

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**Claim No. CV2016-04089**

**BETWEEN**

**GERARD WILLIAM DAVID**

**(the lawful attorney of MONICA DAVID also called MONICA SEDALINA DAVID also called**

**SEDALINA MONICA FRANCIS)**

**Claimant**

**AND**

**THE SOUTH WEST REGIONAL HEALTH AUTHORITY**

**Defendant**

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

The claimant in Person

Mr Roger Kewalsingh and Mr Ravi Mungalsingh for the Defendant

Date: 3 June 2019

## **RULING**

### **BACKGROUND**

1. Monica David, the Claimant's mother, is the wife of Errol David (the deceased) who died on 11 November 2012, aged 84 years. The Claimant is the son of the deceased. The Claimant brings this action against the Defendant for alleged medical negligence resulting in the death of the deceased. On 8 November 2013, a Grant of Letters of Administration in the estate of the deceased was issued in favour of Monica David.
2. On 13 June 2016, Monica David executed a limited Power of Attorney registered as Deed No. DE201601523858 in favour of the Claimant, to commence this claim on her behalf and the Estate of the deceased.
3. By Notice of Change of Attorney filed on 18 September 2018, the Claimant is now not represented by an attorney-at-law and pursues the claim in person.
4. The Claimant claims that during the period 9 November 2012 to 11 November 2012, the medical personnel of the Defendant, provided medical treatment to the deceased at the San Fernando General Hospital (the Hospital). The Claimant argues that the Defendant was negligent in not providing a course of treatment to address complications arising from the deceased's medical condition, prostatic hyperplasia

(enlarged prostate). In the Amended Statement of Case filed on 3 April 2017, the Claimant alleged the deceased arrived at the Accident and Emergency Room of the Hospital on 9 November 2012. The nurse attending to the deceased “paid no attention to the remarks and continued to administer paracetamol to the deceased.” The Claimant does not say who made the remarks to the nurse. Furthermore, the Claimant argued that tests of electrocardiogram (ECG), X-rays, and computerized tomography scan (CT scan), revealed that the deceased did not have a stroke. However, no urinalysis or blood tests were done and no examination of the medical condition in relation to the enlarged prostate was done.

5. On 10 November 2012, the deceased was again taken to the casualty ward. The Claimant argued that blood tests were taken for investigation but antibiotics were not administered to the deceased. The Claimant inquired into the condition of his father from a nurse and he was told that his father was treated with medication and he was fine.
6. On 11 November 2016 the Claimant arrived at the hospital and was told that his father passed away. The cause of death stated in the Medical Certificate (not post mortem report) was (a) acute myocardial infraction and (b) benign prostatic hyperplasia. The Medical Certificate was attached to the Amended Statement of Case.
7. The crux of the claim as pleaded was that no urinary or blood tests were done. No anti-biotics were administered for the chills he had. The deceased had been diagnosed previously with benign prostatic hyperplasia (BPH) at the hospital. There

was a failure to check for a urinary tract infection and failure to take steps to deal with the enlarged prostate. Knowing his history they failed to check for a urinary tract infection and to treat this.

8. The reliefs the Claimant sought were:

- i. Damages for medical negligence on the part of the Defendant, its servants and/or agents for the Death of Errol David who died on 11<sup>th</sup> November 2012;*
- ii. Damages pursuant to the Compensation for Injuries Act, Chap. 8:05, Rev. Laws, 2004 [TT].*
- iii. Damages for Pain and Suffering;*
- iv. Loss of Expectation of Life;*
- v. Special Damages and Loss of financial benefit;*
- vi. Punitive and Exemplary Damages;*
- vii. Interest at such rate and for such period as the Court may deem just in the circumstances;*
- viii. Costs;*

*ix. Such further and/or other relief as the Court may seem just.*

9. In the Amended Defence, the Defendant pleaded that there was no negligence during the course of treatment.
10. The Defendant addressed parts of the Claimant's pleadings. First, even though Monica David granted a limited Power of Attorney to the Claimant to commence the claim, the Claimant does not possess the requisite capacity in commencing the claim. A person who has obtained a grant, in this case Monica David, cannot delegate statutory obligations.
11. Second, despite the Claimant falling within the category of 'dependant' of the ***Compensation for Injuries Act Chap. 8:05*** (CI Act), the Claimant failed to plead a claim and did not bring the action within the time stipulated pursuant to the provisions of the CIA.
12. Third, the Defendant argued that the Claimant's pleaded case did not adduce any cause of action for medical negligence and consequently any losses sustained.
13. Fourth, the Claimant failed to particularise the claim for general damages attributed to the alleged negligence. As such, the 'damages' sought by the Claimant had been generically and insufficiently pleaded without any substantial evidence to prove the claim.

