

THE HIGH COURT

2014 No. 3518 P

BETWEEN

(H.) (A MINOR)
(SUIING BY HER GRANDMOTHER AND NEXT FRIEND)

PLAINTIFF

AND

ADELAIDE AND MEATH HOSPITAL DUBLIN INCORPORATING NATIONAL CHILDRENS
HOSPITAL

ST. JAMES' HOSPITAL FOUNDATION LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 24 February 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application to approve a proposed settlement of the within proceedings. The proceedings are fatal injuries proceedings arising out of the death of the plaintiff's mother in April 2012. The plaintiff is a minor, and will not achieve her age of majority until 2023. The proceedings have been taken on behalf of the minor plaintiff by her grandmother and next friend.
2. To protect the anonymity of the minor plaintiff, details of her name and address, and those of her relatives, have been redacted in this judgment. Instead, these parties will be referred to simply as (i) "*the minor*"; (ii) "*the minor's grandmother*"; and (iii) "*the minor's mother*" or "*the deceased*" depending on the context. The use of these impersonal terms should not be mistaken for any lack of empathy on the part of the court. The terms are only being used so as to protect the anonymity of the minor.
3. The proposed settlement is made on behalf of the first named defendant and is in the sum of €325,000 (together with costs). The application to approve the settlement is grounded on an affidavit sworn by the minor's grandmother and next friend on 24 January 2020. The affidavit indicates that the grandmother, at that time, accepted the recommendation of senior counsel that the settlement should be approved. However, by the time the matter came on for hearing on Monday, 17 February 2020, the position of the grandmother had changed, and she has explained to the court that she now considers that the sum is insufficient. Having heard from the grandmother and from senior counsel on behalf of the minor plaintiff, I indicated that I would reserve judgment until today's date.

CIRCUMSTANCES GIVING RISE TO THE FATAL INJURIES CLAIM

4. The minor's mother ("*the deceased*") had attended at the emergency departments of the two hospitals named in the proceedings on various dates between the end of March 2012 and the first week of April 2012.
5. In brief, the case made against the two hospitals is that the deceased had taken an overdose of paracetamol on 31 March 2012, and that the paracetamol levels in her blood had been misinterpreted by the hospital staff. In particular, the expert report indicates that given her known chronic alcoholic dependency, the deceased should have been

treated as fulfilling the criteria for “high risk” management. This alleged error is said to have resulted in a failure to treat her properly, and, ultimately, to her death.

ACTUARIAL REPORT

6. An actuarial report has been obtained in support of the minor’s claim for loss of dependency. The report has been prepared by Joseph G. Byrne & Sons Consulting Actuaries Ltd., and is dated 10 October 2018. Given the concerns which have since been raised by the minor’s grandmother as to the amount of the proposed settlement, it is necessary to consider this actuarial report in some detail.
7. (It should be noted that the references in this judgment to the “assumptions” underlying the actuarial report are intended as a reference to assumptions made on the basis of instructions received by the actuaries from the instructing solicitors).
8. The capital value of the loss of dependency has been calculated on the basis that the deceased’s financial contribution to the minor’s support would be based on social welfare payments. The financial contributions are calculated as having a capital value of €92,650.
9. The financial value of the *care and domestic assistance* which the deceased would have provided to the minor has been calculated separately. This has been done on the basis of a sliding scale as follows. The care and assistance are valued at €400 per week to the age of 12 years; €200 per week from the age of 12 to 18 years; and €100 per week from the age of 18 to 23 years. The capital value is calculated at €210,000.
10. The aggregate of the two heads of loss of dependency is €302,650.

SPECIAL DAMAGES

11. The special damages claimed on behalf of the minor are as follows.

Funeral expenses	€4,303
Legal Costs (Coroner’s Court)	€7,500
Miscellaneous	€750
TOTAL	€12,553

12. These expenses have been vouched through an affidavit sworn by Pdraig O’Donovan, Solicitor.

SOLATIUM

13. The Civil Liability Act 1961 (as amended) makes express provision for the recovery of reasonable compensation for mental distress resulting from a wrongful death. Specifically, under section 48 of the Act a judge is required to determine such amounts (if any) as the judge shall consider reasonable compensation for mental distress resulting from the death to each of the statutory dependants. The payment is referred to as the “solatium”.

