

IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM No. 817 of 2021

BETWEEN

**DIANA PORTILLO DE LEON
(Administratrix of the Estate of
Juan Antonio De Leon)**

CLAIMANT/ APPLICANT

AND

**MINISTER OF HEALTH
JAIRO REYES
ATTORNEY GENERAL**

**1ST DEFENDANT/ RESPONDENT
2ND DEFENDANT/RESPONDENT
3RD DEFENDANT/RESPONDENT**

BEFORE The Honourable Madam Justice Patricia Farnese

Hearing Date: June 20, 2023

Appearances

Darrell Bradley, for the Claimant/Applicant
Agassi Finnegan, for the Defendants/Respondents

APPLICATION TO APPOINT EXPERT

Introduction

[1] Ms. Portillo De Leon applies under CPR Rule 32.6 to have Dr. Héctor Guillermo Ortiz Mojica appointed as an expert witness in these proceedings. Dr. Mojica is a paediatric surgeon who practices medicine in Mexico. These proceedings plead gross negligence in the care and treatment of Ms. Portillo De Leon's son, Juan Antonio, which caused his death when he was 11 years old. Ms. Portillo de Leon alleges that the 2nd Defendant unnecessarily performed a surgery that caused Juan Antonio's death.

[2] The Respondents oppose the application on three grounds. First, Dr. Mojica, not being a pathologist, does not have the requisite expertise to assist the court as an expert witness. Second, Ms. Portillo De Leon proposes to put to Dr. Mojica the question of whether the 2nd Defendant was grossly negligent, which is a legal question only the court can decide. The Respondents allege other questions impute a finding thereby risking his impartiality. Third, Dr. Mojica is prohibited from being an expert witness because he is not a registered medical practitioner licensed to practice medicine in Belize.

Issues

[3] The application raises the following issues:

1. Does Dr. Mojica have the requisite expertise to assist the court?
2. Do the proposed questions to be put to the expert preclude my appointment of Dr. Mojica as an expert witness?
3. Is Dr. Mojica barred from being an expert witness because he is not registered to practice medicine in Belize?

Analysis

1. Does Dr. Mojica have the requisite expertise to assist the court?

[4] The cause of Juan Antonio's death is central to these proceedings. The Crown asserts that pathologists are specialists trained to determine causes of diseases, and because Dr. Mojica is not a pathologist, he cannot assist the court. The Death Certificate lists septic shock as the direct cause of Juan Antonio's death and confluent broncho pneumonia and intra cardia thrombosis (a blood clot) as antecedent causes. Although the basis of this argument is not fully explained in the affidavit of Ms. Samantha Matute, Assistant Solicitor General, in opposition to this application, I understand from the arguments presented during the oral hearing that these conditions arose from an underlying infection, namely Covid. Therefore, not being a pathologist, Dr. Mojica cannot assist the court with confirming that Covid caused Juan Antonio's death.

[5] The Crown's submissions also seem to suggest that I must accept the cause of death as listed on the Death Certificate because the claim does not explicitly challenge the veracity of that certificate. If that is in fact what is being asserted, I reject that assertion. I will decide how much weight to afford the conclusions of the Death Certificate after the Parties have presented their evidence and submitted their arguments. Moreover, even if I decide to give the Death Certificate great weight, I am not precluded from finding that the surgery was also a contributing cause of Juan Antonio's death.

[6] Ms. Portillo De Leon is entitled to fully ventilate her claim of gross negligence. It is clear from her pleadings that Ms. Portillo De Leon is alleging that surgery had a role in her son's death. I will decide whether she is correct. The CPR clearly outlines that I can get assistance in making that decision from an expert whose overall duty is to assist the Court:

32.2 Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.

32.3 (1) It is the duty of an expert witness to help the court impartially on the matters relevant to his expertise.

(2) This duty overrides any obligations to the person by whom he is instructed or paid.

This case will likely involve highly technical, medical evidence related to Juan Antonio's surgery. Dr. Mojica's affidavit filed in support of this application details his extensive training and experience as a paediatric surgeon. I find Dr. Mojica's expertise is reasonably required to resolve the proceedings justly. The Crown will have a full opportunity to be heard as to the weight to be given to his expert opinion.

2. *Do the proposed questions to be put to the expert preclude my appointment of Dr. Mojica as an expert witness?*

[7] No. A firm list of questions is not required in the application to appoint an expert witness. Their inclusion in the application provides some context from which the court can assess whether the expert can assist the court with resolving the proceedings. The exact scope of the expert's report (i.e. the question the expert is asked to address), is a matter for the Parties to negotiate after the expert is appointed.

[8] To require the precise content of those questions be defined prior to an expert's appointment risks parties expending time and financial resources for no purpose if the application is denied. Moreover, the quality and utility of the report may be undermined if the instructing party is unable to modify those questions in response to concerns the non-instructing party may have with respect to the questions put to the expert.