14. Fifth, the Claimant failed to plead the requisite damages regarding the Estate of the deceased. The Claimant failed to plead the circumstances and details (if any) of the deceased's consequent contribution towards the Claimant's lifestyle and maintenance that would warrant a dependency or estate claim. In the absence of any substantial pleading or evidence, the Defendant denies that the Claimant is entitled to any damages sought.

15. The Defendant pleaded that the plan of care afforded to the deceased was in accordance with standard procedure and was conducted pursuant to the reasonable standard given the circumstances and symptoms with which the deceased presented. As such, the Defendant acted in accordance with the proper practice as accepted by a reasonable body of medical practitioners. The patient was continuously monitored, the relevant tests were performed so as to rule out the possibility of stroke and heart attack.

16. The crux of the Defence on the merits was that a stroke was ruled out; blood tests were done; he was repeatedly reviewed; his blood pressure, respiration and blood sugar was monitored; his blood sugar fluctuated; he was treated or investigated for heart, stroke and high blood pressure; he was administered medication for a 38 degree temperature; complete blood and urine tests were done; he was treated with augmentin for infection. Further, the post mortem showed he died from myocardial infraction (heart attack). There was a narrowing of the critical heart vessel (95%). There had been high levels of cholesterol.

17. The defendant says the claim should be struck out at this time without the need for a full trial because of matters raised in its pleadings. The following issues arose and submissions were filed by the parties.

## ISSUES

1. Whether a chose in action includes commencing a claim.
2. Whether the word property in the *Trustee Ordinance (Ch. 8. No. 3—1950 Ed.)* covers a chose in action.
3. Whether a personal representative, specifically administrators, can delegate their statutory function by power of attorney.
4. Whether the Claimant has failed to sufficiently state the requisite capacity within which he has commenced the instant Action pursuant to Part 8.5(4) of the *Civil Proceedings Rules (1998)* as amended.
5. Whether the Claimant has locus to institute these proceedings under the CI Act.
6. Whether the Claimant has instituted these proceedings for compensation under the CI Act within the time allowed by law.
7. Whether a cause of action has been made out against the Defendant.

## ISSUE 1

18. Whether a chose in action includes commencing a claim.

## LAW

19. **Halsbury's Laws of England (Vol 13) 2017, paragraph 1** states:

*The expression 'chose in action' or 'thing in action' in the literal sense means a thing recoverable by action, as contrasted with a chose in possession, which is a thing of which a person may have physical possession. The meaning of the expression 'chose in action' or 'thing in action' has expanded over time, and is now used to describe all personal rights of property which can only be **claimed or enforced by action**, and not by taking physical possession.*

*A chose in action is no less a chose in action because it is not immediately recoverable by action, such as a debt payable in the future. Though the existence of a remedy or remedies is an essential condition for the existence of a chose in action, the remedies are not property in themselves, capable of assignment separately from the chose.*

20. This definition is also found in the case of **Torkington v Magee [1902] 2 K.B. 427 at page 430**, where a chose in action was defined as a "... *personal right of property which can only be claimed or **enforced by action**, and not by taking physical possession.*"

21. In **Halsbury's Laws of England (Vol 13) 2017 at paragraph 7**, reference is made to whether a right or cause of action can be classed as a chose in action:



*A right or cause of action has been held to be a chose in action, for example a right of action arising under contract, including a claim for unliquidated damages for breach of contract, or a right of action arising out of tort ...*

*Examples of rights or causes of action which have been held to be choses in action are:*

- i. claims against directors of a company for misfeasance;*
- ii. the right of a trustee to recover trust funds from a former trustee guilty of breach of trust;*
- iii. an assignor's right to be indemnified by an assignee against the covenants in a lease assigned, although a right of indemnity against all proceedings in respect of the non-payment of the mortgage debt given by the purchaser of mortgaged property to the executors of a deceased mortgagor is not assignable;*
- iv. a lessee's right to be relieved against a forfeiture of the lease;*
- v. the right of the vendor of shares to be indemnified by the purchaser against liability in respect of unpaid calls;*
- vi. a right of re-entry on non-payment of rent;*
- vii. a right of re-entry upon land under a condition arising by virtue of a deed;*
- viii. a right or title of entry into land of which a person is disseised;*

- ix. *the right to a property in title deeds when in the hands of third persons;*
- x. *mortgage deeds, being securities for the payment of money;*
- xi. *in relation to a trade union, the income of the union including contributions, fines, entrance fees or other moneys paid by members;*
- xii. *a claim to an indemnity;*
- xiii. *a share in a racehorse;*
- xiv. *a right of proof in a liquidation;*
- xv. *a right to financial adjustment;*
- xvi. *a right of action for infringement of an intellectual property right.*

22. With respect to whether a chose in action can be assigned, ***Halsbury's Laws of England (Vol 13) 2017 paragraph 14***, states: “that as a general rule choses or things in action may be transferred from one person to another by assignment inter vivos.”

