LaFONDIARIA INSURANCE COMPANIES, LTD., by and through the LIBERIAN TRADING AND DEVELOPMENT CO., LTD., "TRADEVCO," Appellant, *v.* DAVID HEUDAKOR and GBORMAH HEUDAKOR, an infant, by and through her father, DAVID HEUDAKOR, Appellees.

APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT GRAND BASSA COUNTY.

Argued March 13, 14, 1973. Decided April 26, 1973.

1. Payment of dowry to the parents of a woman will seal a marriage under customary law.
2. A parent who may be only the putative father of an infant may still bring an action in behalf of the infant in a representative capacity.
3. A single cause of action may not be founded on theories of both contract and tort.
4. The insured and not the insurer is the real party to be sued in an action against a tortfeasor.
5. Special damages must be alleged with particularity and proved beyond speculation.
6. A defendant's restriction to a bare denial upon dismissal of the answer does not deprive defendant of the right to cross-examine.
7. Nor does such restriction to a bare denial exempt the plaintiff from the need to prove the essential allegations in the complaint.
8. In 1967, when this case arose, no action for wrongful death could be brought by the beneficiaries of a deceased for their losses sustained, no authority therefor having been created by the Legislature and the right to such action being nonexistent under the common law.
9. The constitutional guarantee of a remedy for an injury by due course of law means, in effect, the guarantee to any person injured of those remedies provided for all by legislative enactment.

A truck owned and operated by AGIP (Liberia) Ltd. in the course of its business by an employee, struck and instantly killed Martha Heudakor on October 10, 1967. The insurance company representing AGIP Ltd. settled with the administrator of the estate of the deceased. Thereupon an action was commenced in damages against the insurance company by the husband of the decedent, for himself and on behalf of his infant daughter, for the

loss sustained by them as a result of the death of the wife. A jury verdict was returned for plaintiffs in the amount sought by them. Defendants appealed from the judgment. The Supreme Court, after expressing doubt as to the marital status of the father, addressed itself primarily to the nature of the action, characterizing it as an action for wrongful death, as distinct from the survival of an action permitted by law, in which the estate recovers for the damages sustained by deceased, including pain and suffering, if any. Since the present action was by plaintiffs for the losses sustained by them as a consequence of the death, the theory of the action could not be sustained, for at the time of the commencement of the suit no statute permitting actions for wrongful death had been enacted. *Judgment reversed.*

Christian Maxwell, James G. Bull, and *J. Dossen Richards* for appellants. *Joseph Findley* for appellees.

MR. JUSTICE HENRIES delivered the opinion of the Court.

According to the record certified to this Court, on October 18, 1967, a truck belonging to AGIP (Liberia) Ltd., being operated by one of its employees while on the company's business, knocked down and ran over Martha Heudakor, who died instantly. The plaintiffs alleged that the accident was caused by the gross negligence of the operator of the vehicle and claimed damages in the amount of $20,488.75, as reimbursement for funeral expenses and compensatory damages. They demanded full settlement of this claim from AGIP, which referred this claim to its insurer, the appellants in these proceedings. The plaintiffs then communicated with the insurers who informed them that compensation had been paid to Zarnie Johnson, the legally appointed administrator of the intestate estate of Martha Heudakor, and that he had exe-

cuted a release to the insurers, thus closing the matter. Upon receiving this negative response from the insurers, David Heudakor, for himself and his minor daughter, Gbormah, commenced this action of damages for the death of his wife and the child's mother, in the Circuit Court of the Second Judicial Circuit, Grand Bassa County, against LaFondiaria Insurance Companies, Ltd., of Florence, Italy, through its representatives in Liberia, the Liberian Trading and Development Company, Ltd. (TRADEVCO).

The defendant filed an answer, moved to dismiss the complaint and the motion was denied. The trial court, in ruling on the law issues, dismissed the answer and placed the defendant on a bare denial. Thereafter, a jury trial was held and a verdict was returned for the plaintiffs, awarding them the damages which they sought. It is from this jury verdict and judgment of the trial court that the defendant has appealed.

Several interesting issues were raised in the consideration of this case which will be inversely considered: (1) whether the trial court had jurisdiction over the subject matter; (2) whether this action was one which falls under the survival of causes statute; (3) whether the special damages pleaded were proven; (4) whether the appellant was the proper defendant; and (5) whether the plaintiffs had the legal capacity to sue.

