

IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 2 OF 2017

ANITA GALE ORTEGA
(Administratrix of the Estate of Shane Donovan Goff, deceased)
SHANE DONOVAN GOFF JR. (A minor)
SHANICE SHANTELL GOFF (A minor)
SHANYA ANITA GOFF (A minor)
BY ANITA GALE ORTEGA
(Their Mother and Next Friend) Appellants

v

EATON BELISLE Respondent

BEFORE

The Hon Mr Justice Sir Manuel Sosa President
The Hon Madam Justice Minnet Hafiz-Bertram Justice of Appeal
The Hon Mr Justice Murrio Ducille Justice of Appeal

M Arguelles for the appellants.
Respondent unrepresented.

15 March 2019.

By Written Submissions (Filed only by the Appellants).

SIR MANUEL SOSA P

[1] This appeal should, in my opinion, be allowed. I concur in the reasons for judgment given, and the orders proposed, in the judgment of my learned Brother, Ducille JA, which judgment I have read in draft.

SIR MANUEL SOSA P

HAFIZ BERTRAM JA

[2] I have read in draft the judgment of my learned brother Ducille JA. I concur in the reasons for judgment given, and the orders proposed therein.

HAFIZ BERTRAM JA

DUCILLE JA

Introduction

[3] This is an appeal from the 20th January, 2017 decision of Madam Justice Sonya Young wherein she determined, amongst other things that (1) the respondent's negligent driving was the sole cause of the death of Shane Goff ("the deceased"), (2) that the Estate of Shane Goff was only entitled to recover (a) special damages in the amount of \$4,600.00 and (b) damages for loss of expectation of life in the amount of \$3,500.00, (3) that as a common law spouse cannot bring a claim for damages under the Law of Torts Act ("Tort Act"), the first Appellant, Anita Ortega, was unable to bring a claim in damages under that Act and (4) that as no proof had been provided to the court that the deceased was the father of the remaining appellants no claim made pursuant to the Tort Act could be sustained on their behalf.

[4] The parties have consented to the determination of the appeal on the basis of written arguments. Submissions were filed on behalf of the appellant. No submissions were filed on behalf of the Respondent.

Factual Background

[5] The first appellant, Ms. Ortega, is the duly appointed administratrix of the estate of the deceased, Shane Goff who was killed in a car accident occasioned by the respondent's negligent driving. Ms. Ortega claims that she shared a common-law union with the deceased and that the 2nd -4th appellants are minor children of that union. Ms.

Ortega, in her capacity as administratrix, lodged the action the subject of this appeal on her own behalf and that of the minor children.

[6] In her claim form dated 9th June, 2016 Ms. Ortega claimed, amongst other things, (i) damages and loss pursuant to section 9 of the Torts Act in the sum of \$336,960.00 for loss of earnings, (ii) damages pursuant to section 9 of the Torts Act for loss of expectation of life in the sum of \$3,500.00 (iii) consequential loss pursuant to section 16(2) of the Torts Act.

[7] At paragraphs 21 – 27 of her judgment, the learned Judge found as follows:-

“21. Having found Mr. Belisle [the Respondent] to be solely responsible for the death of Shane Goff and the injury caused to Mr. He, I now venture to assess the damages to be awarded. Before I begin I wish to quote in reference to McCrae v Chase Int’l Express Ltd [2003] EWCA 505 in Munkman on Damages 11th Edition at paragraph 18.50 which would be our launching pad:

“What is interesting is that the observation made in McCrae are similar to those made over 50 years ago in the case of Bonham Carter v Hyde Park Hotel Ltd [1948] WN 89, 92 Sol Jo 154, KBD:

‘Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage, it is not enough to write down the particulars, and, so to speak, throw themselves at the head of the court saying “This is what I have lost. I ask you to give me these damages.” They have to prove it.’

That said, I shall deal with Shane Goff first.