23. In contrast, the position with respect to whether a bare right to litigate is assignable, ***Halsbury's Laws of England (Vol 13) 2017 at paragraph 98*** states:

*A bare right of litigation, such as a claim for damages for defamation or personal injury, is not assignable (**Dawson v Great Northern and City Rly Co [1905] 1 KB 260 at 271**) and on the principle that the law will not recognise any transaction savouring of maintenance or champerty.*

24. In the matter, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at page 117, Lord Hoffman discussed whether a chose in action can be assigned:

*At common law, for reasons into which it is unnecessary to discuss, choses in action could not be assigned. In equity, they could.*

*In each case, however, what is assignable is the debt or other personal right of property. It is recoverable by action, but what is assigned is the chose, the thing, the debt or damages to which the assignor is entitled. The existence of a remedy or remedies is an essential condition for the existence of the chose in action but that does not mean that the remedies are property in themselves, capable of assignment separately from the chose. So, for example, there may be joint and several liability; a remedy for the recovery of a debt or damages may be available against more than one person. But this does not mean that there is more than one chose in action. The assignee either acquires the right to the money (or part of the money) or he does not. If he does, he necessarily acquires whatever remedies are available to recover the money or the part which has been assigned to him.*

ANALYSIS

25. The learning suggests that a chose in action includes a cause of action. Further it stands to reason that commencing a claim is a chose in action based on the authority of *Halsbury's Laws of England (supra) at paragraph 7*. A chose in action can be assigned. However, a bare right of litigation cannot be assigned based on public policy considerations. The Claimant's cause of action is medical negligence and he seeks several pecuniary reliefs. On this issue, if the cause of action is made out, then the Claimant would satisfy the legal requirement which is addressed later.

## ISSUE 2

26. Whether the word property in the *Trustee Ordinance (Ch. 8. No. 3—1950 Ed.)* covers a chose in action.

## LAW

27. In Trinidad and Tobago, section 2 of the *Trustee Ordinance (Ch. 8. No. 3—1950 Ed.)* defines the word property. It states:

*“property” includes real and personal property, and any estate, share and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not; ... (Emphasis added)*

28. Therefore, it stands to reason that the word “property” in the *Trustee Ordinance*, based on the learning in *Halsbury's Laws of England at paragraph 1*, refers to a chose in action.

### ISSUE 3

29. Whether a personal representative, specifically administrators, can delegate their statutory function by power of attorney.

### LAW

30. Under section 2 of the ***Wills and Probate Chap. 9:03***, representative is defined as:

*“representative” means the executor or the administrator for the time being of a deceased person; and includes the Administrator General, and in the construction of any Act or Ordinance or rule where the word “heir” or “heirs” is used, the same shall, as regards the devolution of the legal estate in land, be held to apply to the representative, and, as regards the beneficial interest, to the person or persons entitled under the provisions of the Administration of Estates Act;*

31. Additionally, ***Halsbury's Laws of England Volumes 102 and 103 (2016)***, at **paragraph 608** states:

*The expression 'personal representative' is used to describe either an executor (whether he has proved the will or not) or an administrator ... The personal representatives represent the deceased in regard to his real estate to which he was entitled for an interest not ceasing on his death as well as in regard to his*

*personal estate and are deemed in law to be his heirs and assigns within the meaning of all trusts and powers.*

32. Section 10(4) of the **Administration of Estates Act Chap. 9:01**, provides:

*On the death of any person all his estate real and personal whatever within Trinidad and Tobago shall vest in law in the Administrator General **until the same is divested by the grant of Probate or Letters of Administration to some other person or persons**: Provided that the Administrator General shall not, pending the grant of such Probate or Letters of Administration, take possession of or interfere in the administration of any estate save as in this Act and in the Wills and Probate Act provided. (Emphasis added)*

33. From the authorities above, a personal representative which includes an administrator, is given the function to manage the deceased's estate by legislation.

34. **Halsbury's Laws of England Volume 1 (2017) paragraph 16**, states that the functions of an administrator can be delegated to an agent:

*Where the authority of the agent is required to be conferred by a deed, or where in any other circumstances it is desired formally to appoint an agent to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally, the necessary authority is conferred by an instrument known as a power of attorney.*

35. In Trinidad and Tobago, section 24 of the *Trustee Ordinance (Ch. 8. No. 3—1950 Ed.)*, provides ways in which a trustee or personal representative may delegate his or her power:

*24. (1) Trustees or personal representatives may, instead of acting personally, **employ and pay** an agent, whether an attorney at- law, banker, stockbroker, or other person, to transact any business or do any act required to be transacted or done in the execution of the trust, or the administration of the testator's or intestate's estate, including the receipt and payment of money, and shall be entitled to be allowed and paid all charges and expenses so incurred, and shall not be responsible for the default of any such agent if employed in good faith.*

