



THE HIGH COURT

2019 No. 635 P

IN THE MATTER OF PART IV OF THE CIVIL LIABILITY ACT 1961

BETWEEN

MARGARET McLAUGHLIN

(ON BEHALF OF THE STATUTORY DEPENDANTS OF JOHN McLAUGHLIN)

PLAINTIFF

AND

AARON McCOLGAN

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 12 July 2021

INTRODUCTION

1. This judgment is delivered in respect of an application to approve a proposed settlement of a fatal injuries claim. The approval of the court is required in circumstances where some of the statutory dependants are minors.

TECHNICAL TERMS USED IN THIS JUDGMENT

2. A number of technical terms will appear throughout this judgment, and it may be of assistance to explain these briefly now. First, reference will be made to the “*statutory*

dependants” of the deceased. This refers to those members of a deceased person’s extended family (as defined) who are entitled, in principle, to claim damages for wrongful death. It should be emphasised that a statutory dependant who comes within the definition will not necessarily have been *financially* dependent on the deceased as of the date of death. Put otherwise, the concept of dependency has a broader meaning in this context than it does in everyday speech.

3. Secondly, reference will be made to the “*representative plaintiff*”. This is the person in whose name proceedings have been brought on behalf of all of the other statutory dependants. Although that person is the only plaintiff formally named in the proceedings, he or she represents the other dependants. In the present case, the representative plaintiff is the widow of the deceased.
4. Thirdly, reference will be made to a type of damages known as the “*solatium*”. This is a statutory sum allowed as compensation for mental distress caused by the wrongful death of another. It is currently fixed at a maximum sum of €35,000. (Section 49 of the Civil Liability Act 1961).

FACTUAL BACKGROUND

5. These proceedings arise out of the tragic death of John McLaughlin (“*the deceased*”) on 20 February 2017. The defendant had been driving a motor vehicle which collided with the deceased’s vehicle. Thereafter, the defendant unlawfully left the scene of the fatal accident. The defendant has since been convicted in the Circuit Court of dangerous driving causing death and is currently serving a sentence of imprisonment.
6. The proceedings are taken by the deceased’s widow, Margaret McLaughlin, on her own behalf and on behalf of the other statutory dependants. The deceased’s parents and siblings, who come within the definition of “statutory dependants” for the purpose of the

Civil Liability Act 1961, have, to their credit, waived any entitlement to share in any damages recovered in the proceedings. Thus, the proceedings are, in effect, brought on behalf of the widow of the deceased and her three minor children.

7. These proceedings were instituted in 2019. The parties have since entered into negotiations and a settlement has now been agreed between the parties, subject to the approval of the High Court. Under the terms of the proposed settlement, the sum of one million euro is to be paid by way of damages. This sum is intended to compensate the widow and her minor children for, *inter alia*, the mental distress suffered as a result of the death of the deceased, and for the loss of future dependency. The sum is intended to reflect €35,000 in respect of the solatium and €24,428 in respect of expenses.
8. It is also agreed under the proposed terms of settlement that the representative plaintiff is to recover her legal costs as against the defendant's insurers. It has been agreed that the legal costs are to be measured on the basis that brief fees have been incurred. The quantum of the costs is to be adjudicated upon, i.e. measured, by the Office of the Chief Legal Costs Adjudicator in default of agreement between the parties.

CIVIL LIABILITY ACT 1961

9. The right to bring a claim arising out of a fatal injury is provided for under Part IV of the Civil Liability Act 1961. See, generally, *Wolohan v. McDonnell* [2020] IEHC 149; [2020] 2 I.L.R.M. 483.
10. Section 48 of the Civil Liability Act 1961 stipulates that only one action may be brought against the same defendant in respect of a wrongful death, and that that action shall be for the benefit of all the dependants. The term "dependant" is defined as a spouse, civil partner, parent, grandparent, step-parent, child, grandchild, step-child, brother, sister,

half-brother or half-sister, of the deceased. The definition also includes former spouses and civil partners, and co-habitants.

