IN THE SUPREME COURT OF BELIZE A.D. 2016
(CIVIL)

CLAIM NO. 29 of 2016
BETWEEN

JOHN ROMERO
(LELANIE SANCHEZ, HAILEY ROMERO,
JOHAN ROMERO & HEIDY ROMERO
by their next friend John Romero) **CLAIMANTS**

AND

THE ATTORNEY-GENERAL OF BELIZE **DEFENDANT**

Before:	**The Honourable Madame Justice Griffith**
Dates of Hearing:	**17th October, 2016; 21st November, 2016 (oral judgment).**
Appearances:	**Ms. Iliana Swift, Courtenay Coye LLP for the Claimants; Ms. Agassi Finnegan, Crown Counsel and Ms. Trenia Young, Senior Crown Counsel for the Defendant.**

DECISION

Assessment of damages – Dependency Action under Torts Act, Cap. 172 – Claim on behalf of Estate – No Grant of Administration at time of institution of claim –Capacity of Claimant to sue on behalf of Estate without Grant of Administration – Grant of Administration obtained after institution of action – Non-relation back of Grant - Limitation of Action.

Introduction

1. In September, 2015 Nolberta Sanchez, common law wife of John Romero (the Claimant) met her untimely demise at the Government's main public hospital, as a result of complications which arose after she gave birth to her fourth child by caesarean section. John Romero brought a claim for damages arising from his wife's death against the Attorney-General (as the C-section was carried out at the Western Regional Hospital) and the Karl Heusner Memorial Hospital, which is a statutory Authority.

The issue of liability was resolved by way of mediation and attributed solely to the Government, thus the claim was discontinued against the Hospital Authority. The remaining issue of the assessment of damages was left to the Court decide and continued against the Government as sole defendant.

2. Counsel for the Claimant had filed no evidence to support the estate claim, and at the hearing of the assessment, sought leave of the Court to include such evidence and to amend the claimant's capacity to that of representative of the deceased's estate. There was objection from the Defendant on the basis that the claim was instituted by the Claimant without the requisite grant of administration, with the effect that the Claimant had no capacity in law to have brought the claim on behalf of the deceased's estate. There was no objection to the dependants' action under the Tort's Act, Cap. 172 having been filed without the grant. The application for the Claimant to proceed with the action on behalf of the estate was dismissed and the assessment proceeded in respect of the dependants' claim only. The Court's reasons for dismissal of the application to allow the estate claim to go forward and the quantification on assessment of the dependency are the subjects of this decision.

Issues

3. (i) (a) What is the effect of the claim having been instituted without the Claimant holding a grant of administration of the deceased's estate?

   (b) Can any defect in capacity now be cured by amendment to the claim?

   (ii) What amount in damages is to be awarded to the Claimants under the Torts Act, Cap. 172 of the Laws of Belize?

Analysis of Issues

Issue (i) The Estate Claim

4. The Claim was commenced in the name John Romero in January, 2016, signaling his personal capacity, as well as in the name John Romero as next friend for the

deceased's four minor children. The cause of action arose upon the deceased's death (intestate) on the 9th September, 2015, after giving birth by caesarean at the Western Regional Hospital on the 8th September, 2015. The deceased had been transported for treatment from the Western Regional Hospital on the 9th September, to the Karl Heusner Memorial Hospital where she died. Despite the claim not having been styled as administrator or intended administrator of the deceased's estate, in addition to the dependency action under the Torts Act, the claim nonetheless pleaded the cause of action of damages for wrongful death on behalf of the deceased's estate. At the time of institution of the claim, the Claimant was not in possession of a grant of administration for the deceased's estate. However, at the time the hearing for assessment of damages in November, 2016, the Claimant had obtained a grant of administration in October, 2016 and sought to advance both the dependency and estate claims at the assessment.

5. There was no objection raised by the Defendant in respect of the standing of the Claimant to advance the dependency claim as next friend for the deceased's minor children. This standing is clearly afforded by section 11 of the Torts Act which provides for the action to be brought in the name of any or all dependants where there is no executor or administrator of the deceased. It should be noted that although the Defendant did not object to the dependency claim on behalf of the deceased's minor children, there was objection to the claimant being classified as a dependant based upon his common law relationship with the deceased. This objection was quite correct as there has been no general conference of legal status on the common law union.
6. Section 148:05 of the Supreme Court of Judicature Act, Cap. 91 has afforded a cause of action to persons in a common law union for 5 or more years, specifically in relation to division of property. However the legal status afforded a spouse in respect of other areas of the law remain applicable in relation to parties legally married.

