

**THE SUPREME COURT OF BELIZE, A.D. 2019**

**CLAIM NO. 158 OF 2020**

**IVAN RENE PENNER**

**CLAIMANTS**

**DALEN RALPH PENNER**

**AND**

**GERHARD PENNER**

**DEFENDANT**

**BEFORE the Honourable Madam Justice Sonya Young**

Written Submission:

8<sup>th</sup> July, 2020

Decision

25th September, 2020

**Appearances:**

**Mr. Nicholas V. Dujon, SC, Counsel for the Claimants.**

**Keywords: Tort - Death by Negligent Driving - Both Parents Deceased -  
Default Judgment - Assessment of Damages - Dependents - Intangible Loss  
Award - Torts Act Cap 172**

**DECISION**

1. This tragedy occurred on the 23rd March, 2019. The Claimants and their five (5) siblings lost both parents in a road traffic accident when their motorcycle

was struck from the rear by a motor vehicle being driven by the Defendant. The grief of losing a single parent is unbearable but to lose both at the same time is inconceivable.

2. This court extends its condolences to the children who have brought this Claim pursuant to the Torts Act section 9 and 10. The Court recognizes that this Claim should have been brought by the Claimants as next friends of the minor children (Rule 23.2) or an application ought to have been made for the two Claimants to represent the interest of all concerned (Rule 21.1).
3. Nonetheless, they seek damages for the wrongful act which caused the death of their parents. There was no Defence filed and a default judgment was entered in the Claimant's favour on the 11th May, 2020 with damages to be assessed. There was no claim for special damages so only general damages remain to be assessed. This is the Court's assessment. It is to be remembered that this assessment is not of the value of a human life.

#### **A. The Law:**

4. The relevant sections of the Torts Act states:

*(9) Where the death of a person is caused by a wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the party injured to maintain an action for damages in respect of his injury thereby, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death was caused under such circumstances as amount in law to felony.*

*(10) Every such action shall be for the benefit of the wife or husband, and every parent and child of the person whose death has been caused, but notwithstanding anything contained in the Limitation Act, no such action shall be commenced at any time later than twelve months after the death of such deceased person.*

5. It must be understood that a Claim brought pursuant to this Act can only be for the benefit of the select group stated in section 10 and not for the estate. The Court finds it imperative to state this because although the claim form does not claim this, Counsel at the end of his submissions asked for sums which the Court considers the *“estate and the dependents of both deceased are entitled to.”* In law it is only the personal representative, duly appointed by a court who may bring a claim on behalf of the estate of the deceased.

**B. The Evidence:**

6. The Claimants exhibited the death certificates and marriage certificate of Abram and Irene Penner. They also exhibited their own birth certificates and that of their siblings, evidencing that they were all the children of the deceased. Ivan was born on the 4<sup>th</sup> December, 1990. He would have been 28 years old when his parents died. Dalen was born on the 12<sup>th</sup> July, 1993 (25 years at their death), Julianne on the 24<sup>th</sup> September, 1995 (23 years at their death), Arlin on the 26<sup>th</sup> July, 1997 (21 years at their death), Kenway on the 30<sup>th</sup> July, 2001 (17 years, on the cusp of 18 at their death), Waldy on the 14<sup>th</sup> January, 2004 (15 years at their death) and Cadron on the 6<sup>th</sup> June, 2011 (7 years at their death).

**C. Who are dependents?:**

7. The Torts Act includes children in the select group of potential dependents. However, not every child will fall into the definition of child under the Act. Section 8 explains that for the purpose of sections 9 to 16 inclusive “child” means son or daughter, step-son or step-daughter, adopted son or adopted daughter under the provisions of the Families and Children Act, or a grandson or grand-daughter.”

8. A perusal of the Families and Children Act Cap. 173 reveals in section 2(1) that child means, unless provided otherwise in law, a person below the age of eighteen years. That Act also extends parental maintenance responsibility beyond the age of 18 years if that child remains in school or some training facility or is mentally or physically disabled.
9. This judgment will therefore consider only Kenway, Waldy and Cadron as dependents. The others all being over 18 years old at the time of their parents' death and having proven no special reason for consideration otherwise.

**General Damages:**

10. The sum of \$20,500.00 is awarded for each parent for loss of expectation of life. This is not intended to be the value placed on a life; it is only a nominal show of respect for that life. This sum is to be shared equally amongst all their children. There was no claim for funeral expenses.

**Assessing the Dependency**

**Abram Penner:**

11. Abram appeared to be the sole bread winner of the family. He was 52 years old, in good health and had been living a healthy and vigorous life. His income farming has been stated to be and has been proven to the requisite standard to be \$105,569.72.
12. While \$16,436.72 was claimed for his part time work at the Farmers Trading Centre (FTC), the evidence used to support this figure seemed to be the full time figure. The letter from Farmers Trading Centre (FTC), which accompanies the statement, states quite clearly that Mr. Penner worked full

time from 2000 to 2018 and on standby services until his passing. The statement covers the period 2017 to 2018. There is one payment in January 2019 which the Court accepts as the proven monthly payment. Although it may increase or decrease according to need, the precise rate or information needed to calculate the possible increase or decrease was not provided. The Court will therefore use \$52.42 per month to calculate the yearly income being \$629.04.