*(2) Trustees or personal representatives may **appoint any person to act as their agent or attorney** for the purpose of selling, converting, collecting, getting in, and executing and perfecting assurances of, or managing or cultivating, or otherwise administering, any **property** subject to the trust or forming part of the testator's or intestate's estate **in any place outside Trinidad and Tobago, or executing or exercising any discretion or trust or power vested in them in relation to any such property**, with such ancillary powers, and with and subject to such provisions and restrictions as they may think fit, including a power to appoint substitutes and shall not, by reason only of their having made such appointment, be responsible for any loss arising thereby.*

*(3) Without prejudice to such general power of appointing agents as aforesaid—*

*(a) a trustee may appoint an attorney-at-law to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the attorney-at-law to have the custody of, and to produce, a deed having in the body thereof or endorsed thereon a receipt for such money or valuable consideration or property, the deed being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration;*

*(b) a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the production of any such deed by the attorney-at-law shall have the same statutory validity and effect as if the person appointing the attorney-at-law had not been a trustee;*

*(c) a trustee may appoint a banker or attorney-at-law to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of insurance, by permitting the banker or attorney-at-law to have the custody of and to produce the policy of insurance with a receipt signed by the trustee, and a trustee shall not*



*be chargeable with a breach of trust by reason only of his having made or concurred in making such appointment:*

*Provided that nothing in this subsection shall exempt a trustee from any liability which he would have incurred if this Ordinance had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or attorney-at-law for a period longer than is reasonably necessary to enable the banker or attorney-at-law, as the case may be, to pay or transfer the same to the trustee. This subsection applies whether the money or valuable consideration or property was or is received before or after the commencement of this Ordinance. (Emphasis added)*

36. Significantly, *Tolley's Administration of Estates Issue 52, March 2019* at **D4.1** states:

*Although the office of personal representative is not assignable, personal representatives are not required to carry out all of their duties personally. However, a personal representative cannot delegate unless he has the requisite authority, which derives either from **statute** or from an **express power contained in the deceased's will**. (emphasis added)*

37. The Defendant submitted that Monica David, the Administratrix of the Estate of the deceased cannot by Power of Attorney, delegate her statutory obligation as mandated

under the **Administration of Estates Act Chap. 9:01** to a third party. The Defendant submitted at paragraph 10:

*The right to sue for the benefit of an estate is a right vested in the Administrator/Administratrix of the Estate of the deceased. The Administration of the estate of Errol David, deceased cannot therefore be delegated, as it can only lie in the Administratrix. This right can be assigned, however it cannot be delegated by way of Power of Attorney.*

38. In addition, the Defendant submitted the case of **Phylis Crawford v Frankie Ramkhalawan CV2017-0441 at paragraph 21 – 24** to highlight that the Claimant's mother could not assign her statutory functions as administrator.

39. The limited Power of Attorney read:

*KNOW ALL MEN BY THESE PRESENTS that I, MONICA DAVID of 9-11 Bonanza Gardens, Green Acres, San Fernando, in the Island of Trinidad, in the Republic of Trinidad and Tobago, DO HEREBY APPOINT GERARD WILLIAM DAVID of 9-11 Bonanza Gardens, Green Acres, San Fernando, in the Island of Trinidad, in the Republic aforesaid (hereinafter called "my Attorney") my true and lawful Attorney to act in, conduct and manage all my affairs and for the purpose aforesaid I hereby confer upon my Attorney the following powers and authorities:-*

***To exercise all powers, rights and liberties for High Court Action against South West Regional Health Authority for the death of ERROL DAVID, deceased.***

*For me and in my name to accept service of any Writ of Summons or other legal process and to appear and represent any Court and before all magistrates or judicial or other officers whatsoever as by my Attorney shall be thought advisable and for me **and in my name or otherwise to commence any action or other proceeding in any Court of Justice** including but not limited to High Court Action against South West Regional Health Authority for negligence into the death of ERROL DAVID for the recovery of any debt sum of money right title interest property matter or thing whatsoever now due or payable or to become due or payable or in anywise belonging to me by any means of account whatsoever and the same action or proceeding to prosecute or discontinue or become nonsuited therein if my Attorney shall see cause. And also to take such lawful ways and means for the recovering or getting in any such sum of money or other thing whatsoever which shall by my Attorney be conceived to be due owing belonging or payable to me by any person whomsoever and also to appoint any Solicitor to prosecute or defend in the premises aforesaid or any of them as occasion may require either in my name or in the name of my Attorney.*

*In general to do all other acts deeds matters and things whatsoever in or about the said High Court Action against South West Regional Health Authority and affairs or concur with persons jointly interested with me therein in doing acts deeds matters and things herein either particular or generally described as amply and effectually to all intents and purposes as I could do in my own person if this deed had not been made.*

40. The Defendant submitted that the limited Power of Attorney assigns to the Claimant the power to bring a Claim on behalf of Monica David and not the deceased.