The plaintiff husband, in his complaint, alleged that he was the lawful husband of the deceased, Martha Heudakor, who was also the mother of their minor daughter, Gbormah, at the time of her death and, therefore, he had brought the action on behalf of himself and the child. Checking through the certified record we discovered a question put to appellees' witness, Yarbar, on direct examination.

"Q. Tell us if you can whether Martha Heudakor was the wife of David, if he married her, how and by what means?

"A. Yes. I know that she was his proper wife; David and Martha were loving and her parents came to see us to settle the woman palaver so I paid the dowry in an amount of $9.00 and they turned Martha over to me and I tendered some money to her parents and she became my wife and she lived with me for 7 years and she died."

From this answer it appears that Yarbar, instead of David, was the husband of the decedent at the time of her death, yet the appellees made no effort to explain away the doubt created by this damaging testimony of their own witness. It is clear that Yarbar did meet the requirements for marriage in accordance with customary law, insofar as the payment of dowry to the parents of the woman is concerned, as set forth in the Aborgines Law.

"The legal dowry for a woman shall be in accordance with tribal custom but in no case shall exceed forty dollars. Dowry shall be paid only to the parents of the woman, or if the woman is without parents or relatives standing *in loco parentis,* she shall be considered the ward of the Tribal Authority and the dowry shall be paid to it.

"If a woman declares her resolve not to continue living with her husband, the husband may appeal to her parents for a refund of dowry. In case the family refuses or is unable to refund the dowry, she shall remain his wife until the family shall be willing and able to make the refund.

"No person except the appropriate member of the woman's family shall be permitted to refund to the husband the dowry paid by him for his wife." 1956 Code 1:404.

See also *Teah* v. *Tetee,* 3 LLR 407 (1933). There is no indication that the decedent renounced her relationship with Yarbar and returned to her own parents, who in turn refunded the dowry, and that David Heudakor

subsequently married or remarried her prior to her death.

Since the child, Gbormah, is a minor, and there is no evidence to indicate that she is not the child of David Heudakor and the decedent, it was proper for him to bring this action on behalf of the child. Under our Civil Procedure Law an infant or minor child must sue through one of the parents, a representative, or a friend or a guardian *ad litem*. Rev. Code 1:5.12; see also *Nimley* v. *Kaba,* 14 LLR 82 (1960).

As regards the appellees' capacity to sue, it is clear that David, in a representative capacity, could bring the action on the child's behalf, but there is doubt that he could do so on his own behalf, since it has not been established satisfactorily that he was the husband of the deceased at the time of her death.

The second issue is whether the appellant was the proper defendant in this action. As far as the facts go, AGIP, and not the appellant, was the owner and employer of the operator of the vehicle which killed the decedent, yet AGIP was not made a party to this suit. However, the appellees contend that this suit was based upon a contract, not a contract between the parties to this action, but the insurance contract between AGIP and the appellant. Nonetheless, they failed to join AGIP as a party or to introduce the contract into evidence. While it is true that appellant was the insurer, and that under the ordinary automobile liability insurance policy the insurer undertakes to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or death sustained by any person caused by accident and arising out of the ownership, maintenance, or use of the automobile, yet we have found no law which authorizes the injured party to substitute the insurers for the insured, the real party, in an action of damages caused by a vehicle. The proper procedure would have been to sue the insured and join the insurer as a party defendant. This not having been

done, we hold the view that appellant was not the proper defendant.

In passing, it should be noted that the appellees contend that their approach to this action was two-pronged, that is to say, that the action was based partly on contract and partly on tort. At this juncture we feel impelled to state, as did Mr. Chief Justice Grimes in *Cavalla River Co., Ltd.*, v. *Pepple,* 4 LLR 39, 49 (1934), that "In Liberia the distinctions between actions *ex contractu* and *ex delicto* were always carefully maintained from the very foundation of this Republic, and still exist." Although under the Civil Procedure Law, Rev. Code 1:1.3, there is only one form of civil action, and the distinction between actions at law and suits in equity and the form of those actions and suits heretofore existing are abolished, yet the substantive distinctions between actions on contracts and those founded in tort still exist. Consequently, where there is a blending into one of two incompatible causes of action as though they were cognate, the action is dismissible on the ground of duplicity. *Henrichsen* v. *Moore,* 6 LLR 351 (1939).

