

Peoples Act 1954 on the aborigines' right to be given compensation when the State Authority acquired their aboriginal land is to be read as "shall" in accordance with Article 13(2) of the Federal Constitution which guarantees adequate compensation for compulsory acquisition of a person's property.

[27] Thus, in view of Article 162(6) and the aforesaid settled principles on statutory interpretation, the question which we posed to ourselves in order to answer the legal poser granted in the leave to appeal is this: Is section 8(2) of the CLA incongruous with Article 5 of the Federal Constitution? My answer to that is a definite no, for as laid out in **Rookes's** case (supra) in order to be entitled to exemplary damages, the plaintiff himself must be the victim of the punishable behaviour for its object is not to compensate him but to punish the defendant and to deter him and others in the same shoes or similar position from committing such wrongs. In the words of Lord Devlin in **Broome v Cassell & Co.** [1972] AC 1027 at page 1126:

> *"The plaintiff must himself have been the victim of the conduct of the defendant which merits punishment: he can only profit from the windfall if the wind was blowing his way."* (emphasis added)

Given that the deceased victim is not suing but his estate is, that condition for exemplary damages is not met in this case.

[28] Secondly, and most obviously, there is nothing in the Federal Constitution which provides in any direct or vague way, the right of the estate of a deceased to such damages, unlike those constitutional provisions in **Assa Singh's** case (supra) and **Sagong Tasi's** case (supra). Saying this should not in any way be interpreted to mean that I am demeaning our constitutional guarantee of right to life and/or condoning the acts of the deceased's custodians in this case for their wrongful actions should indeed be punished. However, the alleged incongruity of the law in this respect must be cured by Parliament and not the court given the principles of statutory interpretation and the clear constitutional provision which I have enumerated earlier for deciding otherwise would, in the words of Abdoolcader SCJ in **Television Broadcasts Ltd. & Ors** [1985] 2 MLJ 34, *'amount to unwarranted transgression into the legislative domain'*. Therefore, whilst the House of Lords in **Ashley's** case (supra) could circumvent the same statutory prohibitions in their law since their Constitution is unwritten, I could not do the same because of Article 162(6).

[29] Saying this does not mean that the appellants are allowed to walk away scot free for the wrong that had been done to the deceased. Without resorting to or giving a violent interpretation to the clear provision of section 8(2) of CLA, on the facts of this case, punishment can and ought to be meted out under aggravated damages, which the respondents had also specifically prayed for in their statement of claim. I say this because firstly, from its very nature, aggravated damages is to compensate the victim or as in this case, his estate for the unacceptable behaviour of the appellants. As stated by the learned author in **McGregor on Damages, Nineteenth Edition** at page 1653:

> *"Aggravated damages come into the picture where the injury to the claimant's feelings is increased by the flagrancy, malevolence and the particularly unacceptable nature of the assaulting defendant's behaviour."* (emphasis added)

[30] Thirdly, these two types of damages are intertwined when it comes to this particular tortious claim. Lord Devlin in **Rookes's** case (supra) at pages 1229 – 1230 recognised and discussed the intertwining principles governing the award of these two damages when His Lordship held as follows:

> *"The sums awarded as compensation for the assault and trespass seem to me to be as high as, if not higher than, any jury could properly*

have awarded even in the outrageous circumstances of the case; and I can see no justification for the addition of an even larger sum as exemplary damages. The case was not one in which exemplary damages ought to have been given as such.

This conclusion will, I hope, remove from the law a source of confusion between aggravated and exemplary damages which has troubled the learned commentators on the subject. Otherwise, it will not, I think, make much difference to the substance of the law or rob the law of the strength which it ought to have. Aggravated damages in this type of case can do most, if not all, of the work that could be done by exemplary damages. In so far as they do not, assaults and malicious injuries to property can generally be punished as crimes, whereas the objectionable conduct in the categories in which I have accepted the need for exemplary damages are not, generally speaking, within the criminal law and could not, even if the criminal law was to be amplified, conveniently be defined as crimes. I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law." (emphasis added)

[31] What Lord Neuberger said in **Ashley's** case (supra) at page 996 paragraph 102 is equally instructive on this point and is reproduced below:

"*102 Aggravated damages are awarded for feelings of distress or outrage as a result of the particularly egregious way or circumstances in which the tort was committed, or in which its aftermath was subsequently handled by the defendant."* (emphasis added)

In this case, there is no denying the exacerbation of the above-mentioned feelings by the very fact that the deceased had died due to the inaction of the ones who were there to enforce the law.

[32] Therefore, based on the authorities cited above whilst at the same time giving due deference to the express prohibition in section 8(2) of the CLA, the respondents in this case should be entitled to be compensated with aggravated damages which amount must reflect the sufferings of the deceased and at the same time the sheer abhorrence of the court against the negligent conduct of the appellants, even though the degree of its seriousness is not on the same footing as other reported cases where the deaths of the detainees were the result of physical abuse by their custodians. Factoring such feeling of the court is permissible as held by Lord Hailsham in **Broome's** case (supra) at page 1073:

> *"In awarding "aggravated" damages the natural indignation of the court at the injury inflicted on the plaintiff is a perfectly legitimate motive in making a generous rather than a more moderate award to provide an adequate solatium. But that is because the injury to the plaintiff is actually greater and, as the result of the conduct exciting the indignation, demands a more generous solatium."*

[33] Thus, I would answer the legal question posed in the affirmative and consequentially reaffirm the decision of this Court in **Kugan's**

case. Consquentially, this appeal is allowed and based on the reasons I have elaborated earlier, I would substitute the sum of RM200,000.00 awarded as exemplary damages to be that under aggravated damages. I would, in furtherance of the same abhorrence mentioned above, make no order as to cost despite the success of the appellants in this appeal.

[34] My learned sister and brother Judges, Rohana Binti Yusuf, PCA, Abang Iskandar Bin Abang Hashim, CJSS, Abdul Rahman Bin Sebli, FCJ, Zabariah Binti Mohd. Yusof, FCJ, and Hasnah Binti Dato' Mohammed Hashim, FCJ, have read this judgment in draft and have expressed their agreement with it.

Signed

(RHODZARIAH BINTI BUJANG)
Judge
Federal Court of Malaysia
Putrajaya

Date: 22.3.2021

Parties Appearing:

For The Appellant:

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Cases Referred To:

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(2) Sambu Pernas Construction & Anor v. Pitchakkaran [1982] 1 MLJ 269;

(3) Public Prosecutor v. Gan Boon Ann [2017] 3 MLJ 12;

(4) Datuk Seri Khalid Abu Bakar & Ors v. N Indra P. Nallathamby & Anor Appeal [2014] 9 CLJ 15;

(5) Ashley v Chief Constable of Sussex Police [2008] 2 WLR 975;

(6) Hassan Bin Marsom & Ors. v. Mohd Hady Ya'akop [2018] 5 MLJ 141;

(7) Chin Choy & Ors. v Collector of Stamps Duties [1979] 1 MLJ 69;

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(9) Thompson v Goold & Co. [1910] AC 409;

(10) Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449;

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(13) Pinner v Everet [1969] 1 WLR 1266;

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(19) Assa Singh v Menteri Besar, Johor [1969] 2 MLJ 30;

(20) Kerajaan Negeri Selangor & Ors. v Sagong Tasi & Ors [2005] 6 MLJ 289;

(21) Broome v Cassell & Co. [1972] AC 1027 at page 1126;

(22) Television Broadcasts Ltd. & Ors [1985] 2 MLJ 34.