41. At page 3 of the Claimant's Reply to the Defendant's Submissions, it was submitted that the case of ***Phylis Crawford v Frankie Ramkhalawan (supra)*** should not have been referenced by the Defendant as it was not relevant. The Claimant submitted:

*"... this case pertaining to wills and not to the intestacy relevant to this instant action. The fact that Letters of Administration alone could be submitted to the Honourable Court as a result of intestacy denotes that the dependant by right of succession is the personal representative managing the estate of the deceased comprises as far as can be ascertained his pension and benefits, his residential and personal property, and his incurred right to sue for wrongful death."*

The Claimant at page 4, in response to whether power can be delegated submitted:

*“The Claimant brings to the attention of the Honourable Court the finding that the personal representative enjoys powers of delegation on par with trustees, without regard to privity of contract and regardless of being sole or joint beneficiary to any aspect of the estate. All that is required is for the personal representative to be a beneficiary, sole or joint. Even so, it transpires that 22.2 and 22.3 (CPR 1998) of the findings cited in said judgment supports effective transfer done by way of trust or promise to establish trust, which becomes relevant concerning the joint status of the estate of the deceased. It will be seen that assertions contradicting any prohibition to delegate recurs overtly or implicitly ensuing citations throughout this reply.”*

42. The Claimant submitted that with respect to a personal representative delegating through a Power of Attorney:

*“Once a grant of representation has been made, personal representatives have merely the limited powers of delegation that are enjoyed by trustees generally (1925 Act, ss. 23(2), 25(10)” [3-11]*

*“A trustee who has a beneficial interest in land, or in the income from it, can freely delegate by power of attorney. Typically, this might be a joint owner of property, where the joint owners are technically trustees holding the property for themselves as beneficiaries.” [1-11]*

43. The Claimant provided no citation for the source of this extract entitled ***Power of Attorney***.

#### ANALYSIS

44. Section 24 of the ***Trustee Ordinance (supra)*** provides that by a Power of Attorney, a personal representative can appoint categories of persons to administer the estate. Section 24(1) specifically defines the category of persons. A personal representative may employ and pay an agent, whether an attorney at- law, banker, stockbroker, or other person. This category of persons is limited to persons employed and paid by the personal representative as an agent. The Claimant in this matter does not plead that he is an employed agent of the personal representative.

45. Under section 24(2), the personal representative may appoint, in contrast to employ and pay, any person to act as their agent or attorney to administer, any property. Any property as defined in the ***Trustee Ordinance (supra)*** refers to a thing in action which by law also refers to bringing a claim. However, the section limits the ability of the agent to deal with the property which forms part of the testator's or intestate's estate to ***any place outside Trinidad and Tobago***. It goes on to say that the person appointed can execute or exercise any discretion or trust or power vested in them in relation to any ***such property***. Property used a second time preceded by the word such, refers to property outside of Trinidad and Tobago. The Claimant's claim arises from the medical negligence of doctors based at a local hospital. Section 24(3) specifically refers to trustee's appointment of agents to act on their behalf and not personal

representatives. Therefore, the Claimant does not fall within the sections of the ***Trustee Ordinance (supra)***.

46. Additionally, the ***Trustee Ordinance (supra)*** refers to the office of the personal representative. The limited Power of Attorney as drafted did not say that Monica David in her capacity as legal personal representative is delegating such a power. Instead the preamble refers to Monica David in her personal capacity. Even though the operative part of the limited Power of Attorney refers to bringing a claim against the Defendant for the death of the deceased, it does not follow that such a power can be granted by Monica David. The power must be granted in her capacity as personal representative. This reasoning is in accordance with the learning in ***Tolley's Administration of Estates Issue 52, March 2019 at D4.1*** which indicated that the power to delegate stems from statute.

#### ISSUE 4

47. Whether the Claimant has failed to sufficiently state the requisite capacity within which he has commenced the instant Action pursuant to Part 8.5(4) of the ***Civil Proceedings Rules (1998)*** as amended.