11. The manner in which damages are to be assessed is set out at section 49 of the Civil Liability Act 1961 as follows.

“49.(1)(a) The damages under section 48 shall be—

- (i) the total of such amounts (if any) as the judge shall consider proportioned to the injury resulting from the death to each of the dependants, respectively, for whom or on whose behalf the action is brought, and
- (ii) subject to paragraph (b) of this subsection, the total of such amounts (if any) as the judge shall consider reasonable compensation for mental distress resulting from the death to each of such dependants.

(b) The total of any amounts awarded by virtue of subparagraph (ii) of paragraph (a) of this subsection shall not exceed €35,000.

(c) Each amount awarded by virtue of paragraph (a) of this subsection shall be indicated separately in the award.”

12. Sub-section 49(1A) provides for the possibility of the total amount of the compensation for mental distress (“*the solatium*”) being increased from the current figure of €35,000, by way of Ministerial Regulations. Provision is made under sub-section 49(2) for damages to be awarded in respect of funeral and other expenses incurred.

13. In summary, the effect of Part IV of the Civil Liability Act 1961 might be described as follows. First, it provides for a *substantive* right of action to recover damages for the wrongful death of another. This right is confined to those members of the deceased’s extended family, i.e. the “statutory dependants” as defined, who have suffered mental distress and/or injury (including loss of dependency) as a result of the wrongful death. Secondly, it provides for a *procedure* whereby the individual claims of the statutory dependants must be prosecuted in a single set of proceedings.

14. The Supreme Court has emphasised in *O'Sullivan v. C oras Iompair  ireann* [1978] I.R. 409 (at 421) that the statutory right of action is given to the dependants as individuals, so that each of them is entitled to be compensated for the loss resulting to him or her personally. Put otherwise, the legislation does not provide for what might be described informally as a “class action”, whereby a global sum would be awarded to the statutory dependants as a class.
15. In the event that a claim for a wrongful death comes on for full hearing, the court must assess the individual damages which each of the statutory dependants is to be awarded. The individual damages must be proportionate to the injury resulting to the particular dependant from the deceased’s death. The damages are to be based on the reasonable expectation of the pecuniary benefit which would have accrued to the particular dependant “but for” the wrongful death of the deceased. See *Davoren v. Health Service Executive* [2016] IECA 39, [28] to [30].
16. The individual damages payable to any particular dependant will be informed by their connection with the deceased. For example, in the case of a minor child claiming for the wrongful death of a parent, the damages would seek to compensate for the loss of direct financial support provided by the deceased parent, and for the loss of what are quaintly described in the case law as “domestic services”. The deceased parent might not only have been providing financial support, e.g. paying for accommodation, food, education and other necessities, but may also have been providing care and support. For example, the deceased parent may have been responsible for minding a pre-school child at home. An attempt will have to be made to put a monetary value on the loss of such child minding, e.g. to assess what the cost of employing a professional child minder, to provide a level of care and support equivalent to that previously provided by the deceased parent,

might be. See, generally, A. Barr, *Damages in Fatal Injury Actions — Selected Issues* (2011) 16(2) Bar Review 36.

REQUIREMENT FOR COURT APPROVAL

17. Order 22, rule 10(1) of the Rules of the Superior Courts provides as follows.

“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.”

18. The requirement for court approval is intended to ensure that the interests of minors are properly protected in the settlement of proceedings. The court is in a position to provide a neutral assessment of the value of the claim and of the reasonableness of the settlement figure, having regard to issues such as any risk on liability. The court can also ensure that the apportionment of the overall sum as between the adult and minor dependants *inter se* is fair. This mitigates against any risk of a potential conflict of interest between a representative plaintiff and the minor dependants.
19. The requirement for court approval also constitutes a safeguard against possible error on the part of the legal advisors acting on behalf of the representative plaintiff. Moreover, the court can exercise some control over legal costs in those cases where the proposed settlement is an “all in” settlement, i.e. the legal costs are to be paid out of the figure proposed rather than there being a separate order for costs as against the defendant.
20. Where a settlement or compromise has been approved by the court, the claim will be regarded as fully and finally settled, and the minor dependant will be bound by same. It will not be open to the minor dependant to seek to reagitate the claim on reaching their age of majority.