The third issue is whether the special damages pleaded were proven. The appellees sought recovery of damages in the amount of $20,488.75, of which $1,288.75 was for funeral expenses and the remaining $19,200.00 was for the care of the two-year old child, Gbormah, until she reached her maturity at eighteen, at the rate of $1,200.00 per annum. Appellees contend that they proved these special damages by their introduction and admission into evidence of two letters written to counsel for plaintiffs by the attorneys for the insurance company, dated February 5 and 14, 1968, in which they declined to deal with the plaintiffs, having settled the matter with the administrator of the deceased's estate, as they contended. Nothing else of substance is contained therein.

The appellees argue that these letters constituted admissions that appellant recognized the right of compensa-

tion for the injury complained of, but that they made payment to Zarnie Johnson, the administrator, instead of appellees; that the admissions in these letters were never denied by appellant. Moreover, appellant in its answer never denied the quantum of damages prayed for. Therefore, it is taken to have admitted appellees' claim.

There are two aspects to this contention: (1) whether the failure to join issue with respect to the quantum of damages alleged by plaintiffs released them from proving special damages, when defendant was placed on a bare denial; and (2) whether the mere admission of these documents into evidence constituted sufficient proof of the special damages. As to the first aspect, it is settled that special damages must be particularly alleged and affirmatively proved. Every item of the amount claimed must be proved, and proved in such a manner as to leave no doubt that the plaintiff is entitled to recover it. *Kashouh* v. *Cole,* 15 LLR 554 (1964); *Vianini Co.* v. *Cole,* 16 LLR 95 (1964). With this principle in mind, it is necessary to remark that, although the dismissal of a defendant's pleading places him on a bare denial of the facts alleged in the complaint, it does not deprive him of the right to cross-examine, on proof of allegations contained in his adversary's pleadings, or documents filed with those pleadings; nor does it exempt the plaintiff from proving all the essential allegations set forth in the complaint. The defendant's restriction to a bare denial does not necessarily decide a civil case in favor of the plaintiff. *Salami Bros.* v. *Wahaab,* 15 LLR 32 (1962). We are, therefore, of the opinion that it was incumbent upon appellees still to prove with particularity the special damages they pleaded.

As to the second aspect of this issue, it is significant that, except for the introduction into evidence of these two letters, nowhere in the record of the trial of this case was any effort shown to have been made to prove that it would cost $1,200.00 a year to take care of the child.

Not a single receipt was introduced into evidence to show the expenditure of any amount for funeral expenses. While it is proper for documentary evidence which is material to issues of fact raised in the pleadings, and which is received and marked by the court, to be presented to the jury, yet if the evidence has no probative force, or insufficient probative value to sustain the proposition for which it is offered, its mere admission adds nothing to its worth and it will not support a finding. Generally, in order to authorize a recovery of damages for death resulting from a wrongful act, the evidence must show the extent and amount thereof or furnish facts and data as a basis from which the jury may approximate the proper amount with reasonable certainty. 25A C.J.S., *Death,* § 129.

In *Vianini Co.* v. *Cole, supra,* at page 97, Mr.Justice Pierre spoke for this Court on the point.

> "It is our opinion that specific sums of money asked for as special damages must be based upon definite and certain knowledge as to their correctness; and in such eventuality, this must be testified to and proved at the trial in order to justify a judgment awarding such sums."

This is still our view and, therefore, we do not find that the appellees clearly proved the amount of damages awarded by the jury. It is not sufficient to leave the court with speculative calculations and conjectures.

The fourth issue is whether this action falls within the survival of causes of action statute as contended by the appellees.

> "Except as otherwise specifically provided by statute, every cause of action shall survive the death of every person in whom or against whom such cause of action has accrued, and every cause of action for damages caused by an injury to a third person shall survive the death of such third person." Civil Procedure Law, L. 1958–59, ch. XLI, § 169(1).

