

THE HIGH COURT

2019 No. 19 PIR

BETWEEN

ELLA DUNNE (A MINOR)
(SUING BY HER MOTHER AND NEXT FRIEND JACQUELINE KENNEDY)

APPLICANT

AND

WILLIAM STAPLETON

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 13 January 2020

INTRODUCTION

1. This matter comes before the High Court by way of an application for a ruling in respect of the adequacy of an assessment made by the Personal Injuries Assessment Board. The Applicant herein sustained personal injuries in a road traffic accident in September 2017. I will refer to the Applicant hereinafter as the "*Injured Party*". The Injured Party will not reach the age of majority, i.e. 18 years of age, until November 2020. The fact that the plaintiff is a "minor" has the legal consequence that any claim for damages arising out of the personal injuries is subject to specific procedural requirements. In particular, the approval of the court is required in respect of any proposed compromise (to use a neutral term) of the claim.
2. As a result of amendments introduced under the Personal Injuries Assessment Board Act 2003 ("*the PIAB Act*"), personal injuries proceedings cannot normally be brought without the prior authorisation of the Personal Injuries Assessment Board ("*PIAB*"). It is a necessary first step, therefore, for a claimant to apply to PIAB for an assessment of damages. The assessment is then notified to the claimant and the respondent, i.e. the party alleged to have caused the personal injuries. The legislation provides for two contingencies as follows.
 - (i). If either the claimant or respondent *rejects* the assessment, then PIAB will issue an authorisation which authorises the claimant to institute legal proceedings.
 - (ii). If the claimant and respondent both *accept* the assessment, then the assessment becomes enforceable as an "order to pay". The payment of the amount specified in an order to pay constitutes a "satisfaction" of the claimant's personal injuries claim. In the case of a claimant who is a minor, an *additional* procedural requirement must be complied with as follows. An application must be made to the appropriate court for approval of the acceptance of the assessment.
3. The unusual feature of the present case is that the position of the Injured Party changed during the process. The Injured Party, through her mother and next friend, had initially indicated that she intended to accept PIAB's assessment. PIAB acknowledged receipt of this acceptance of the assessment by letter dated 24 October 2018. This letter concludes by indicating that PIAB's involvement in the matter was now complete and that it was closing its file. The only outstanding matter at that stage was an application for court approval.

4. It seems that thereafter the next friend sought additional legal advice, and an opinion was obtained from counsel in relation to the value of the personal injuries claim. Counsel suggested that further medical reports be obtained in respect of the injury which the Injured Party had received to her ankle.
5. The upshot of all of this was that by the time the matter came before the High Court for ruling on 29 July 2019, the next friend's application was to have the assessment rejected. Put shortly, the High Court was invited to reject an assessment which the next friend herself had previously accepted on behalf of the Injured Party. Given the unusual nature of the application, I directed that a further affidavit be filed explaining the precise circumstances in which this change of position came about. A detailed affidavit on behalf of the solicitor who represents the Injured Party on the instructions of the next friend has since been filed. The matter was then listed for further submissions on 21 October 2019. Judgment was reserved until today's date.

FACTUAL BACKGROUND

6. The application for a ruling had initially been grounded on a single affidavit, which had been sworn by the Injured Party's mother and next friend. This affidavit sets out the circumstances of the road traffic accident. The affidavit indicates that, in the days that followed the accident, the Injured Party complained of ongoing pain and discomfort in her neck and in her left ankle. It is a concern in relation to the latter injury to her ankle that has prompted the change in position in respect of the acceptance of the PIAB assessment.
7. It appears from the medical reports exhibited that, as of February 2018, the prognosis was that the Injured Party's Condition should gradually improve over the next twelve to eighteen months. See, in particular, the medical report of Dr Brian O'Dea dated 7 February 2018 as follows.

"Impression & Prognosis: This fifteen year old girl sustained significant neck muscle spasm and pain as a result of a road traffic accident in September 2017. She did not have any of these neck pain symptoms prior to the accident. She appears to be making a gradual good recovery from her soft tissue neck injuries. My clinical impression is that her condition should gradually improve over the next twelve to eighteen months."