21. In deciding whether to approve a proposed settlement under Order 22, rule 10 in the context of a fatal injuries claim under Part IV of the Civil Liability Act 1961, the court will generally address the following two matters in sequence. First, the court must consider whether the proposed settlement is reasonable in all the circumstances. This will require consideration of issues such as whether liability is contested, and the amount of damages which are likely to be recovered were the proceedings to go to trial. This exercise has to be performed on the basis of far 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. Counsel on behalf of the representative plaintiff will have provided a confidential opinion to the court that candidly sets out the strengths and weaknesses of the case. Ultimately, however, the decision on whether to approve the settlement resides with the court alone.
22. Secondly, the court must consider whether the apportionment of the overall sum as between the dependants *inter se* is fair. Of course, as the court's function is directed to protecting the interests of the *minor dependants*, the focus will be on the amount to be apportioned to them.
23. As discussed under the previous heading, the damages should be proportionate to the injury resulting to the particular dependant from the deceased's death. In many instances, it will be necessary, for practical reasons, that a sum notionally attributable to a minor dependant in respect of loss of dependency be paid over to the surviving parent to be expended for the benefit of the children. The surviving parent will be running the household and responsible for the provision of support and care to the children. It would not be in the children's interest were monies which are needed now for day to day household expenses to be held in abeyance until they reach their age of majority.

24. Finally, the decision on whether or not to approve a settlement involves the administration of justice within the meaning of Article 34 of the Constitution of Ireland. The ruling is made in the context of *inter partes* litigation; and if an order is made approving the proposed settlement, then the claim will be regarded as fully and finally settled. Accordingly, applications to approve settlements in cases involving minor dependants are, generally, heard in public in open court.
25. It is important to emphasise, however, that in those cases where a court *refuses* to approve a proposed settlement, it would be inappropriate for the broadcast or print media to report the details of the case. It is an essential feature of an application to approve a settlement that counsel for the representative plaintiff is under an obligation to disclose to the court any weaknesses in the claim, to ensure that the court may reach an informed view on the reasonableness of the proposed settlement. It would be unfair to the statutory dependants were these weaknesses, which have been disclosed to the court on a confidential basis for a specific purpose, to be published and thus at risk of coming to the attention of the defendant.
26. These considerations do not arise in those cases where the court has *approved* the settlement. In such instances, the proceedings will have come to an end and there will be no subsequent trial of the action. The outcome of such an application can be reported in the ordinary way.

(1). REASONABLENESS OF THE PROPOSED SETTLEMENT

27. Leading counsel on behalf of the representative plaintiff has recommended the settlement to the court and has furnished a candid opinion explaining his rationale. Separately, the representative plaintiff has confirmed on affidavit that she is in favour of the proposed settlement.

28. The terms of the proposed settlement are that the sum of one million euro is to be paid by way of damages. This is intended to reflect the capital value of the recoverable losses incurred by the widow and her three children. (The other statutory dependants have waived any claim).
29. The court has been provided with copies of two actuarial reports which have been prepared on behalf of the plaintiff and defendant, respectively. There is a significant divergence between the two reports in respect of the capital value attributed to the claim for loss of dependency. The explanation for this divergence is that the respective reports have made very different assumptions as to what the likely future earnings of the deceased would have been had he survived.
30. The employment position of the deceased had been unusual. The deceased had been a qualified accountant and had been employed by E & I Engineering Group since 2013. It seems that the deceased subsequently took on a new role within the company on a trial basis for one year. During the trial period, the annual salary paid had been approximately €40,800. However, the understanding seems to have been that, on the successful completion of the trial period, the annual salary would increase to €75,000, with an additional commission or bonus of €20,000. The trial period had not yet been completed as of the date of the deceased's tragic death: the period would have been completed a number of weeks later on 31 March 2017.
31. The defendant's actuarial report is based on an annual salary of €40,800; the plaintiff's on an annual salary of €95,000.
32. The reasonableness of the proposed settlement turns largely on the view one takes of the likelihood of the court of trial deciding that damages should be recovered by reference to the higher figure. The assessment of the loss of dependency is complicated by the following two factors. First, the pay arrangements described above had not been reduced

