

## THE HIGH COURT

[2017 No. 631 P.]

BETWEEN

ALAN THAWLEY

PLAINTIFF

AND

RONAN GAVIN

DEFENDANT

**RULING of Mr. Justice Barr delivered on the 8th day of February, 2018****Introduction**

1. This action concerned a wrongful death action brought by the plaintiff in relation to the death of his wife, Malak Kuzbary Thawley (hereinafter "*the deceased*") on 8th May, 2016. It was alleged that her death was caused by the negligence of the defendant, who was sued as a representative of the National Maternity Hospital, Holles Street, Dublin. Liability had been conceded by the defendant. The plaintiff brought the action on his own behalf and on behalf of the seven other statutory dependants listed in the Personal Injuries Summons. They are resident in the United States of America.

2. The action commenced on 12th January, 2018. A settlement was reached between the parties out of court on 16th January, 2018. This ruling concerns the apportionment of the solatium damages among the statutory dependants.

**Background to the Present Application**

3. Following settlement of the action on 16th January, 2018, the plaintiff's solicitor, Ms. Caoimhe Haughey, sent explanatory letters and an Authority form to each of the statutory dependants by email at 18:03hrs on 19th January, 2018. The explanatory letter explained to the statutory dependants that the action had been brought by the plaintiff pursuant to s. 48 of the Civil Liability Act 1961 (as amended). They were further told that if they so wished, they could make a claim to be entitled to some portion of the sum of €35,000 which was the maximum amount recoverable as solatium. In the Authority form, they were asked to confirm whether they wished to participate in the claim for solatium to be assessed and determined by the High Court, or to confirm that they did not wish to participate in such claim.

4. The statutory dependants in respect of whom the wrongful death action was brought, were as follows: the plaintiff (the deceased's husband), Sam Kuzbary (deceased's father), Fadia Jabri (deceased's mother), Jennifer Lynn Kuzbary (stepmother), Abdalrazzak Al Olabi (stepfather), Rouwaida Hakim Kuzbary (grandmother), Miriam Kuzbary (half sister), and Omar Al Olabi (half brother). All of the statutory dependants are of full age, with the exception of Omar Al Olabi, who is fourteen years of age, having been born on 20th January, 2004.

5. The matter was listed before this Court on 23rd January, 2018, for the purpose of ruling the apportionment of the solatium damages. The application was moved on the basis of an affidavit sworn by the plaintiff on 23rd January, 2018. In that affidavit, the plaintiff averred that the deceased's grandmother and her half sister, had each indicated to him that their preference was that any entitlement that they may have to a share of the solatium, should pass to him as the deceased's lawful husband. An Authority signed by the deceased's grandmother to that effect was exhibited to the affidavit.

6. At that hearing, it was erroneously, indicated to the court that none of the other statutory dependants had indicated whether or not they wished to share in the solatium damages in response to the letter from the plaintiff's solicitor dated 19th January, 2018. In those circumstances, and in light of the averments contained in Mr. Thawley's affidavit, the court ruled that the entire of the solatium damages should be paid to the plaintiff.

7. It appears that on returning to her offices later that day, Ms. Haughey discovered that unknown to her, the deceased's father, Mr. Sam Kuzbary and the deceased's stepmother, Ms. Jennifer Lynn Kuzbary, had on 22nd January, 2018, sent emails at 20:48hrs attaching their completed Authorities, indicating that they wished to have provision made for them from the solatium damages. On Friday, 26th January, 2018, Ms. Haughey applied to the court, to have the matter relisted for further consideration. The court acceded to that request and listed the matter for 10:45hrs on 1st February, 2018.

8. On 29th January, 2018, Ms. Haughey sent a detailed letter to Mr. Sam Kuzbary and to Mrs. Jennifer Kuzbary outlining how the error had occurred and accepting full responsibility for the fact that their signed Authorities, indicating a wish to be included in the solatium damages, had not been brought to the attention of the court. She further informed them that she had returned to court and obtained an order reopening the matter, which was to be heard on 1st February, 2018. They were asked to state in writing the reasons and in what circumstances they believed that the court should make provision for them out of the solatium damages.