3. *Is Dr. Mojica barred from being an expert witness because he is not registered to practice medicine in Belize?*

[9] The Crown argues that the combined effect of the definition of “practice of medicine” in section 2 and section 28(2) of the *Medical Practice Act*¹ makes it unlawful for Dr. Mojica to offer an expert opinion to the court. I disagree. A pragmatic, purposive interpretation of the *Medical Practice Act* supports my finding that the Act is not a bar to Dr. Mojica being appointed as an expert witness in these proceedings.

[10] The *Medical Practice Act* defines the “practice of medicine” as including:

rendering a written or otherwise documented medical opinion concerning the diagnosis or treatment of a patient, or the actual rendering of treatment to a patient within Belize by a medical practitioner located outside Belize as a result of transmission of individual patient data by electronic or other means from within Belize to such medical practitioner or his agent....

Subsection 28(2) of the *Medical Practice Act* provides:

(2) A person who, not being qualified, registered or licensed to practise medicine

...

(c) engages in the practise of medicine in Belize,

commits an offence and is liable on summary conviction to a fine of fifty thousand dollars or to imprisonment for a term of ten years, or to both.

When read in isolation, these provisions appear to suggest that Dr. Mojica would be committing an offence because he would be practicing medicine without being registered if he were to provide his expert opinion.

[11] Subsection 65(a) of the *Interpretation Act*² directs this court to adopt a purposive approach to statutory interpretation:

65. The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provisions in question is reasonably possible, namely,

¹ Cap. 318 of the Substantive Laws of Belize.

² Cap. 1 of the Substantive Laws of Belize.

(a) that a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not;...

The Caribbean Court of Justice, likewise, endorses a pragmatic, purposive approach to statutory interpretation.³ The precise language used in the specific provisions requiring interpretation is just one factor the court considers. The purposive approach also requires the court to look at the objectives of the *Medical Practice Act* and read the provisions in the context of the legislation as the whole.

[12] The purpose of the *Medical Practice Act* is to protect the public from unqualified, fraudulent, or incompetent medical practitioners to ensure the highest quality of care to the public. The Act adopts a self-regulatory model and empowers the Medical Council to act as the arbitrator of competence in Belize. A medical practitioner who is acting as an expert witness poses no risk to the public. Dr. Mojica will not be caring for a patient, either directly or indirectly; he will be providing an opinion to the court that the court will consider and assign the appropriate weight to, when resolving the Parties' dispute.

[13] The legislature is required to unambiguously restrict the court's long-standing authority,⁴ expressly recognized by *CPR* Rule 32.6, to decide whether a person is qualified to serve as an expert witness. Nothing in the *Medical Practice Act* supports a finding that the Medical Council's assessment of a medical practitioner's qualifications and competence, while a factor that may be relevant to consider, was intended to usurp the court's jurisdiction to decide who is or is not qualified to be an expert.

[14] Finally, I note that Belize is a small jurisdiction where impartial, specialized expertise is often not readily available within the country. There is a high probability that restrictions on who the court may appoint will result in the court having no impartial, expert assistance with highly technical, medical evidence thereby undermining the court's ability to come to a just resolution of the matter.

[15] Moreover, adopting the overly restrictive interpretation of the *Medical Practice Act* proposed by the Crown, may place the public at risk or result in human rights abuses. For example, I am aware that my colleagues in the criminal division have benefitted from the expertise of psychiatric expert, Dr. Seena Fazel, who is unregistered to practice in Belize, in the sentencing of violent offenders.⁵ Psychiatric expertise can be essential to assessing culpability and risks of reoffending to ensure the rights of the accused are respected and public safety is safeguarded. The

³ See e.g. *Cuffy v. Skerrit* [2022] CCJ 12 (AJ) DM.

⁴ *R v. Silverlock* [1894] 2 QB 766.

⁵ See e.g. *The Queen v. B.M.G.* Indictment No. C79/2020.

potential impacts of excluding expert assistance from medical practitioners because they normally do not practice in Belize are clearly out of line with the objectives of the *Medical Practice Act*.

Disposition

[16] It is hereby ordered that:

1. Dr. Héctor Guillermo Ortiz Mojica is appointed as an expert in these proceedings and he is required to file an expert's report pursuant to CPR 32.6.
2. Dr. Mojica's expert report is to be filed and served on or before August 25, 2023.
3. The Parties may put questions to Dr. Mojica within 28 days of receipt of his expert report.
4. Dr. Mojica is to respond to the questions posed by the parties within 28 days of receipt of the Parties' questions.
5. Costs of this application shall be in the cause.

Dated 23 June 2023



Patricia Farnese
Justice of the High Court