8. PIAB has assessed general damages in the sum of €20,000 (together with a sum of €1,187 in respect of special damages, i.e. losses and expenses incurred, and fees and other expenses).
9. The affidavit indicates that the next friend had instructed her solicitor to accept the PIAB assessment. Some, but not all, of the relevant correspondence has been exhibited in this regard. It is explained that "as a matter of precaution" papers were subsequently sent to junior counsel for an opinion in relation to the value of the claim. The relevant opinion has been exhibited. Counsel advised that in circumstances where the mother had expressed a concern that the Injured Party's ankle is now weaker than before the accident, and that this results in residual symptoms following sporting activity, a report

should be sought from a consultant orthopaedic surgeon in relation to the ongoing problems with the Injured Party's ankle.

10. Two such reports were subsequently obtained on 6 February 2019, and 20 March 2019, respectively. In brief, these reports indicated that a surgical intervention *might* be required. The position is summarised as follows by the consultant orthopaedic surgeon in the second of his two reports.

“I have reviewed the claimant's MRI scan left ankle dated 6th March 2019. Her peroneal tendons are intact. I see no evidence of peroneal tendon pathology. The osteochondral surface of the tibiotalar, subtalar and transverse tarsal joints are intact. The Achilles tendon and planter fascia are intact. I do not see evidence of attenuation of the lateral ankle complex (ATFL) anterior talofibular ligament which is consistent with her instability. While the majority of ankle instability can be addressed through aggressive physiotherapy, peroneal strengthening, proprioceptive and balance exercises, a small proportion require surgical intervention (a Brostrom lateral ligament reconstruction). The decision surgically is determined by instability (frequency of episodes and impact on day-to-day activities and recreational sporting activities) and is a personal one. The recovery post surgery is in the order of 4 months.”

11. A supplemental affidavit has since been filed by the solicitor acting on behalf of the Injured Party on the instructions of the next friend. This affidavit was filed on 1 October 2019. It sets out a fuller chronology in respect of the dealings between the solicitors and PIAB.

RELEVANT STATUTORY PROVISIONS

12. Section 35 of the PIAB Act provides as follows.

35.—(1) This section applies to a relevant claim where—

- (a) a next friend or the committee of a minor or a person of unsound mind is acting on behalf of the minor or person in respect of the claim, or
- (b) the claim relates to a proposed action for damages under section 48 of the Act of 1961,

and the next friend, committee or, as the case may be, the person proposing to bring that action for damages *accepts, subject to the assessment being approved under this section, the assessment made under section 20 of the relevant claim.**

- (2) Where any enactment or rule of court requires any settlement of a relevant claim to which this section applies to be approved by the court then that enactment or rule of court shall apply, with the necessary modifications, to the assessment referred to in subsection (1) as if proceedings had been brought in relation to the claim, and the court shall have jurisdiction to approve the assessment accordingly on application in that behalf being made by the next friend, committee or other person referred to in that subsection.

- (3) The court shall order that the costs of such an application by the applicant shall be borne by the respondent or respondents.
- (4) Unless and until an assessment of a relevant claim to which this section applies has been approved by the court, the assessment, despite section 33, shall not become binding on the claimant and the respondent or respondents.
- (5) In this section "court" means the court which has jurisdiction to make an award of damages of the amount of the assessment the subject of the application for approval or, if 2 or more courts have jurisdiction to make such an award, whichever of them possesses the lesser or the least jurisdiction to make an award of damages in respect of relevant claims.

*Emphasis (italics) added.

13. Section 33 provides *inter alia* that an assessment which has been accepted by a claimant will normally be binding on them. This is subject to the requirement for the approval of the court under section 35 (above).
14. Order 22, rule 10(11) of the Rules of the Superior Courts (as inserted by S.I. No. 517 of 2004) provides as follows.
 - (11) In the case of applications for the approval by the Court of an assessment under section 35(2) of the Personal Injuries Assessment Board Act 2003 (in this sub-rule hereinafter referred to as "the 2003 Act"), the following procedure shall apply:
 - (a) An application for the approval of the Court shall be made by motion ex parte by the next friend, committee or other person referred to in section 35(1) of the 2003 Act.
 - (b) The application shall be grounded upon an affidavit entitled