**Emails from Mr. and Mrs. Kuzbary**

9. A number of emails were sent by Mr. and Mrs. Kuzbary on 29th January, 2018, and on 30th January, 2018, wherein they set out their views on the apportionment of the solatium damages. In an email dated 29th January, 2018, sent at 16:08hrs, Ms. Jennifer Kuzbary stated as follows:-

*"I have read your letter. My signed participation, so called, in your scheme was merely to support Malak's father and other blood relatives. My immediate response to your original letter was to decline any involvement. The tragic death of my stepdaughter is bad enough, and the only people who ought to receive any kind of monetary 'award' are her husband and her biological relatives, in particular her brother. I would say sister, too but she declined participation.*

*I will not be shamed by someone who knows nothing of the truth behind our alleged 'strained relations' with a very well loved daughter."*

10. At 17:12hrs on the same date, Ms. Kuzbary sent a postscript to her email which was in the following terms:-

*"P.S. my apologies, Ms. Haughey for misspelling your name. By the way, I did not notice any kind of apology from you towards us for the 'genuine inadvertence and consequences' of your alleged 'error'. I am led to believe this was a lawyer*

*trick, but I could be wrong."*

11. In a further postscript sent by email at 18:22hrs on 29th January, 2018, Ms. Kuzbary stated:-

*"If you want truth to go 'round the world', you must hire an express train to pull it; but if you want a lie to go 'round the world', it will fly; it is light as a feather and a breath will carry it." – Reverend Charles Haddon Spurgeon*

12. Mr. Sam Kuzbary also sent a number of emails. The first was sent at 16:32hrs on 29th January, 2018, in which he stated:-

*"Thank you for handling this matter.*

*After consultation with the key individuals whom birthed and raised our late daughter which are myself, her mother Fadia, her stepmother Jennifer and her stepfather Abd, we are all agreed to participate in order to render our shares to her little brother.*

*It is unfair at this point to attempt arguing false information presented to the court, especially that Malak was killed and cremated thousand of miles away from us. Our expressions were turned down and objected to by her husband and we do not have any desire to hear from him again or see him anymore.*

*Her husband did not raise her. Her husband did not immigrate her to the US. Her husband did not tend to her schooling. Her husband did not change her diapers, etc.*

*For my wife and me to be present in the upcoming hearing on February 1st, we will need to spend in excess of \$6,000 for round trip air fare not including lodging etc.*

*As my wife already advised you in writing, this award should only go to her brother, not her husband. After all, her husband is responsible for her pregnancy that went south, and required appropriate medical attention and not a late night emergency clinic visit to an understaffed so called maternity hospital.*

*As I told her husband, God Almighty lifted her away from him and us and gave her eternal home in heaven."*

13. Some hours later at 20:20hrs, Mr. Kuzbary sent the following email:-

*"Reading your purported claims about missing emails, communication from me and my ex-wife's husband is a false story. You know it and we know it.*

*I now question your integrity and honesty in this process based on your claims, since it is a fast moving case.*

*I have copied the court to hold you and all for your proclaimed falsity.*

*We are her grieving family and we demand that her little brother should be the only one entitled to any compensation.*

*You should note that she was killed on the US Mother's Day 2016.*

*For you to make the claims listed in your briefs based on a false affidavit by her junior, irresponsible husband is absurd. Contact his own family here in Houston and ask how good of a son he is for his parents.*

*You have no earthly idea and the court should know the character of the individual involved in here, her husband.*

*The monies awarded are crumbs, but your proclaimed oversight of timely returned emails is outlaw and criminal. The honourable court should make a note of that when deciding during re-evaluation on February 1st.*

*Our travel expenditure to take part in this upcoming procedure will exceed the amount you are talking about. We do not find our money hanging off a tree in the back yard. We work hard for it, and Malak's little brother would be much worthy of receiving it than spending it on travel to come and participate in your contaminated procedure."*

14. A copy of the aforementioned email appears to have been resent by Mr. Kuzbary at 02:20hrs on 30th January, 2018. One hour later at 03:23hrs, he sent the following email to Ms. Haughey:-

*"Furthermore, Ms. Haughey*

*It appears that you and your office had acted promptly on returned emails received from my younger daughter, Malak's sister, Miriam and her grandmother, who does not read or write in English, being an Arab from Syria nor does she have an email. But you opted to claim to the honourable court that your so called writer overlooked our correspondence. What a false joke Ms. Haughey. I hope the honourable judge presiding sees through it.*

*The honourable court can be provided with copies of our transmission upon request. You know.*

*More importantly, I wonder if you have ever lost a child of your own and you get faced with this pile of crap. Your country's delinquent medical staff killed my kid. They did not have a tool to stop the bleeding they inflicted. They did not have blood to put in her system. They referenced her as a Syrian refugee and not a human being.*