Contrary to what appears to be a belief of entitlement based upon section 148:05, grants of administration to common law spouses are made by the court not as a result of any change to the legal definition of spouse, but pursuant to the power of the Chief Justice under section 164 of Cap. 91, in special circumstances notwithstanding an entitlement in law of some other person, to issue a grant administration to any person whom it is thought just or expedient so to do. The issue of the claimant's entitlement as a dependant as common law spouse however did not materialize, as albeit pleaded, a claim on his behalf was not advanced at the assessment of damages.

7. Returning to the claim on behalf of the Estate, the Defendant's objection was that the position in law is that unlike an executor - who derives authority from appointment as such under a will – an administrator, derives his authority to act in relation to the deceased's estate from appointment by the court. The effect of the two positions is that the executor can take action from the time of death of the testator, but the administrator can take no action in respect of the deceased's estate and a subsequent grant of administration does not operate to validate actions taken before the authority was conferred by the court by way of the grant. A number of cases were cited by the Defendants in support of this proposition. Primarily, the Court accepts the authority of **Ingall v Moran** [1] in which in circumstances not unlike the instant case, it was definitively held by the UK Court of Appeal, that an administrator, has no cause of action in relation to a deceased's estate, vested in him before obtaining letters of administration.
8. Further in this regard, that the doctrine of 'relation back' which legitimizes acts done in relation to personal property of a deceased person by a personal representative prior to obtaining a grant, has no application so as to validate an action commenced in court prior to the issue of a grant of administration. The grant of administration indisputably having been obtained by the Claimant only in October, 2016, and the claim having been instituted in January, 2016, there was

[1] 1944 1 All ER 97; also cited was **Caudle v LD Law Ltd** [2009] 2 All ER 1020

no answer in law available to the Claimant, which could legitimize any claim pleaded on behalf of the estate. It is in this respect, that the application to amend the claim to allow the estate action now to be added to the claim, arose. The application was made both to substitute the capacity of a party under Part 19 and to amend the statement of case under Part 20. The Defendant resisted both aspects of the application on the basis that at the time the Claimant obtained the grant of administration, the limitation period of one (1) year which applied to the cause of action against the Government had already expired in September, 2015, thus the action was statute barred.

9. These were practically the same facts of ***Ingall v Moran***[2] where an action was brought by a father in respect of the estate of his deceased son, who died intestate as a result of a vehicular accident. The writ was styled by the father as administrator of his son's estate but at the time of commencement of the action, there had been no grant issued to the father. A grant of administration was issued approximately two months after institution of the writ but before service, and it was also the case that at the time of issue of the grant, the statutory limitation of 12 months for suit against a public authority had expired. Upon hearing of the matter some 5 months after the issue of the grant of administration the defendant therein contended that the action was not properly constituted as the plaintiff had held no grant at the time of commencement of the action.
10. Albeit recognized by Scott LJ that the action and pleadings were a nullity as the father had no authority to commence the proceedings, the alternative argument of the plea of limitation was nonetheless considered. In relation to the plea of limitation, the plaintiff in ***Ingall v Moran*** asserted the doctrine of 'relation back', however Scott LJ plainly held that the doctrine was of no assistance to the plaintiff therein. It was stated that 'if the writ was bad when issued, the action was never commenced'…so that once the [limitation date] had passed 'without a duly qualified administrator, the cause of action was barred and could not be

[2] Supra

resurrected.[3]With particular reference to any question of adding a cause of action or party, Scott LJ cited ***Mabro v Eagle, Star & British Dominions Insurance Co. Ltd.***[4]**:-**

> *'In my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the statute of limitations would be defeated. The court has never treated it as just to deprive a defendant of a legal defence. If the facts show either that the particular plaintiff or the new cause of action sought to be added are barred, I am unable to understand how it is possible for the court to disregard the statute.'*