This case is one of first impression in this jurisdiction insofar as it concerns the survival statute which operates as a restriction upon the common law rule embodied in the maxim "a personal action dies with the person." The general interpretation of survival statutes is that by such statutes causes of action for injuries to the person are made to survive the death of the injured person whether the death results from the injury or from some other cause. Hence, the distinction between a survival statute and a wrongful death statute is that, although originating in the same wrongful act or neglect, the cause of action which survives is for the wrong to the injured person, while the action for wrongful death is for the wrong to the beneficiaries. 16 AM. JUR., *Death,* § 65. Another important difference between the two types of statutes may be that where death is instantaneous, or substantially so, there can be no cause of action under the survival acts, since the decedent had no time to suffer any appreciable damage, and so no cause of action ever vested in him; but the suddenness of death is no bar at all to an action under the death acts. 16 AM. JUR., *Death,* §§ 84, 85. Basically the survival statute authorizes the survival of the action which the decedent herself might have maintained. Moreover, the survival statute must be read in conjunction with the Civil Procedure Law as provided in the Injuries Law, 1956 Code 17:14: "The provisions of this Title are to be considered as annexed to, incorporated in, and controlling the provisions of the Civil Procedure Law, except chapter 24." We, therefore, must refer to the Civil Procedure Law.

"Substitution in case of death.

"1. In general. Except as otherwise specifically provided by law, if any party to an action dies while such action is pending before any court in this Republic, the action may be continued by or against the executors, administrators, or other legal representatives of the deceased party or parties in accordance

with the provisions of this subchapter and the statutes relating to survival of actions." Rev. Code 1:5.31.

Reading these sections together it is our opinion that section 169(1), *supra* contemplates the survival of an action, and therefore the object of the statute is to continue the cause of action which the person injured had. Thus, the right to be enforced is not one springing into existence from the death of the decedent, but is one having a previous existence with the incident of survivorship derived from the statute itself.

In the case at bar, Martha Heudakor did not commence an action, because she died instantly, and furthermore the plaintiffs are not seeking damages for a wrong done to the decedent, but for a wrong done to themselves as a result of the loss of decedent, and therefore the action is not one which comes under the survival statute.

The final issue is whether the trial court had jurisdiction over the subject matter. It is clear from the complaint in this action that the plaintiffs are seeking damages for the loss sustained as a result of the wrongful death of the alleged wife and mother. The action is brought on their own behalf, and not on behalf of the decedent, to compensate themselves for the pecuniary loss caused by the destruction of the life of a person on whom they probably depended for maintenance or assistance. Thus, the action proceeds on the theory of compensating the beneficiaries, in this case the appellees, for loss of the economic benefit which they might reasonably have expected to receive from the decedent in the form of support, services, or contributions during the remainder of her lifetime if she had not been killed. Hence, it is our opinion that this suit has all of the elements of a wrongful death action, a novelty in this jurisdiction.

Having established this fact, we must next determine whether such an action is cognizable before the courts of this Republic. The appellees relied on the Injuries Law, particularly the survival statute, section 169(1), *supra,*

which we have already dealt with. We would like to state further that, according to the Injuries Law: "The object of a civil action for injuries is to indemnify the injured person, not to punish the injurer; therefore, it follows that the measure of damages is the actual amount of the loss or inconvenience sustained by the injured person without any reference to the degree of misconduct of which the injurer may have been guilty." 1956 Code 17:11. It is clear from this section that the intent of the Legislature was to compensate the injured person himself for the loss or inconvenience he sustained; and if he died after the commencement of the action, the action survived him. In that event, the damages awarded go to the estate and not to the beneficiaries. The Legislature did not intend, by the Injuries Law or survival statute, to compensate others for death resulting from injuries to another person. This is borne out by the new Vehicle and Traffic Law.

> "1. Liability of owner. Every owner of a vehicle used or operated on any highway to which this title is applicable shall be liable and responsible for death or injuries to a person or property resulting from negligence in the use or operation of such vehicle in the business of such owner or otherwise, by any person using or operating such vehicle with the permission, express or implied, of the owner." Rev. Code 38:51(1).

The difference between the statutes is clear, for this particular section does afford the right to recover for wrongful death caused by the negligent use of an automobile. But, alas, this statute was enacted after the instant case had commenced.

Wrongful death is the death of a human being occasioned by the negligence or wrongful act of another. "At common law a cause of action for personal injuries resulting in death terminates on the death of the victim or the wrongdoer. And it is generally accepted that the in-

fliction of death did not create a civil liability at common law." 22 AM. JUR., 2nd, *Death,* § 1. This being the case, no action could lie to recover damages for such wrongful death, no matter how close the relation between the deceased and the plaintiff, and how clearly the death may have involved pecuniary loss to the latter. 16 AM. JUR., *Death,* § 44.