*There is not a day that goes by that my eyes do not produce tears on their own for her loss. How dare you diminish our grief counsellor. How dare you?"*

15. Subsequent to the hearing held on 1st February, 2018, Mr. Sam Kuzbary sent a number of emails to Ms. Haughey. In an email dated 5th February, 2018, sent at 16:15 hours, Mr. Kuzbary stated that the court should be informed that it was now more than a year and a half since his daughter had passed away and they had not received a single card or memorial on the anniversary of her passing. He went on to state that although they had been born abroad, they were no different from other parents or families, who had suffered the sudden loss of a child. He stated that a nice word in memory of the dead went a long way, especially to the parents. He noted that children were supposed to bury their parents, not the other way around. He went on in the email to make a

number of comments in relation to the plaintiff, which it is not necessary to repeat in this ruling.

16. Attached to that email, were a number of emails that had passed between Mr. and Mrs. Kuzbary and the plaintiff in the days subsequent to the deceased's death and in the days leading up to her funeral in Dublin. Again, it is not necessary to set out the content of those emails in this ruling. Suffice it to say that while initially cordial, relations between the plaintiff and the other members of the family seem to have deteriorated sharply in relation to the question of their attending the funeral. This was email correspondence which passed between the plaintiff and members of the deceased's family in the immediate aftermath of her tragic death. While the content of these emails may well explain the current strained relations between the statutory dependants, I do not think that they assist the court greatly in determining what apportionment should be made of the solatium damages.

17. In a further email dated 6th February, 2018, sent at 03.00 hours, Mr. Sam Kuzbary told Ms. Haughey that the response which he had furnished to her in previous emails represented the views of the entire family including those of his wife, Jennifer, his ex-wife Fadia, her husband Abd and their son Omar. The court was also furnished with an email sent from Ms. Jennifer Kuzbary to Mr. Sam Kuzbary dated 5th February, 2018, in which she thanked her husband for the emails which he had sent. She went on to state that:-

*"This horrible death has affected us all and while there is no monetary compensation that could ever bring Malak back, her younger brother Omar especially deserves the respect and dignity of at least something of value from this tragedy."*

Finally there was an email dated 6th February, 2018 from Mr. Aboalrazzak Alouabi, the deceased's stepfather, to Mr. Kuzbary, authorising him to speak on behalf of "us all" in this matter.

### Conclusions

18. I have considered all the circumstances of this case including the emails from Mr. and Mrs. Kuzbary, with some care. I accept the explanation given by Ms. Haughey, that the reason why the signed Authorities, which had been furnished by Mr. and Mrs. Kuzbary, in which they indicated that they wished to have a share in the solatium damages, were not brought to the attention of the court on 23rd January, 2018, was due to the fact that these emails, which came into her office at approximately 20:48hrs on the previous evening, had not, in fact, been brought to her attention prior to her attending at court on the following morning. Ms. Haughey is well known to this Court for a number of years as a diligent and hardworking solicitor. In such role, she is also an officer of the court and as such, she owes a duty directly to the court, as well as a duty to her client. I am satisfied that she has always discharged her duties to the court in an entirely honourable way.

19. I am further satisfied that once Ms. Haughey became aware of the Authorities which had been furnished by Mr. and Mrs. Kuzbary, she immediately took steps to have the matter relisted for further consideration before the court and did so at a time before the formal Order of the court had been perfected. It was in these circumstances that the court agreed to relist the matter for further consideration on 1st February, 2018. In so doing, I am entirely satisfied that the plaintiff's solicitor, Ms. Haughey, acted in a proper fashion.

20. When the matter did come before the court on 1st February, 2018, counsel representing the plaintiff, was mindful of his duty to represent the views and interests of all the statutory dependants named in the personal injury summons. To that end, Mr. Keane, S.C, very properly put before the court all the emails which had been furnished by Mr. and Mrs. Kuzbary. He did not attempt to water down or discredit those emails, but merely noted that they were at odds with the content of the affidavit which had previously been sworn by the plaintiff.

21. While it was regrettable that the signed Authorities furnished by Mr. and Mrs. Kuzbary were not before the court when it made its initially ruling on 23rd January, 2018, the matter has now been rectified and I am satisfied that in sending a number of emails, they have been given a full opportunity to set out whatever case they wish to make in relation to the apportionment of the solatium damages. Accordingly no prejudice or injustice has arisen by virtue of the error on the part of Ms. Haughey in failing to notice that she had received the signed Authorities from Mr. and Mrs. Kuzbary and in failing to bring them to the attention of the court on 23rd January, 2018.