14. As originally enacted under the Civil Liability Act 1961, this payment was capped at IRE£1,000. This sum has since been amended pursuant to the Civil Liability (Amendment) Act 1996, and the revised amount is circa €25,400. This is the sum applicable to the present proceedings.
15. (The current maximum amount payable for mental distress is €35,000, as amended by Ministerial Order. However, this revised figure only applies to dependants of those who are fatally injured from 11 January 2014 onwards. The date of death of the deceased in the present proceedings was April 2012).
16. It is very much to the credit of the minor's family that each of the statutory dependents who would otherwise have been entitled to claim a share in the solatium have waived their rights in this regard. More specifically, the deceased's mother, father, brother and half-brother have all executed waivers in favour of the minor. Put shortly, the family members have all agreed that the full amount of the solatium (€25,400) should be paid to the minor.

FULL VALUE OF THE CLAIM

17. If the assumptions underlying the actuarial report are correct—and this is disputed by the minor's grandmother—then the full value of the minor's claim would be in the order of €340,603. This figure is calculated as follows.

Overall loss of dependency	€302,650
Special damages	12,553
Solatium	€25,400
TOTAL	€340,603

18. The proposed settlement is for an overall sum of €325,000. Counsel for the minor plaintiff, Mr Finbarr Fox, SC, has expressed the unequivocal view in both his written opinion, which has been exhibited as part of the grandmother's affidavit grounding the application, and in his oral submissions, that the proposed settlement of €325,000 comes close to the full value of the claim. The difference of some €15,000 is described as "very modest and wholly acceptable" in all the circumstances of the case. Counsel also draws attention to the judgment of the Supreme Court in *Reddy v. Bates* [1983] I.R. 141 which indicates the limits on the use of actuarial evidence.

THE OBJECTIONS TO THE ASSUMPTIONS IN THE ACTUARIAL REPORT

19. The minor's grandmother made a helpful submission to me on 17 February 2020 setting out her concerns in respect of the proposed settlement. This submission can be summarised as follows. Whereas the grandmother accepts that her daughter (the deceased) had not been in paid employment at the time of her death in April 2012, she suggests that it would be an insult to describe any lone parent rearing a child as being "unemployed". Rearing a child is a job in itself. Moreover, the deceased had planned to return to the workforce once the minor had started school.

20. The grandmother and her husband are now responsible for rearing the minor. The grandmother pointed out with frankness that her own health is not good, and that the family are living in rented accommodation. The grandmother expressed a concern that the minor should be secure in the event that anything were to happen to her (the grandmother).
21. The grandmother emphasised that she is not seeking any damages on her own behalf and has waived her claim to share in the solatium. This is so notwithstanding that the grandmother has suffered the anguish of losing her own daughter.

DECISION

22. It should be acknowledged from the outset that the grandmother's sole objective is to advance the best interests of the minor. Not only has the grandmother undertaken responsibility for rearing the minor despite her own ill-health, she is also doing everything in her power to ensure that proper provision is made for the minor's future. All of this is very much to the credit of the grandmother.
23. It is also to the credit of the minor's wider family that each of the statutory dependents, who would otherwise have been entitled to claim a share in the solatium (€25,400), have waived their rights in this regard. More specifically, the grandmother herself; and the deceased's father, brother and half-brother have all executed waivers in favour of the minor.
24. Given her selfless commitment to the minor, the concerns raised by the minor's grandmother as to the adequacy of the proposed settlement are deserving of careful consideration by this court.
25. In deciding whether or not to approve a proposed settlement in favour of a minor in a fatal injuries claim, a court must assess *objectively* the prospects of achieving a higher award were the matter to go to trial. This exercise has to be performed on the basis of more limited information than would be available to the trial judge. The court must instead draw upon its knowledge of the risks inherent in litigation, and attempt to identify potential weaknesses in the claim which may affect the outcome of the proceedings.
26. Applying this approach to the circumstances of the present case, it is necessary to consider the robustness of the assumptions underlying the actuarial report. The grandmother has criticised the assumption that her daughter would not have returned to the workforce once the minor had commenced school. If this criticism is well-founded, then the capital value of the claim might be understated. As set out earlier, the capital value of the loss of dependency has been calculated on the basis that the deceased's financial contribution to the minor's support would be based on social welfare payments. If a figure for employed work were substituted for the social welfare payments, then the capital figure would, obviously, increase.
27. As against this, however, regard must be had to the acknowledged health difficulties which the deceased had suffered from. The claim against the hospitals is advanced on