"IN THE MATTER OF THE PERSONAL INJURIES ASSESSMENT BOARD
ACT 2003
and
"IN THE MATTER OF AN APPLICATION RELATING TO A.B., A [MINOR
OR PERSON OF UNSOUND MIND], OF [ADDRESS] BY C.D., ACTING AS
[STATE CAPACITY] ON BEHALF OF THE SAID A.B."
 - (c) Such application shall be made to the President of the High Court or a Judge assigned by the President to hear such applications.
 - (d) When approving such an assessment the Court may appoint a person of full age to act as next friend of the minor or, where appropriate, of the person of unsound mind.
 - (e) Where applicable, the provisions of Order 22, rule 10(3) to (6) and rule 11 shall apply mutatis mutandis to assessments made in favour of minors or persons of unsound mind approved in accordance with this sub-rule in

respect of the amount recoverable in accordance with section 38 of the 2003 Act.

- (f) The Registrar shall send by ordinary prepaid post or by e-mail to the Personal Injuries Assessment Board a certified copy of any order made pursuant to this sub-rule.
- (g) In the event of an order to pay issuing in accordance with section 38 of the 2003 Act, a copy thereof shall be sent forthwith by the Personal Injuries Assessment Board to the Registrar in the Central Office by ordinary prepaid post or by e-mail.

DISCUSSION AND DECISION

15. This application for a ruling in respect of the PIAB assessment comes before the court in the very unusual circumstances where the Injured Party, having initially accepted the assessment of €20,000 (plus special damages and fees and expenses) through her next friend, now requests the court to *reject* the self-same assessment.
16. The first question which arises for consideration is whether the prior acceptance of the assessment gives rise to a form of estoppel whereby the Injured Party is precluded from disavowing same. The answer to this question is provided by subsection 35(4) (set out in full at paragraph 12 above). This subsection states that an assessment shall not become binding on a claimant unless and until approved by the court. Thus, notwithstanding section 33—which provides that an assessment which has been accepted will normally be binding—a minor will not be bound by an assessment accepted on their behalf by their next friend *unless and until* the assessment is subsequently approved by the appropriate court.
17. The next question to be considered, then, is whether the application has been brought before the appropriate court. More specifically, it is necessary to consider whether the application should have been made to the Circuit Court or to the High Court. The allocation of jurisdiction is governed by section 35(5) of the PIAB Act as follows.
 - (5) In this section “court” means the court which has jurisdiction to make an award of damages of the amount of the assessment the subject of the application for approval or, if 2 or more courts have jurisdiction to make such an award, whichever of them possesses the lesser or the least jurisdiction to make an award of damages in respect of relevant claims.
18. The key criterion for determining the court to which an application for approval should be made is the “amount of the assessment”. More specifically, the application for a ruling is to be made to the court which has monetary jurisdiction to make an award of damages of the amount of the assessment made by PIAB. On the facts of the present case, the application for approval should have been made to the Circuit Court as the amount of the assessment (€21,187) falls within the monetary jurisdiction of that court in personal injuries proceedings (€60,000). Whereas the High Court has concurrent jurisdiction to make awards of less than €60,000, it is expressly provided under section 35(5) that the

application should be made in whichever court possesses the lesser or the least jurisdiction.

19. Although not explained on affidavit, the reason the application has, instead, been made in the High Court is, presumably, that the next friend envisages that any award of damages would exceed €60,000, and would thus go beyond the monetary jurisdiction of the Circuit Court in personal injuries actions. I will have something to say about this at paragraph 23 below, but for the purposes of the procedural issue now under consideration, the point is that it is the monetary value of PIAB's assessment which alone determines the court to which the application for a ruling should be made. Strictly speaking, therefore, the application for a ruling in the present case should not have been brought before the High Court. However, in order to avoid putting the Injured Party to the time and trouble of making a fresh application to the Circuit Court, I propose to take the very unusual step of accepting jurisdiction in this case. I propose to do so on the basis of the High Court's inherent jurisdiction and/or Order 22, rule 10(1) as follows.

10.(1) In any cause or matter in which money or damages is or are claimed by or on behalf of an infant or a person of unsound mind suing either alone or in conjunction with other parties, no settlement or compromise or payment or acceptance of money paid into Court, either before or at or after trial, shall, as regards the claims of any such infant or person of unsound mind, be valid without the approval of the Court.