11. In the instant case, the claim is not entirely bad as there was a valid cause of action instituted pursuant to the Torts Act for the benefit of the deceased's dependants, who are her four minor children. With respect to the estate claim which was pleaded but no evidence sought to be advanced until the hearing of the assessment, the Claimant's position is exactly the same as that decided in ***Ingall v Moran***. The limitation against the Government having expired as of the 8th September 2016, the grant of letters of administration in October 2016 could not assist with respect to the action filed in January, 2016; and no new claim could be incorporated by way of amendment or otherwise so that the cause of action on behalf of the estate, is effectively barred. The existing claim on behalf of the dependents will proceed for the benefit of the deceased's four minor children. Costs in the sum of **$1500** are awarded to the Defendant upon dismissal of the Claimant's application to substitute a party and amend statement of case.

<u>Issue (ii) – Assessment of Damages for the Dependants.</u>

12. The assessment of a dependency claim under the Torts Act extends for the benefit of the statutorily defined dependants of a deceased and the value of this claim is to the extent of dependency lost along with other benefits prescribed by statute.

[3] Ingall v Moran supra @ pg 100.
[4] [1932] 1 KB 485 per Scrutton LJ @ 487

By contrast, a claim on behalf of the estate would have allowed pain and suffering, financial expenses including loss of earnings up to death and in the future. There was no claim made for the parents of the deceased and given that spouse has not been extended under this Act to include a common law spouse, the dependency assessed herein is for the benefit of the deceased's minor children only. This dependants' claim is predicated on a loss of benefit in respect of which there is a reasonable expectation that the dependant would have continued to receive had the deceased lived.[5] The claim therefore includes pecuniary loss such as money brought into a household; loss of gratuitous services performed by the deceased (such as domestic work) or loss of fringe benefits, for example perquisites from employment.

Submissions on Quantum

13. Counsel for the Claimants submitted a quantification based on four heads – special damages, including funeral expenses and medical expenses; loss of expectation of life; loss of services as mother; and loss of dependency. Both parties agreed upon a conventional sum of $3,500 which is seen awarded for loss of expectation of life in a number of cases[6]. It is noted, that an award for loss of expectation of life is now by statute[7] discontinued in the United Kingdom in respect of both living claimants and an estate, upon death. How or why it accounts for an award under a dependency action is not clear save for it being dubbed a 'conventional award'. If one were to really consider the nature of a dependency claim, an award for loss of expectation of life represents a loss to the deceased which ought to devolve unto the estate and therefore is not a loss of the dependants.

[5] Munkman on Damages, 11th Ed. para 15.10.
[6] **Adita Canul** (as Administratrix and nf) **v Francis Alfaro et al**. Belize Supreme Court Action No. 522 of 2000 per Conteh CJ @ para 40; Morales De Habet v Adolfo Medina et al, Belize Law Reports Vol IV pg 173
[7] UK Administration of Justice Act, s. 1(1)(a) however there is no similar restriction in Belize contained in s.26(4) or (5) of the Administration of Estates Act, Cap. 197, which provides for survival of causes of actions for the benefit of an estate.

14. This view notwithstanding, this point was not put to Counsel in this light much less argued, thus the Court maintains the line of authorities and grants the award in the apparently conventional sum of $3,500. However due notice is given that the origin and relevance of the award in a dependency claim will be called into question at the next available opportunity. Funeral expenses were awarded in the sum of $3,800 and an award of $458 only was made for medical expenses as the Claimant was unable to prove the entire amount claimed of $1,482. The Court's intervention was primarily required in respect of the quantifications for loss of services as mother and loss of dependency.

    Loss of services as mother

15. Counsel for the Claimant referred to the case of **Corbett v Barking Havering and Brentwood Health Authority** [8] as support for the application of the multiplier/multiplicand approach to quantifying a claim under this head. Counsel for the Defendant however relied upon **Stanley v Saddique**[9] which espouses the contrary view that the multiplier/multiplicand approach is not the appropriate method for quantification. Instead, it was stated that the Court must attempt to do its best to award a sum which takes into account all the circumstances and prospects for changes in support over time. The Claimant's quantification based on the multiplier/multiplicand approach was submitted in the sum of $69,000, whilst the Defendant's lump sum approach (based upon a comparable English awards in relation to each child) was a total of just over $68,280.