#### LAW

48. Part 8.5(4) of the ***Civil Proceedings Rules (1998)*** as amended (CPR) provides:

*If the claimant is claiming in a representative capacity under Part 21 he must state what that capacity is.*

49. Part 21.2 of the CPR, states:

*Appointment of representative claimant or defendant—procedure*

*21.2*

*(1) An application for an order appointing a representative party may be made at any time, including a time before proceedings have been started.*

*(2) An application for such an order may be made by—*

*(a) any party;*

*(b) any person or body who wishes to be appointed as a representative party; or*

*(c) any person who is likely to be a party to proceedings.*

*(3) An application for such an order—*

*(a) must be supported by evidence; and*

*(b) must identify every person to be represented, either—*

*(i) individually; or*

*(ii) by description, if it is not practicable to identify a person individually.*

*(4) An application to appoint a representative defendant must be on notice to the claimant.*



*(5) An application to appoint a representative claimant may be made without notice.*

*(6) The court may direct that notice of an application be given to such other persons as it thinks fit.*

*(7) If the court orders that a person not already a party shall be a representative defendant, it must make an order adding him as a defendant.*

50. In ***Anthony Murray and Others v Dorothy Vierra / Dorothy Vierra V Anthony Murray and Others CV 2010-03679 procedural app. No. 142 and 143 of 2011***, the Court at ***paragraphs 15 and 16*** stated:

*15. The general rule is that a beneficiary of an estate is not entitled to bring an action in respect of his interest in an estate without the personal representative being a party, unless he can show special circumstances: See: **Roberts v. Gill & Ors. (2110) 2 WLR 1227**, a decision of the Supreme Court of the United Kingdom.*

*16. Special circumstances have been held to include fraud on the part of a trustee, collusion between the trustee and a third party, and insolvency of the trustee. The underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy. See: **Roberts v. Gill & Ors. (supra) at para. 46.***

51. The Defendant submitted at paragraph 18 – 20, that according to Part 8.5(4) of the CPR, a Claimant must state what representative capacity he or she is adopting. The Claimant has not done so. The Defendant further submitted that Monica David, cannot by way of a Power of Attorney, delegate her responsibilities and obligations as the Administratrix of the estate of Errol David to any other person. Additionally, the Claimant also does not plead that the right to sue was assigned to him by his mother. Therefore, the representative capacity as set out by the Claimant in the proceedings on behalf of the estate is not in keeping with the CPR.

52. The Claimant in response submitted at page 10:

*“... it has already been observed that the fact Letters of Administration alone could be tendered to the Honourable Court as a result of intestacy connotes that the Claimant is joint or equitable beneficiary of residential property along with remaining surviving family of the deceased and therefore holds an interest in the matter. The pension of the deceased enumerated in ... derives from a different source of contract, namely that of employment, than from the right of representation, and therefore the Claimant presumes no entitlement to matters concerning the pension exclusive to the dependant but to the residential property shared with the surviving family and presumably to the incurred right to sue. “*

53. The Claimant further submitted at page 11 that: *“the Claimant is assented limited powers of attorney from the personal representative and is established in the names of parties as agent of the personal representative.”*

#### ANALYSIS

54. The intitulement of the Amended Statement of Case shows the Claimant is acting as the lawful attorney of Monica David. This issue has been dealt with earlier. Therefore, as beneficiary to the estate of the deceased the Claimant had to indicate the capacity he is bringing the claim. The requisite capacity is not reflected in the pleadings and according to ***Anthony Murray and Others v Dorothy Vierra / Dorothy Vierra V Anthony Murray and Others (supra)*** which states that the personal representative must be a party upon which an application can be made for representation. The Claimant has not established that capacity.

#### ISSUE 5

55. Whether the Claimant has locus to institute these proceedings under the CI Act.

#### LAW

56. Section 2(1) of the CI Act, provides:

*2. (1) In this Act, “dependant” means wife, husband, parent, grandparent, child, grandchild and any person who is, or who is the issue of a brother, sister, uncle or aunt.*

57. The Defendant submitted at paragraph 24, that the Claimant did not say whether he is an executor or administrator of the estate and can therefore only commence the action if he pleads that he is a dependant. However, no facts have been pleaded that he is a dependant. Additionally, the Claimant has not pleaded that there was a dependency relationship between him and the deceased.

58. In response the Claimant submitted at page 11:

*“From what the Claimant can apprehend regarding Part 8.5(4) of the Civil Proceedings Rules (1998) for stating capacity for action, surely by the term “representative” the Defendant could not be equating the personal representative of the estate with what the Claimant understands to be the representative party to the case. The Claimant is declared to the Honourable Court to be representing in the capacity of lawful attorney of the personal representative. Similar to the issue of the limited powers of attorney produced by legal professionals and ratified by the Registrar General, this designation of the Claimant has been prepared and entered into court record by legal professionals without incident only until the Defendant had gained opportunity to object. It is now appreciated by the Claimant that the personal representative has full powers to delegate the right to sue incurred as part of the estate of the deceased.”*

## ANALYSIS

59. The Claimant falls within the definition of a dependant of the deceased. However, he has not pleaded that he was a dependant of the deceased. Therefore, he has not satisfied that he can bring a claim under the CI Act.

## ISSUE 6

60. Whether the Claimant has instituted these proceedings for compensation under the CI Act within the time stipulated under the *Limitation of Certain Actions Chap. 7:09* (LCA).