20. As explained under the next heading below, there will be certain costs implications as a result of this course of action.
21. I turn next to consider the question of whether, on the particular facts of the case, the assessment of €20,000 (plus special damages and fees and expenses) should be approved. I am satisfied, having regard to the two reports of the consultant orthopaedic surgeon described at paragraph 10 above, that the assessment does not reflect the full value of the claim. More specifically, it seems to me that the ongoing difficulties in relation to the Injured Party's left ankle would justify a higher award were the matter to proceed to trial. It is evident from the more up-to-date medical reports that the injury to her left ankle continues to affect the Injured Party and, in particular, her ability to participate in sporting activities. Further, a surgical intervention *might* be required.
22. I propose, therefore, to make an order rejecting the PIAB assessment. Upon receipt of a certified copy of this order, PIAB will be in a position to issue the authorisation necessary for the taking of proceedings.
23. There is, however, one further matter which should be addressed as follows. Whereas I am satisfied that the value of any award which might be achieved at full trial is likely to be in excess of €20,000, it must be doubtful whether it would exceed the monetary jurisdiction of the Circuit Court in personal injuries proceedings (€60,000). I say this having regard to the figures for similar injuries set out in the Book of Quantum (2016). It is ultimately a matter for the next friend, with the advice of her legal representatives, to

decide in what jurisdiction to issue. This ruling should not, however, be interpreted as an endorsement for the taking of proceedings before the High Court.

COSTS ORDER

24. Section 35 of the PIAB Act indicates that the costs of an application for the approval of an assessment which has been accepted on behalf of a minor shall be borne by the respondent or respondents. This only makes sense, however, in the context of an application where the next friend acting on behalf of a minor is inviting the court to *approve* the amount assessed by PIAB. The obtaining of the court approval is the final step in the process which allows the personal injuries claim to be “satisfied” without the necessity of proceedings being instituted. It is a procedural step that must be performed in the case of a minor, and it makes sense that the costs of the application should not be borne by the claimant, i.e. deducted from the amount of damages as assessed by PIAB. Rather, as with fees or expenses reasonably and necessarily incurred by the claimant in complying with *other* provisions of the PIAB Act, the payment of the costs of the application to court should be provided for separately. See, by analogy, section 45 of the PIAB Act.
25. The same considerations do not apply in circumstances, such as in the present case, where the position adopted by the next friend acting on behalf of a minor claimant has *changed* during the course of the process. Having initially accepted the assessment, the next friend in the present case now invites the court to reject the sum of €20,000 (plus special damages and fees and expenses). Had the next friend simply rejected this assessment from the outset, this would have avoided the necessity of making any application to court. This is because the scheme of the legislation is such that the sanction of the court is only ever required where it is intended to *accept* an assessment. The decision to *reject* an assessment is one which can be made by a next friend on the basis of independent legal advice without any necessity for involvement by the court.
26. Whereas the reasons for which the next friend in the present case changed her position are understandable, the need for any application to court could have been avoided had the assessment been rejected from the outset. Without intending any criticism of the next friend or her legal advisers, it seems to me that it would be unfair to expect the respondent to bear the costs of this avoidable and unnecessary application. This is especially so where the respondent does not obtain the benefit which normally accrues to a respondent in this type of application, namely the “satisfaction” of a personal injuries action without the necessity for litigation. The effect of the ruling in the present case, i.e. the order rejecting the assessment, is that the Injured Party will be authorised to institute legal proceedings against the respondent. It would be unfair to require the respondent to pay for the doubtful privilege of having proceedings instituted against him.

FORM OF ORDER

27. I propose to make an order rejecting the assessment of €20,000 (plus special damages and fees and expenses) made by PIAB in respect of the personal injuries claim on the part of the Applicant herein, Ella Dunne, and will make a declaration that, on receipt of a certified copy of the order, PIAB may issue an authorisation within the meaning of section

14 of the Personal Injuries Assessment Board Act 2003. I will direct that the Registrar shall send a certified copy of this order and judgment to the Personal Injuries Assessment Board by ordinary prepaid post.

28. For the reasons set out under the previous heading, I make no order in respect of the costs of the application for a ruling.