16. The Court's determination accords more with the approach suggested by the Defendant, however after examination of the award in greater detail, the amount is much reduced. Munkman on Damages [10] categorises this award as a non-pecuniary intangible loss. The award is described as a 'separate award' which cannot be quantified and is usually relatively modest. Munkman's reference to a Law Commission Report on Claims for Wrongful Death, puts the rationale for the

[8] [1991] 1 All ER 498
[9] [1992] QB 1
[10] Supra @ para 16.37

award as follows:-

> *"…a mother obviously does more for her children than mere housekeeping and childminding, and she provides her services with more commitment than would a hired help.*
> *The deceased mother will usually have unique qualities that no hired replacement can offer."*

The amount usually awarded is regarded as not calculable on a strict mathematical basis as the benefits received by a child from his or her mother will vary with age and several other variables. The main issue of the appeal in ***Corbett*** as cited by Counsel for the Claimant, was the correctness of the trial judge's assignation of the respective multiplier/multiplicand values of in calculating pecuniary loss of dependency.

17. A careful reading of this authority however, confirms Munkman's position of a separate award, appropriately modest, which is awarded in recognition of the personal element of attention and services of a mother, for which there can be no replication by a caregiver. Purchas LJ in **Corbett**, highlighted the trial judge's treatment of the award which had been based upon a submission by Counsel for the plaintiff before the trial judge (actually the author of McGregor on Damages wherein the principle was stated[11]). The trial judge also referred to the principle as it was addressed in both ***Mehmet v Parry***[12] and ***Regan v Williamson***[13]**.** The trial judge's treatment of the award of loss of services of mother - in the context the special services lost upon the death of the mother, was of a reluctant acknowledgment of that special quality lost - but not in such wide terms as being a 'head of damage' known to the English law in valuing a dependency claim.
18. As it concluded, Purchas LJ and indeed the rest of the Court of Appeal were content to let rest this aspect of the award in ***Corbett.*** The substantial discussion and adjustments made by the Court of Appeal, to which Counsel for the Claimant referred, were those made to the values and calculations of the multiplier and

[11] McGregor on Damages, 15th Ed. para 1588.
[12] [1977] 2 All ER 529.
[13] [1976] 2 All ER 241.

multiplicand in relation to quantifying the pecuniary dependency in the form of the cost of care required to be substituted for the infant child upon the death of the deceased mother in that case. The manner in which the 'loss of services of mother' has been suggested in the instant case is thus not correct, and would amount to a duplication of the pecuniary value yet to be quantified for the deceased's dependants herein. After consideration of the principle as intended, a fixed amount in sum of **$5000** per child is awarded in relation to the intangible loss of mother's services herein. This amount is awarded on the basis that the children are all very young as opposed to pre-teens, teenagers or adult children, in which case the value of the intangible loss would be quantified lower, if at all.

Loss of Dependency

19. This aspect of the claim is based upon the pecuniary loss which can be proven to be incurred by the minor children upon the death of their mother. Given that the Court has to estimate the period which the dependants would have continued to benefit and in what amount, it is this loss which is calculated on the multiplier/multiplicand basis. The parties differed only in relation to the respective values to be applied to both variables. With respect to the multiplicand, the Claimant's submission, based upon a number of local authorities[14] was the annual salary of the deceased paired with a multiplier of 16 years. The multiplicand was taken from the evidence of the Claimant that the deceased earned $922.52 monthly ($11,070.24 annually) from her employment as a housekeeper and kitchen assistant at a hotel in Big Falls, Toledo. The deceased had been so employed since November, 2008.
20. The Claimant also deposed that from her salary, the deceased paid for the children's babysitting, schooling, clothing and other child related expenses.

[14] **Canul v Alfaro et al.** supra - multiplier of 16 applied towards dependency arising from death of 28 year old father leaving 2 toddlers and young wife; **Morales De Habet v Adolpho et al**, supra – multiplier of 16 applied towards dependency arising from death of 29 year old father leaving 2 toddlers and a young wife.