the basis that their management of her treatment failed to take into account that the deceased fulfilled the criteria for “high risk” management. More specifically, the expert report prepared for the Coroner’s Court by a Clinical Professor of Emergency Medicine referred to the deceased as having a “long history of psychosocial disorder and of attempted self-harm, in association with chronic alcohol dependency” and liver disease. She is also described as having been “difficult to manage from a medical and psychosocial point of view”.

28. These are factors which might, in principle, be relied upon at trial to suggest—not only that the deceased would not have obtained employment—but also that the figures for care and domestic assistance provided to the minor, as set out in the actuarial report, might be overstated. It will be recalled that the care and assistance provided by the deceased is valued at €400 per week to the age of 12 years. This is so notwithstanding that the replies to particulars indicate that the minor was being looked after *jointly* by the deceased and the grandmother. The consequence of the use of a multiplier in calculating capital values is that even a modest revision downwards in these figures could reduce the overall sum by a significant amount, to be measured in tens of thousands.
29. There is a significant risk that, if this action were to proceed to trial, the assumptions underlying the actuarial report would be vulnerable to challenge. The final award might be less than the €325,000 now offered.
30. It is simply not possible to say with any certainty what might have happened but for the premature and tragic death of the minor plaintiff’s mother in April 2012. The most that this court can do on an application to approve a proposed settlement is to assess the prospects of achieving a higher award at trial. I am satisfied that the sum of €325,000 represents close to the full value of the claim, and that this figure is unlikely to be bettered at trial. The assumptions underlying the actuarial report are reasonable and realistic having regard to the factors referred to above. It would not be prudent to reject the proposed settlement and to allow the matter to go to full trial in the hope that the trial judge might take an optimistic view of the deceased’s employment prospects. To do so would entail an unjustified risk of the minor receiving an award less than the €325,000 now offered.
31. Having regard to all of the circumstances, the court will make an order approving the proposed settlement.

NO FINDING ON LIABILITY

32. One of the factors which a court may have to consider in deciding whether to approve a proposed settlement is the risk, if any, which the plaintiff will face at trial in establishing that the defendant is liable in tort. If there is a significant risk on liability, then it may be appropriate to approve a settlement notwithstanding that it does not represent the full monetary value of the claim. The court must balance the risk of the plaintiff failing to establish liability—and thus receive no damages at all—against the prospect of their succeeding and recovering the full value of their claim. Sometimes this balance is struck by discounting the full value of the claim to reflect the risk on liability.

33. It is not necessary to address the issue of liability in the present case given that—for the reasons set out under the previous heading above—the proposed settlement represents close to the full value of the claim. This judgment does not make any finding—one way or the other—on the question of whether the minor plaintiff would have been at risk in establishing liability against the defendants.
34. For the sake of completeness, it should be noted that the offer of settlement in the present case has been made without any admission of liability. The first named defendant has filed a full defence to the proceedings, and the proceedings are to be struck out as against the second named defendant.

FORM OF ORDER

35. For the reasons set out in this judgment, an order will be made approving the proposed settlement of €325,000. The settlement is as between the plaintiff and the first named defendant and has been reached without any admission of liability. The proceedings are to be struck out as against the second named defendant.
36. A sum of €12,553 is to be paid to Padraig O'Donovan & Company Solicitors upon their undertaking to discharge the sums payable by way of special damages and fees. The balance of the €325,000 is to be paid into court to the credit of this action and separate credit of the minor plaintiff.
37. I will also make an order for legal costs in favour of the plaintiff as against the first named defendant, to reflect the fact that the terms of settlement provide for the payment of costs. In default of agreement between the parties, the quantum of those legal costs is to be measured by the Office of the Legal Costs Adjudicator under the Legal Services Regulation Act 2015 and Order 99 (as amended).

Appearances

Finbarr Fox, SC and Kristian Douglas instructed by Padraig O'Donovan & Company Solicitors for the Plaintiff