to writing. There is no written contract confirming the intended increase in salary. Secondly, the person who ultimately took on the deceased's position in the company is paid a salary which is significantly less than €75,000.

33. Having regard to the unusual employment history and to the fact that the individual now employed in the post is paid significantly less than €75,000, I am satisfied that the proposed terms of settlement are reasonable. It seems to me that were the matter to go to full hearing, the trial judge would likely not value the case at more than €1,150,000. This figure involves discounting the salary bonus of €20,000, and accepting that it would be open to the widow to return to work full-time (should she so choose) once her youngest child begins primary school.
34. This sum would have to be discounted in accordance with the principles in *Reddy v. Bates* [1983] I.R. 141. These principles require that where loss of earnings have been calculated on the assumption that an individual would remain in full-time permanent employment until the age of retirement, a discount has to be applied to reflect the exigencies of life, including the risk of loss of employment. These principles have more recently been summarised as follows by the Court of Appeal in *Walsh v. Tesco Ireland Ltd* [2017] IECA 64 (at paragraph 69).

“The reasons why a well motivated person may find themselves not working continuously or full time into the future are too numerous to mention. However, by way of example, they might be injured in a road traffic accident with the result that they cannot work or they might fall prey to some illness with similar unfortunate consequences. Their husband, partner, one of their children or an elderly relative might, for some period of time, need their care and support such that they would not be able to work or work fulltime as they had hoped. As people advance in life the risk of these occurrences cannot be ignored or ruled out. Nobody is immune from such risks. [...]”

35. Were a discount of between 10% and 15% to be applied to the sum of €1,150,000, it would produce a figure which aligns with that offered in the proposed settlement.

36. In summary, it is unlikely that the figure offered would be exceeded were the matter to go to trial, and there is some slight risk that a lower sum would be awarded were the trial judge to take a particular view of the employment history.
37. It should be reiterated that the function of the court in approving a settlement is to protect the interests of the minor dependants. Their mother, as an adult, has full legal capacity to enter into a settlement insofar as her own share of the claim is concerned. It is only where a court considered that the overall sum proposed under a settlement was unreasonably low, and would adversely affect the minor dependants, that a court would likely refuse to approve the settlement. For the reasons set out under the next heading, I am satisfied that generous provision has been made for the minor dependants in the present case.

(2). APPORTIONMENT

38. Having concluded that the overall settlement is a good and reasonable settlement, it is next necessary to consider the proposed apportionment of the settlement figure as between the mother and the three children.
39. The approach taken in the actuarial report is to calculate the reduction in household income arising from the deceased's death, and from the mother's having to move from full to part-time employment, and then to apportion the loss as between the mother and children. These figures have been calculated, initially, on a weekly basis. The apportionment is approximately 40% to the mother, with 20% to each of the three children. A multiplier is then applied to these figures, and the appropriate adjustment made to reflect the length of time before each child reaches the age of 23 years. The capital sums attributable to the three children, in descending order of age, are as follows: €80,861; €90,687 and €99,431. A capital sum of €669,593 has been attributed to the

mother. This higher sum reflects, *inter alia*, the fact that her loss of dependency is for life, whereas it is assumed that the children would have become financially independent of the deceased upon reaching the age of 23 years.