Damages re: Shane Goff:

22. Ms. Ortega says she spent \$3,000.00 in funeral expenses and approximately \$1,600.00 on his wake. She presented no receipts and the figures were disputed by the Defendant. However, there is no doubt that the deceased was buried and these figures seem reasonable in the circumstances. His Estate shall therefore be awarded \$4,600.00 in special damages for funeral expenses and wake. The Estate will also be awarded the conventional sum of \$3,500.00 for loss of expectation of life.

23. Ms. Ortega goes on to say that at the time of his death Shane Goff was the sole provider and income earner for the household. He took care of her and the three children. I state early that a common-law spouse cannot bring a claim under the Tort Act as such a person does not fall within the categories of persons recognized by section 10 of that Act as being capable of benefitting. Section 10 reads:

“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 ...”

24. The right of certain dependents “to bring a claim is statutory only and the statutory restrictions must be strictly applied. A wife is a married woman in relation to her husband and does not include a female party to a common-law union. It must also be noted that although the personal representative of the deceased has the right to bring such an action, that person, if not included in the special category of persons, simply cannot benefit.

25. The Court accepts that the three minor children could be dependents having a reasonable expectation of financial benefit from the deceased once they have been proven to be within the special category (children of the deceased). And although put to strict proof of this in the defence, no proof other than Ms. Ortega’s say so, has been provided to this Court. This claim

must therefore fail. Further, this Court could do no assessment of the pecuniary loss of support or expectation of support for each child when there was of age whatsoever provided.

26. Were I to merrily and arbitrarily pluck a figure from the sky, (as counsel for the Claimants seems to have done in his submissions), it is doubtful that my choice would withstand scrutiny. It would certainly send the wrong message regarding the presentation of evidence for the assessment of damages of this nature.

27. Moreover, the Privy Council in *Kansan v Kampala Aerated Water Co. Ltd* 1965 1 WLR 618 made it clear that the use of a blanket multiplier was “plainly wrong” where the ages of dependents vary. This flaw in the presentation of evidence is not only unfortunate, it is detrimental.”

The Appeal

[8] The appellant’s Notice of Appeal was filed on the 2nd August, 2017. Therein the findings of the learned Judge are challenged on two grounds. The appellant contends that:

“(i) the learned trial Judge misdirected herself in fact and erred in law in concluding that the Appellants did not prove that the three (3) minor children were those of the deceased. Further in this regard, the learned trial Judge misdirected herself in failing to give any or any proper consideration or weight to the significant of the uncontested evidence of Anita Gale Ortega that she had three (3) children with the deceased and;

(ii) in failing to make an award for loss of earnings in favour of the deceased’s estate, the learned trial Judge utterly failed to consider her own finding that the Respondent was negligent and caused the death of Shane Donovan Goff and thereby erred in law, acted on a wrong principle and misdirected herself.”

At paragraph 28 of the appellants' Skeleton Submissions, the appellants seek to raise what amounts to a third ground of appeal. There the appellants claim that, "... the learned trial Judge erred in law to also find that the common law wife, Anita Ortega, could not, at paragraphs 23 & 24 of Her Ladyship's judgment, benefit under the Torts Act."

For ease of discussions the appellants' grounds can be grouped into two categories Beneficiaries under the Tort Act and Loss of Earnings. Each category will be canvassed in turn.

Beneficiaries under the Tort Act

[9] The appellants posit that the amendments made to the Supreme Court Judicature Act, Administration of Estate Act and Domestic Violence Act recognizing common law unions and providing protection and certain rights to members of those unions have amended the meaning of wife within section 10 of the Tort Act to include common law wives. As such, the appellant argues, the learned trial Judge was wrong to conclude that, "**... a common-law spouse cannot bring a claim under the Tort Act as such a person does not fall within the categories of persons recognized by section 10 of that Act as being capable of benefitting.**" Heavy reliance was placed on particular excerpts and rules of statutory interpretation set out by the learned authors of Bennion on Statutory Interpretation, 5th Edition; excerpts that in my opinion are inapplicable to the present case.

[10] The relevant provisions of the Tort Act read as follows:-

**"8. For the purposes of sections 9 to 16 inclusive of this Act-
"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 granddaughter;
"parent" means father or mother, step-father or step-mother,
adopted father or adopted mother, grandfather or grandmother**

..