22. Turning to the substantive issue before the court on this application, the position would appear to be as follows: the deceased's grandmother and half sister have indicated that they wish that their entitlement to any part of the solatium damages, should go to the plaintiff as the lawful husband of the deceased. The deceased's mother, stepfather or half-brother, have not returned any signed Authority. The deceased's stepfather has indicated that the views of Mr. Kuzbary represent their views in the matter.

23. As outlined above, Mr. and Mrs. Kuzbary have articulated their views as to how the solatium should be apportioned. They object to the plaintiff getting any of the solatium damages. They do not make any claim to the solatium on their own behalf, but have expressed the view that the entire of the solatium damages should go to the deceased's half brother.

24. The nature of the solatium damages provided for under the Civil Liability Act 1961 was considered by Lavery J. in *Cubbard v. Rederif Viribus Unitis & Galway Stevedores Limited* [1966] 100 ILTR 40, where the learned judge stated as follows:-

*"The view I take of the section is that it is not intended to provide monetary compensation for every member of the family. If it were there would be no end to it. It would mean that there would be damages recovered by a group of people that ordinarily would be very large. I think the section must be considered in the light of some real intense feeling of being grievously affected by the death. I know perfectly well that every member of the family feels the loss of a brother, especially those who are living with him."*

25. In *McDonagh v. McDonagh* [1992] 1 I.R. 119, Costello J. concluded that a girl whose mother was killed in a traffic accident, when the girl was one and a half, was too young to have suffered distress, "whatever about emotional depression" as a result of her mother's death. He considered, however, that the girl's sister aged four at the time of the fatal accident, must have suffered greatly and he divided the maximum statutory amount between her and the parents of the deceased woman.

26. In *Ivanova v. Societe Air France* [2013] IEHC 567, Irvine J. noted that the deceased's father had had little or no involvement in his son's upbringing and according to the deceased's mother, had not provided the deceased with financial or other support. The judge awarded the entire of the solatium damages to the deceased's mother. She noted that the father had waived any entitlement in such payment.

27. It is extremely unusual for the court to be faced with a situation where there is a dispute between the statutory dependants as to the apportionment of the solatium damages among them. However, where such a dispute arises, the court must do the best that it can to apply the provisions of the Act in a fair and just manner. In this case, there are a number of facts which appear to be beyond

dispute. Firstly, it appears that the deceased's mother separated from the deceased's father, when the deceased was five years of age. Thereafter, she did not appear to have any further input into the deceased's upbringing. Secondly, it appears that when the deceased was aged nine, guardianship of her was transferred from her father to her grandmother. Thereafter, it was her grandmother who looked after rearing the deceased in her late childhood and teenage years. Thirdly, while the court is not aware of the date when the deceased's stepfather commenced his relationship with the deceased's mother, the statement by the plaintiff that the deceased had no sibling or familial relationship with Mr. Olabi's son, who is now fourteen years of age, appears plausible on the evidence before the court.

28. It is against that background, that I must consider the representations made by Mr. and Mrs. Kuzbary. I accept the statement made in the email by Mr. Kuzbary that notwithstanding the events which had transpired earlier in the deceased's life, he has been greatly affected by the untimely and tragic death of his daughter. I accept that it is reasonable for a father to suffer grief and anguish over the death of a daughter, even where he may have had somewhat strained relations with her over a number of years. Although there is no evidence that this is so, I am prepared to accept that similar emotions may be experienced by the deceased's biological mother, notwithstanding that she does not appear to have had any meaningful engagement with the upbringing of her daughter since she was five years of age. In these circumstances, I award the deceased's father, Mr. Sam Kuzbary the sum of €1,000 out of the solatium damages. If he wishes to donate that to the deceased's half brother, that is a matter for him. I further award the sum of €1,000 to the deceased's mother, Ms. Fadia Jabri.

29. Ms. Jennifer Kuzbary does not seek any part of the solatium damages on her own behalf. She merely expressed the view that they should be paid to the deceased's half-brother. The deceased's stepfather, Mr. Olabi, has indicated that he adopts the position as set out by Mr. Kuzbary in his emails, as apparently does his son. I am not satisfied that in the circumstances of this case, it is appropriate to make any payment to any of them. It appears that their relationship with the deceased was extremely limited.

30. As the deceased's grandmother and half-sister have waived any claim, I award the balance of the solatium damages in the sum of €33,000 to the plaintiff.