The Claimant also deposed that he is employed - as the Chief of Security at the Toledo Teachers Credit Union and from his salary of $1,500 monthly he met all the utility bills and their loan. The amount spent by the deceased on babysitting (the deceased's mother took care of the children whilst the Claimant and deceased were at work during the day) was placed at $500. The loss of dependency proposed in favour of the Claimant was therefore $177,123.84.

21. On the other hand, the Defendants submit that a multiplier of 14 years would be appropriate in the circumstances having regard to the deductions needed to be taken to account for contingencies, reductions in income, expectation of working life and ages of the dependants. With respect to the multiplicand, the Defendants contend that deductions must be made from the full amount of earnings to account for what the deceased could reasonably have been expected to have spent on herself. In that regard a percentage of 75% of net income was proposed in the amount of $8,302.68. The Defendant also contended that the loss of dependency was to be calculated with reference to pre-trial and post-trial loss. The former would be based on the amount of the deceased's earnings at the date of death, and in the absence of any information indicating the possibility of an increase in earnings the multiplicand would remain the same for post-trial loss of dependency. The total loss of dependency proposed by the Defendants was put forward as $116,237.52 ($8302.68 x 14), with no calculation of interest yet applied).

22. The Court accepts the amount put forward by the Claimant as the deceased's salary, so that the annual earnings is taken at $11,070. The Court also accepts the amount of $500 deposed as payment to the deceased's mother for babysitting services, leaving a balance from the monthly salary of $422.52. That the deceased could have spent a substantial portion of her earnings on her children is also accepted given the Claimant's evidence that he paid utilities and their loan from his earnings.

At earnings of $1,500 the Court accepts that these other major expenses which would be incurred by any household could be met from the Claimant's salary, thus allowing the deceased to spend most of her income on the children. However, like Counsel for the Claimant submitted, it could not be the case that the entire earnings of the deceased was applied towards her children. It must be presumed that some portion was retained for herself and other expenses such as food and other household concerns.

23. Of the $422.52 remaining after the expense of babysitting, an additional fraction of that sum in the amount of $117.74 is taken as applied towards the children for a total monthly dependency of $617.74. The multiplicand is therefore the annual sum of $7412.88 ($617.74x12). In relation to the multiplier, reference is once more made to the judgment of Purchas LJ in ***Corbett***[15]. There were five essential elements said to inform an assessment of loss for the future[16]:-

    (i) The likelihood of the provider of the support continuing to exist;

    (ii) The likelihood of the dependant being alive to benefit from that support;

    (iii) The possibility of the providing capacity of the provider being affected by the changes and chances of life either in a positive or in a negative manner;

    (iv) The possibility of the needs of the dependant being altered by the changes and chances of life, again in a positive or negative way; and

    (v) An actuarial discount to compensate for immediate receipt of compensatory damages in advance and the requirement that the capital be exhausted at the end of the period of the dependency.

24. What thereafter followed in the judgment of Purchas LJ was a comprehensive review of authorities and consideration of the interaction of the factors listed above with reference to individual circumstances. In this case, according to the evidence available the following factors are at best assumed and will inform the calculation of the multiplier:-

[15] Supra @ pgs 508-516
[16] Ibit @509

(i) The dependency of the children would continue until 18 years. Variables not informed by evidence would have been expectation of tertiary education or contingencies on the expectation of life of the children;

(ii) The unchallenged evidence of the deceased's health was that she was in good health, suffered from no health issues thus at the age of 29, could be expected to have a normal life span of at least 60 years which would well allow for the continuance of the expected support to her children until they attained 18yrs;

(iii) The deceased having been employed since 2008, can be said to have been in steady employment, but in the absence of evidence showing any real possibility of increased earning, the earnings are capped as at the date of death.

25. The starting point of the multiplier is thus 18 years for all four children which gives a mean multiplier of 14 years, taking into account the four different ages. From that mean multiplier of 14 years, the Court makes several downward adjustments to reflect contingencies in life on the part of both deceased mother and children and reduction on account of receipt of a lump sum. Accordingly, a mean multiplier of 12 years is found appropriate in this case for application to the multiplicand of $7412.88. The award for loss of dependency for the benefit of the minor children herein is assessed at **$88,954.55**. For purposes of interest which are discussed below, the application of the multiplier is divided into pre-trial loss and post-trial loss. The pre-trial loss amounts to 13 months from the date of death to trial which is 1.1 year. The post-trial loss is therefore calculated with a multiplier from the date of trial, at 10.11 years.