**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.

16.-(1) For the purposes of sections 8 to 15 inclusive, a person shall be deemed to be the parent or child of the deceased person notwithstanding that he was only related to him illegitimately, and accordingly in deducing any relationship which under the provisions of this Act is included within the meaning of the expressions "parent" and "child", any illegitimate person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father."

[11] Curiously, neither husband nor wife is defined in the Tort Act; in these circumstances the guidance of Lord Reid In *Westminster Bank v Zang* [1966] AC 182 at 222 given to Judges undertaking the task of statutory interpretation is applicable. There he states:

"No principle of interpretation of statutes, however, is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous — if they are reasonably capable of more than one meaning — or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the court may

depart from the natural meaning of the words in question; but beyond that we cannot go ...”

[12] The starting point therefore is to give the word or phrase seeking to be defined its plain and ordinary meaning. The Oxford English dictionary clearly defines wife as, “... a married women considered in relation to her spouse.” This definition of wife is no way ambiguous, it is not incompatible with any other provision of the Act and neither is it reasonably capable of more than one meaning. Indeed if it was truly Parliament’s intention to give the term wife or husband any meaning other than its plain and ordinary meaning, it could have done so in the same manner in which the Act provides an expanded definition of child and parent. Parliament chose not to do so.

[13] The subsequent amendments of separate pieces of legislation to include a definition of common law union and recognize the rights of parties thereto cannot be used, as noble as the idea may be, to amend/expand the meaning of a word or phrase in an unrelated Act; especially where no conflict or inconsistencies exists between the Acts. In the premises therefore the learned trial Judge was right in law to conclude that section 10 of the Tort Act does not extend to common law spouses and as such a common law spouse cannot bring a claim under that Act.

[14] Ground 1 of the Notice of Appeal essentially argues that the uncontested witness statement of Ms. Ortega stating that, “ ... [a]t the time of his death my common law husband was 30 years old. His date of birth was August 14th, 1985. He was the sole provider and income earner and took care of me and our three (3) young children ...” was sufficient evidence to establish that the 2nd – 4th appellants are the children of the deceased and thereby able to bring a claim for damages pursuant to sections 9 and 10 of the Tort Act.

[15] The appellants further argue that Ms. Ortega gave sworn testimony in examination-in-chief which was unchallenged via cross-examination and/or scrutinized by the Judge re: credibility or the contents of the witness statement as such, the facts stated therein are uncontested and no further evidence was thereby required to establish that the deceased was the father of the 2nd – 4th appellants.

[16] The appellants further aver that by virtue of sections 19(1) and (2) of the Court of Appeal Act, Ch. 90, and sections 6(l), 6(n) and 7 of the Evidence Act, Ch. 95 this court can take judicial notice of the purported birth Certificates of the 2nd – 4th appellants attached to the Appellants’ Supplemental Skeleton Submissions, draw inferences of fact therefrom and find that based on the Birth Certificates and the Certificate of Suitability of Litigation Friend that the 2nd – 4th appellants were indeed the minor children of the deceased.

[17] It is a well-established principle of law that in civil cases, “he who asserts must prove.” It was the duty and responsibility of the appellants to prove on a balance of probabilities that the deceased was indeed the father of the 2nd – 4th appellants and as such the appellant, in her capacity as administratrix of the estate of the deceased, was entitled to lodge a claim pursuant to sections 9 and 10 of the Torts Act on their behalf and for their benefit. The appellants’ duty to prove their assertion, that the deceased was the father of the 2 – 4th appellants was made more acute by the respondent putting the appellants to strict proof of the children’s parentage.

[18] On the appellants own arguments, no evidence of the children’s parentage other than the Witness Statement of Ms. Ortega was placed before the Judge as proof of the claim. Counsel for the appellants on appeal was also Counsel for the claimants at the hearing below. Absolutely no explanation was provided to this court as to why the purported birth certificates of the 2nd – 4th appellants, attached to the appellants’ Supplemental Submissions were not submitted as evidence before the learned trial Judge.