40. The responsibility for the care and welfare of the children will now be borne by the mother alone, without the benefit of the financial and practical support which had previously been provided by her deceased husband. The mother has had to move from full-time employment to a “job share” arrangement in order to provide care and support for the children. It can certainly be argued that in such circumstances the appropriate course of action is to allocate the lion’s share of any settlement to the surviving parent, on the understanding that they will act in accordance with the best interests of the dependent children.
41. On the facts of the present case, however, the mother has expressed the preference that a sum of money, equivalent to the notional loss attributable to each of the children, should be paid into court for their individual benefit. The relevant sum would then be paid out to each of the children on his or her reaching their age of majority.
42. This is a selfless and generous position for the mother to adopt. A significant part of the monies which are to be held for the benefit of the children are referable to dependency prior to their reaching their age of majority. These monies, which could legitimately have been claimed and expended by the mother in caring for the children during their minority, are now to be preserved intact for their future benefit. In essence, the mother will be running the household from her own share of the overall settlement.
43. This outcome has only been achieved as a result of the generosity of the mother and the fact that the scale of the settlement has the consequence that there are sufficient funds to allow a significant payment to the mother, as surviving parent, to allow her to provide proper care and attention to the children, while at the same time leaving a balance over

which can be held for the benefit of the dependent children until they reach their age of majority. This will give the children a significant advantage as they embark upon adulthood and will allow them, for example, to pursue third level education.

44. It should be emphasised that such a generous approach to dependent minors will not be available in many cases. Typically, the settlement figure will be such that most of same will be required for the discharge of day to day household costs in the short term. It will not be possible to set aside or preserve lump sums for the dependent children.

DIVISION OF SOLATIUM

45. A separate order needs to be made in relation to the division of the solatium. The widow has expressed the preference that the solatium should be divided equally between herself and her three children.
46. There is, however, a legal impediment to this in relation to the youngest of the children. The youngest was not born until after the death of his father. Strictly speaking, the solatium is only payable in respect of those who have suffered “mental distress” as the result of the loss of a relative. This has been interpreted by the High Court (Costello J.) in *McDonagh v. McDonagh* [1992] 1 I.R. 119 as meaning that a very young child, who will have no memory of the deceased, is not normally entitled to participate in the solatium. The judgment appears to draw a distinction between “mental distress” for the purpose of section 49 of the Civil Liability Act 1961, and the emotional deprivation arising from the loss of a parent. Damages are only recoverable in respect of the former. These principles apply with even greater force to a child who had not yet been born at the date of the deceased’s death.
47. Accordingly, I propose to adjust the division as suggested by the widow so as to divide the solatium between herself and her two older children equally.

CONCLUSION

48. For the reasons set out above, I have no hesitation in approving the proposed settlement. The figure offered is closely in line with that which is likely to be awarded were the matter to go to full hearing. The proposed apportionment of damages for loss of dependency as between the mother and children is generous to the children.
49. The solatium is to be divided equally between the mother and the two older children.
50. The proposed form of order is as follows. The sums apportioned to the individual children (together with their individual shares of the solatium where applicable) are to be paid into court to the credit of the children. The capital sums attributable to the three children, in descending order of age, are as follows: €80,861 (plus €11,666.67); €90,687 (plus €11,666.67) and €99,431.
51. An order for costs is to be made in favour of the representative plaintiff as against the defendant. The order will note that, as agreed between the parties, the costs are to be adjudicated on the basis that the briefs are out, i.e. counsel has been briefed for the full hearing. Such costs to be adjudicated in default of agreement by the Office of the Chief Legal Costs Adjudicator in accordance with the Legal Services Regulation Act 2015.
52. The representative plaintiff's solicitor is requested to submit, to the registrar, a draft order for the approval of the court.

Appearances

Kerida Naidoo, SC and John Smith for the plaintiff instructed by Walter Hegarty Solicitor (Derry)

Approved
Gareth S. Mans