Interest

26. The Defendant also submitted that as provided in **Cookson v Knowles**[17], there should be no interest awarded on the post-trial loss and interest at the rate of 3% only should be awarded pre-trial.

[17] [1977] 2 All ER 820

The Claimant simply requested interest on the sum awarded. On the question of interest, ***Cookson*** effected by judicial pronouncement, a change in guideline regarding the award of interest on damages awarded for personal injury or death. The change in guideline was a move away from that in ***Jefford v Gee***[18]regarding interest being awarded on a lump sum in fatal accident cases***.*** The change in award of interest in ***Cookson*** was that in fatal accident cases, damages should be divided into pre-trial and post-trial losses, and interest should be awarded only on pre-trial losses at the half the rate to be applied. Denning MR, premised his position on the award of interest on pre-trial assessment of loss only, by acknowledging the effect of inflation on the amounts earned by a deceased (or a plaintiff) at the date of death (or injury) and the date of trial.

27. It is evident, that in England, there are continued upward adjustments in earnings to take account of inflation. Arising from this difference in earnings between death/injury and trial, Denning MR[19]observed that a plaintiff stands to gain by a delay in bringing a case to trial. The award of interest on the pre-trial sums, was therefore capped at half rate so as not to increase the windfall to the plaintiff. With respect to the post-trial assessment, no interest stood to be awarded in any event given that the loss is incurred after judgment and interest is awarded for the purpose of compensating a plaintiff from being kept out of funds until judgment. Given that post-trial assessments represent future loss, a claimant cannot be said to have been kept out of funds in respect of loss which is calculated on an entitlement in the future, thus no interest is awarded on awards for future pecuniary loss.[20]
28. As far as this Court is concerned, the rationale that informed the award of interest at half rate only on the pre-trial assessment in the UK is not necessarily applicable to Belize.

[18] [1970] All ER 1202
[19] Ibid @ pg 823-824
[20] See A Train & Sons Ltd v Fletcher (Executrix of the estate of Fletcher Deceased) – [2008] EWCA Civ 413

In Belize, there is no tabled increase or formula by which earnings can be adjusted upwards to take account for inflation, such as exists in the UK. Moreover, in relation to this case, the same rate of earnings has been attributed to the deceased from the date of death to the date of trial. There is therefore no increase in the multiplicand which will give rise to a windfall in damages awarded when interest is applied. Instead of half the rate of interest being applied to the pre-trial assessment, the rate of 6% per annum is applied, whilst no interest is awarded on the post-trial assessment of damages.

Conclusion

29. The overall assessment awarded in favour of the Claimant as next friend for the four minor children of the deceased, is in the following terms, to be divided equally amongst the four children:-

Loss of Expectation of Life -			$ 3,500.00
Special Damages			
Funeral Expenses		$3,800.00	
Medical Expenses		$ 458.00	$ 4,258.00
Loss of Services of Mother			
Per Child	$5,000.00 x 4		$ 20,000.00
Loss of Dependency			
Pre-trial	$7,412.88 x 1.083	$ 8,028.14	
Post-trial	$7,412.88 x 10.917	$ 80,926.41	$ 88,954.55
Total			**$116,712.55**

Final Disposition

30. Damages have been assessed for the dependants of Nolberta Sanchez in the following manner, along with the other orders of the court:-

    (i) The Claimant's application to present a claim on behalf of the Estate of Nolberta Sanchez by way of adding a party and amending the statement of case is refused;

(ii) Damages are assessed in total under the Torts Act, Cap. 172 in the sum of **$116,712.55** for the benefit of the children of the deceased Nolberta Sanchez, to be shared equally amongst them;

(iii) Prescribed costs in the amount of **$25,006.88** (less the sum of **$1,500** awarded to the Defendant upon dismissal of the application herein), are awarded on the total damages of $116,712.55;

(iv) The Claimant is awarded interest at the rate of 6% p.a. from the date of death to the date of trial on the damages assessed up to the date of judgment which excludes the post-trial loss of dependency.

Dated this 20th day of February, 2016.

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Shona O. Griffith
Supreme Court Judge.