[19] Simply put there was no proof before the learned Judge substantiating the appellants’ claim that the deceased was the father of the 2nd – 4th appellants. Based on the evidence before the learned Judge at the time of judgment and in light of the standard of proof required, it was entirely open to the learned Judge to conclude, as she did, that as no proof was placed before her establishing that the deceased was indeed the father of the 2nd – 4th appellants that Ms. Ortega’s claim to the same must fail.

Loss of Earnings

[20] The appellants assert that the learned trial Judge erred in law by failing to make an award for 'loss of earnings' in favour of the deceased's estate. In support of this assertion the appellants relied on the decision of the learned Judge in **Elisa Casildo v Imer Hernandez Claim 321 of 2015** , the dicta of the House of Lords in **Pickett (Administratrix of the Estate of Ralph Henry Pickett, Deceased) v British Rail Engineering Limited (1978) UKHL 4 [1980] AC 136** and the Trinidad and Tobago case of **Tawari Tota-Maharaj (Administrator Ad Litem of the Estate of Arvind Tota-Maharaj, Deceased) v Autocenter Limited, Andre Richards, The Beacon Insurance Company Limited HCA: No. 46 of 2003, High Court of Justice, Trinidad & Tobago**).

[21] Section 26 (4) of the Administration of Estates Act ("AEA") provides that:

"26 (4) On the death of any person after the commencement of this Act, 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 the following causes of action:

(a) defamation;

(b) seduction or inducing one spouse to leave or remain apart from the other; and

(c) claims for damages under section 151 of the Supreme Court of Judicature Act, on the ground of adultery."

[22] Section 26 (8) of the AEA further establishes that:

"(8) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by sections 8 to 16 inclusive of the Torts Act, 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 sections as it applies in

relation to other causes of action not expressly excepted from the operation of subsection (4).”

[23] In **Pickett (Administratrix of the Estate of Ralph Henry Pickett, Deceased) v British Rail Engineering Limited (1978) UKHL 4 [1980] AC 136** the House of Lords established that an award in damages for lost future earnings could be made to the Estate of a deceased claimant. Indeed this was recognized by the learned trial Judge in the case of **Elisa Casildo v Imer Hernandez Claim 321 of 2015**. There, after quoting section 26 (4) and 8 of the AEQ, she states at paragraphs 17 & 18:

“17. There can be no doubt that a party to a common law union is a beneficiary under the AEA. Section 54.01 allows that ...

18. For reasons already stated, no survival action brought under the Tort Act on the facts presented can succeed. Further, any action brought for the benefit of the estate must be limited in its scope, to the injury and loss suffered by the deceased. It is confined to such things (by way of example only) as **loss of earning** and funeral expenses.” [Emphasis mine]

[24] As previously mentioned the appellants claimed, “damages and loss pursuant to section 9 of the Torts Act ... and section 26(8) of the AEA ... in the sum of \$336,960.00 for loss of earnings...” and submitted in support of that claim a letter from the deceased’s employer indicating that he earned \$360.00 a week. The judgment contains no discussion on the issue of loss earnings. As such I am unable to determine whether the Judge considered the claim at all and summarily dismissed it or whether an assessment of the claim was inadvertently left out. There are no findings of fact in relation to the deceased’s salary or any discussion re: the appropriate multiplier to be used if any. In light of these circumstances, in my opinion, ground 2 of the Notice of Appeal must succeed and the appeal be allowed on this basis.

[25] In the premises I would allow the appeal and remit the matter to the Supreme Court for an assessment of damages in relation to the claim for loss of earnings. I would order that 50% of the costs of the appeal be the appellants’ to be

taxed if not agreed. I would further order (a) that this order as to costs be provisional in the first instance but become final within 10 working days from the date of delivery of judgment, unless either party shall file application for a contrary order within such period of 10 days and (b) that, in the event of the filing of such an application, the matter of costs be determined on the basis of written submissions to be filed by both parties in 10 working days from the filing of the application.

DUCILLE JA