The common law rule that no action would lie for wrongful death caused great hardship and pain for many persons and in order to avoid such hardships many acts were passed, the first of which was Lord Campbell's Act, passed by the English Parliament in 1846. It provided that

> "whenever the death of any person is caused by the wrongful act, neglect, or default of another, in such a manner as would have entitled the party injured to have maintained an action in respect thereof if death had not ensued, an action may be maintained if brought within twelve months after his death in the name of his executor or administrator, for the benefit of certain relatives, and that the jury may give such damages as they may think have resulted to the respective persons for whose benefit the action is brought." 22 AM. JUR., 2d, *Death,* § 2.

This act was followed in the United States and Canada by statutes modeled after it, and having in view the same general purpose as the English Act.

Since no action for wrongful death was maintainable at common law, and since the right to bring such an action was begun by an Act of the English Parliament, followed by legislative acts in the United States and Canada, it follows that the right to maintain such an action must be created by statute. This being so, if the right to maintain such an action and to recover the damages allowed therein is not expressly given, the judgment rendered in an action for wrongful death cannot properly stand. 16 AM. JUR., *Death,* § 60; 22 AM. JUR., 2d, *Death,* § 12.

The trial court observed that there were no provisions under our law (statutory or constitutional) authorizing wrongful death actions, but it relied on Article I, Section 6th, of the Constitution of Liberia, which provides that "Every person injured shall have remedy therefor, by due course of law." A similar provision is found in the constitution of many states, and it has been interpreted to mean "that for such wrongs as are recognized by the law of the land, the court shall be open and afford a remedy, or that laws shall be enacted giving a certain remedy for all injuries or wrongs. 'Remedy by due course of law,' so used, means the reparation for injury ordered by the tribunal having jurisdiction, in due course of procedure, after a fair hearing." 11 AM. JUR., *Constitutional Law,* § 326. The provision does not create any new right, but is merely a declaration of a general fundamental principle. While it is a primary duty of the courts to safeguard the declaration of a constitutional provision affording a remedy for all injuries, it is not meant thereby that a court can reach out and usurp powers which belong to the Legislature. The form and extent of the remedy which every person shall have for injuries are necessarily subject to the legislative power. Moreover, in spite of the broad recognition of the principle that the law will imply a remedy whenever necessary, there is much legal authority to the effect that the constitutional provision that every man shall have a certain remedy for all injuries or wrongs done to his person, property, or character is not self-executing. 11 AM. JUR., *Constitutional Law,* § 75. One of the recognized rules is that a constitutional provision is self-executing if it supplies a sufficient rule by means of which the right which it grants may be obeyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment. In other words, it must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by

the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action. But if the constitutional provision is so vague as not to admit to an understanding of its intended scope, it cannot be self-executing. A constitutional provision will not be construed as self-executing when to do so would work confusion and mischief. 16 AM. JUR., 2d, *Constitutional Law,* § 97.

Not only does said section not mention any form of action for which a remedy may be had, but it does not supply the means by which the rights it grants may be protected and enjoyed and the duty which it imposes can be enforced. It also does not fix the rights conferred or the liabilities imposed. Hence, the aid of the Legislature must have been intended. The Legislature, by virtue of this provision, has imposed certain liabilities for some injuries and wrongs, but wrongful death was not considered until recently, as mentioned earlier.

The trial court also relied on the General Construction Law, which provides that

> "except as modified by laws now in force and those which may hereafter be enacted and by the Liberian common law, the following shall be, when applicable, considered Liberian law: (a) the rules adopted for chancery proceedings in England, and (b) the common law and usages of the courts of England and of the United States of America, as set forth in case law and in Blackstone's and Kent's *Commentaries* and in other authoritative treaties and digests." 1956 Code 16:40.

Apparently, the judge believed that this section endowed the court with authority to adopt the wrongful-death statutes of the United States and England. But wrongful-death actions were not maintainable at common law, hence, they cannot be maintained here by virtue of the common law of the United States and England. Fur-

thermore, the wrongful-death provisions of England and the United States are statutory, and not common law provisions, and therefore section 40, which relates specifically to nonstatutory laws, is not applicable. Wrongful-death actions, by virtue of being statutory creations, can be adopted only by act of the Legislature and cannot be authorized by the courts. The Legislature had not enacted a wrongful-death statute at the time of the accrual of the action at bar and the trial court had no basis for its action in this matter.

In view of the foregoing, the judgment of the court below is reversed with costs against the appellees. And it is so ordered.

Reversed.