## LAW

61. Section 3 of the LCA, provides:

*3. (1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say:*

*(a) actions founded on contract (other than a contract made by deed) on quasi-contract **or in tort**;*

*(b) actions to enforce the award of an arbitrator given under an arbitration agreement (other than an agreement made by deed); or*

*(c) actions to recover any sum recoverable by virtue of any enactment.*

*(emphasis added)*

62. Section 6 of the LCA, provides:

6. (1) *An action under the Compensation for Injuries Act shall not be brought if the death occurred when the injured person could no longer maintain an action and recover damages in respect of the injury, because of a time limit in this Act or in any other enactment or for any other reason.*

(2) *Where any such action by the injured person would have been barred by the time limit in section 8, no account shall, for the purposes of this subsection, be taken of the possibility of that time limit being overridden under section 11.*

(3) *An action under the Compensation for Injuries Act shall not be brought after the expiry of four years from—*

*(a) the date of death; or*

*(b) the date of knowledge of the person for whose benefit the action is brought whichever is later.*

(4) *This section has effect subject to section 11.*

Section 25(2) of the **Interpretation Act Chap. 3:01** states:

(2) *Subject to subsection (5), where in a written law a period of time is expressed to end on, or to be reckoned to, a particular day, that day shall be included in the period.*

63. In ***Mala Chamroo (Legal Personal Representative of the Estate of Anil Alvin Mahabir) v Richard David Rochford CV 2012-00309*** the Court interpreted the words ***the date of knowledge of the person for whose benefit the action is brought whichever is later.***

These words appear under section 5 of the LCA which does not apply to the CI Act. But they are provided for under section 6 of the LCA which applies to the CI Act. The Court addressed when time began to run for bringing a claim. It had to decide if time began to run on the date the Claimant received any legal or other advice; the date the Claimant was appointed representative of the estate of the deceased; or the date of death of the deceased.

64. At **paragraphs 15 and 16** the court stated:

*15. In **Halford v Brookes and another (1991) 3 All ER 559**, the English Court of Appeal considered section 14 of the Limitation Act, 1980 (“the English legislation”) which is similar to section 7 of our Act. Lord Donaldson MR stated at page 574 of the judgment as follows:*

*“The word (‘knowledge’) has to be construed in the context of the purpose of the section, which is to determine a period of time within which a plaintiff can be required to start any proceedings. In this context ‘knowledge’ clearly does not mean ‘know for certain and beyond the possibility of contradiction’. It does, however, mean ‘knowing with sufficient confidence to justify embarking on the preliminaries to issue the writ, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence”.*

16. Thus, 'knowledge of facts' for the purposes of section 14 of the English legislation therefore did not depend on knowing with certainty and confidence with the help of legal advice that a particular claim was available, since legal advice did not fall within the category of appropriate expert advice necessary for ascertaining knowledge of a fact.

64. Based on the learning *Halford v Brookes and another (supra)* the court in *Mala Chamroo (Legal Personal Representative of the Estate of Anil Alvin Mahabir) v Richard David Rochford (supra)* reasoned that time did not begin to run upon the receiving legal advice that a claim can be brought.

65. In *Sarah Young and Others v Lena Pegus and Others H.C.876/2008. CV.2008-00876* the Court did not begin to run at the time of appointment of the representative of the estate of the deceased. At paragraph 45 it stated:

*... in the judgment of the Court, to hold that time begins to run from the date of the grant of letters of administration to the Claimants would lead to an absurdity since it would mean that a claimant may take perhaps twenty years to obtain a grant of letters of administration and would in those circumstances be entitled to rely on the provisions of sections 5(3)(b) and 5(5) of the Act and to contend that he was within time to commence a claim for the benefit of the estate of the deceased.*



66. In the above cases, the Courts decided that based on the circumstances, time began to run on the date of death of the deceased.

67. The Defendant submitted at paragraph 28, as provided under the LCA, the action is statute barred and there had been no application to extend the time for the commencement of the action. The deceased died on 11 November 2012. The action was commenced by the Claimant on 11 November 2016. The time for the commencement of the Claim would have expired on the 10<sup>th</sup> November 2016 (4 years after the date of death of the deceased).

68. The Claimant responded:

*Part 4 of Compensation Act stipulates that action for the benefit of the dependant may be brought about with no designated time limit under agency of the dependant should no same action be brought about under agency of the administrator within six months of death of the deceased.*

#### ANALYSIS

69. Based on the reasoning above, the Claimant had knowledge of his father's death on 11 November 2012. Four years expired on the night of 10 November 2016. However the date of his knowledge or the death is not counted. The claim was filed on 11 November 2016, so this would have been within the period allowed.