13. Accepted is the dividend payments made by Quality Poultry Products Limited of \$8,072.79 per annum and \$1,998.27 from Country Foods. Although \$1,464.97 was submitted by Counsel, when the statement provided by Country Foods was considered, the average yearly dividend was calculated to be the figure accepted by the Court above.

14. This gave Mr. Penner a total yearly net income of \$116,269.82.

15. The affidavit of Daley Penner, informs that most of this income was spent on the family and the proven dependents were totally dependent on him. Senior Counsel urged an overall six year dependency/multiplier as was allowed for the deceased's wife in **Herlinda Diego et al v Jerry O'Hara David Belize Claim No. 797 of 2018** this Court will accede. The deceased in the **Herlinda case** was the same age and condition as Mr Penner. Each of the dependents will not have an equal period of dependency since their ages vary.

16. Justice Legal in **Rita Griffith v Alberto Efrain Chan Belize Claim No. 614 of 2008** warned at **paragraph 36**:

*“Before making a decision on the multiplier, I must also bear in mind the views of the Privy Council in Kassam v. Kampala Aerated Water Co. Ltd. above. In that case the deceased father died in a traffic accident leaving eight dependents, aged from three years to twenty- three years. The judge had, for all the dependants whose age varied, used one multiplier of 15. The Privy Council held that that was wrong because the eight dependents would not all be equally dependent for the 15 year period. Lord Guest led the criticism of the Judge: “A more serious criticism can, however, be made of the fact that he has taken for all the dependents, aged as they were from 23 to three years, the period of dependency at 15 years, the estimated remainder of the deceased’s working life. This is plainly wrong as the eight dependants would not all be equally dependent for the 15 year period. The elder boys would soon become self- supporting, the girls would probably get married or go into employment, and the younger children would in time grow up and earn their own living. In fact only the youngest, Nazma, would be dependent for the whole period of 15 years. This indicates to their Lordships that the judge’s basis of calculating a £10 a week dependency over a 15 year period is erroneous, and that his award for this reason cannot stand.”*

17. In agreement with Senior Counsel Waldy would have a two year multiplier and the younger Cadron will have the full six years. Counsel made no submissions on Kenway’s behalf perhaps because he was almost 18 years old. The Court will follow suit.

18. We turn now to the multiplicand. Senior Counsel proposed 75%. He sought to rely on the **Herlindo Case** which stated 75% where the deceased supported a wife and children. It appears that Mr Penner had no outside interests and spent his income predominantly on the family. So he may fall outside the usual 25% deducted as being spent on self.

19. In any event, some part of his income would have gone towards maintaining his wife who is now deceased. The evidence supports this view as Mrs Penner was without income. Part of his income also clearly went to his children who were not proven to be dependents as “*they lived at home and paid no room and board*”. Arlin, certainly, was totally dependent on the father although he was 21 years old at the time of his father’s death. The Court can not ignore this because the question is what is the actual material loss to the dependent and not what is the actual material loss overall. Since there is no indication of a precise figure, the Court considered all and using a common sense approach determined a multiple and of 65% for a total of \$75,575.38. The Court reminds that this is not a precise science.

**20. Calculations:**

Waldy and Cadron:

$\$75,575.38 \times 2 = \$151,150.76$

$\$151,150.76$  divided by 2 = \$75,575.38

Cadron:

$\$75,575.38 \times 4 = \$302,301.52$

$\$302,301.52$  divided by 2 = \$151,150.76

Total:

Waldy (2 year dependency) \$75,575.38

Cadron (6 year dependency) \$226,726.14

21. Senior Counsel also sought to recover an intangible loss award for services rendered by the deceased, being the “*essential instructions to his children in all the different aspects of business and farming*” as was stated in the affidavit filed in support of this application. He offered no precedent for this award in Belize. The law as it relates to this type of award remains unsettled even in the UK. While some courts seem to recognize it as a viable head, (**Regan v**

**Williamson [1976] 1 WLR 305, Beesley v New Century Group Ltd [2008] EWHC 3033 (QB) and Grant (Widow and Executrix of the Estate of Douglas Michael Grant, Deceased v Secretary of State for Transport [2017] EWHC 1663 (QB) the recent case of Magill v Parnel Systems (DB Limited) [2017] says otherwise. HHJ Gosnell, in this case agreed with the judgment in Mosson v Spousal (London) Ltd [2015] EWHC 53 (QB) and held that:**

*“I recognize that these claims have become commonplace but I find myself in agreement with Mr Justice Garnham [the judge in Mosson] for the same reasons he gives...I have no doubt that the claimant has lost the care and attention of the deceased in the emotional sense and the loss of that cannot be minimised but it does not sound in additional damages because this is exactly the loss that the bereavement award (modest though it is) is intended to compensate for”*

22. HHJ Gosnell acknowledged that this type of claim sought to compensate the loss of certain advantages gained through the performance of a service by a family member rather than a commercial provider. But in refusing to make the award he explained that if the claim was presented simply for loss of love and affection, it would fail as it would have formed part of the bereavement award.