## ISSUE 7

70. Whether a cause of action has been made out by the Defendant.

## LAW

71. In the matter ***Bertlyn Barker v Eastern Regional Health Authority and Ors***.CV 2014 – **01413** R. Mohammed J, in deciding whether enough was submitted to establish a cause of action in a medical negligence claim stated at ***paragraphs 46-47***:

*46. The law is clear that in medical negligence cases, the burden of proof rests on the Claimant to prove, on a balance of probabilities, medical negligence on the part of the defendant. As such it was for the Claimant to not only show that an injury was sustained, but further that it was as a result of medical negligence on the part of the Second Defendant in his treatment and management.*

*47. To prove a claim in negligence it must firstly be established that a duty of care existed between the parties, i.e. a duty of care was owed to the Claimant by the Defendant. There must also be a breach of that duty followed by damage or injury caused to the Claimant as a direct result of the breach, thereby creating the necessary causal link.*

72. The duty of care owed by a medical professional who treats a patient is set out in the case of ***Bolam v Friern Hospital Management Committee (1957) 1 WLR 582 at pages 586-587***, what is known as, the ***Bolam*** test. In that case McNair J stated:

*But where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not, is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. I do not think that I quarrel much with any of the submissions in law which have been put before you by counsel. Counsel for the plaintiff put it in this way, that in the case of a medical man, negligence means failure to act in accordance with the standards of reasonably competent medical men at the time. That is a perfectly accurate statement, as long as it is remembered that there may be one or more perfectly proper standards; and if a medical man conforms with one of those proper standards then he is not negligent.*

73. Lord Scarman in ***Sidaway v Governors of Bethlem Royal Hospital [1985] A.C. 871*** at **page 881** amplified the test by stating:

*... if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment.*

74. The ***Bolam*** test was applied with approval in this jurisdiction by the Court of Appeal in ***Dr. Patricia Deonarine v Rana Ramlal Civil Appeal No. 28 of 20032.***

75. R. Mohammed J in ***Bertlyn Barker v Eastern Regional Health Authority and Ors.*** (*supra*) at **paragraph 52** further stated with respect to the evidence required:

*52. Consequently, it is submitted that the Court must look at the expert evidence and determine whether, in all the circumstances of the case, the requisite professional standard of care was not reached. This requires firstly, that the medical expert evidence should demonstrate what should have been done, and secondly, that what was done fell below this standard.*

#### ANALYSIS

76. The Claimant in his pleadings indicated that the deceased was a known patient at the hospital. The complications that the deceased experienced on 9 November 2012, and any course of treatment provided by the staff of the Accident and Emergency ward, should reflect the medical condition for which the deceased was undergoing treatment. The Claimant alleges that this was not done, and that the treatment provided to the deceased was in relation to symptoms of a stroke. The Medical Certificate revealed that the death of the deceased was a result of his medical condition. No other documents have been provided or referred to by the Claimant in the form of medical notes or doctor's opinions to the pleadings to make an informed judgment as to whether any breach of duty has been made out. The Claimant bases the claim on his observations on that day and what was told to him. The amended

statement of case identifies that no urinary or blood tests were done; knowing of the medical history there was a failure to check for a urinary tract infection; failure to take steps to deal with an enlarged prostate. The amended Defence disputes that the deceased was not treated properly for what was presented and said complete blood and urine tests were done; augmentin was prescribed for an infection; his blood sugar, blood pressure and respiration was monitored. He was given a laxative for constipation. His 38 degree temperature was treated. The cause of death was recorded as a heart attack secondary to the BPH. The defence noted the deceased was 84 years old.

77. There is no specific pleading as to what ought to have been done additionally. There is also no link between the cause of death and what the doctors and staff of the defendant ought to or could have done differently. The claim lacks the connecting links to show medical negligence. There is nothing independent of the defendant's records to show what were the negligent acts. Undoubtedly there was a duty to the deceased. How the alleged breaches connect to his death is not established by the pleaded case. There were two causes of death identified. How anything the defendant omitted to do or did contributed to his death cannot be identified in the pleaded case of the claimant. Therefore, in any event, it is my view on the merits that a claim in medical negligence would ultimately fail. The court is entitled to use its case management powers to prevent a case being advanced which on the pleadings is bound to fail for lack of facts capable of showing medical negligence. Much seems to be hinged on the post mortem certificate which does not provide the link to any act or omissions of the defendant.

78. In the circumstances for the various reasons set out above the claim is dismissed. It must be terribly difficult for the claimant to bear this loss and it may be that he is quite understandably searching for an answer to his father's death. This does not, obviate the need for the case to be proved. Unfortunately, it does not seem to me that this claim can go forward at all or, if it could, it would fail in any event<sup>i</sup>. I will hear the parties on costs.

Ronnie Boodoosingh

Judge

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<sup>i</sup> I am grateful to Mr Shane Pantin, JRC, for his assistance in this matter.