23. This Court, however, leans towards recognition that if the evidence reveals that there is a true loss of services then that loss ought to be compensated. In this case the affidavit states that his father did much for his children through his skill sharing and that to my mind must be compensated using a conventional though conservative sum.

24. Senior Counsel proposed a sum of \$5000.00 for Cadron who was only 7 years old at the time of his father's death, \$2,500.00 for Waldy and Kenway and \$500.00 each for the older children. The older children as stated before are not dependents under the Torts Act so they cannot make this claim. I am guided by the Court of Appeal in **ATH v MS [2002] EWCA Civ 792** which reduced the award according to the age of the child. The older the child the less the award. This would mean that while this Court is prepared to award Caldon \$5000.00, Waldy will receive \$2,000.00 and Kenway \$500.00.

**Irene Penner:**

25. Mrs Penner was a housewife and caregiver and so had no actual income. This is no indication that there was no value to her contribution. Munkman on Damages for Personal Injuries and Death 11th ed under the caption 'NON-PECUNIARY LOSSES **Damages for death of a mother or carer**' states at paragraph 16.34:

*"The Law Commission report, Claims for Wrongful Death (Law Com no 263) observes that:*

*'..... a mother obviously does more for her children than mere house keeping and child minding, and she provided her services with more commitment than would a hired help. The deceased mother will usually have unique qualities that no hired replacement can offer.'*

*Addressing the issue of 'loss of mother' is increasingly a misnomer. What we are concerned with here is the issue of loss of a person who provides services rather than income."*

26. **Regan v Williamson (ibid)** recognized that simply conducting a mathematical exercise based on a house keeper's salary would be an injustice visited upon the dependents. Watkins J explained that mothers worked to no set schedule and gave attention to their work which was

unparalleled. This Court would venture to say that considering a mother's good work as simply that of a house keeper is to undervalue and disrespect the contribution made. The courts have generally awarded a sum for the financial loss and a separate, relatively modest, award for the 'intangible losses.

27. The affidavit in support of this application for assessment exhibits a statement from a professional caregiver which shows a weekly wage of \$400.00. This figure is accepted by the Court. This would give Mrs Penner a yearly income of \$19,200.00 if she was a house keeper. She was certainly more than that and Senior Counsel has proposed a figure of \$20,800.00 which this Court considers to be quite reasonable. There would be no deductions as this is a valuation of service not an actual income. Senior Counsel also proposed a multiplier of six years which again the Court finds to be acceptable. Waldy and Cadron for the first two years would each receive \$20,800 and Cadron would receive \$41,600.00 for the additional four years.

28. In accessing the intangible loss Senior Counsel asked for \$5000.00 for Caldron, \$2,500.00 for Waldy and Kenway and \$500.00 each for the older children. The older children as stated before are not dependents so they cannot make this claim. This Court is prepared to award Caldron \$5000.00, Waldy \$2,000.00 and Kenway \$500.00.

29. In accessing the pre and post judgment sums the Court used 580 days prior to judgment.

**DISPOSITION:**

**IT IS HEREBY ORDERED AS FOLLOWS:**

1. Damages for loss of expectation of life are awarded in the sum of \$20,500.00 for each deceased person to be divided equally among the Claimants.
2. Pre trial damages for loss of dependency re Abram Penner are awarded in the sum of \$80,985.21 with interest at the rate of 3% per annum from the date of death to the date of judgment herein.
3. The pre trial damages are to be divided as follows:  
Cadron - \$61,370.39, Waldy - \$19,482.40 and Kenway - \$132.40
4. Post trial damages for loss of dependency are awarded in the sum of \$228,816.42 to be divided as follows:  
Cadron - \$170,355.75, Waldy - \$58,092.98, Kenway - \$500.00
5. Pre trial damages for loss of dependency re Irene Penner are awarded in the sum of \$18,041.09 with interest at the rate of 3% per annum from the date of death to the date of judgment herein.
6. The pre trial damages are to be divided as follows:  
Cadron - \$12,182.64, Waldy - \$5,726.00, Kenway \$132.42

7. Post trial damages for loss of dependency are awarded in the sum of \$51,855.91 to be divided as follows:

Cadron - \$34,417.36, Waldy - \$17,073.97, and Kenway \$367.58

8. Prescribed costs are to be paid by the Defendant. I will rely on Counsel to calculate and insert in the draft order for approval.

**SONYA YOUNG**  
**SUPREME COURT JUDGE**