

APPROVED

[2022] IEHC 374



THE HIGH COURT

2022 No. 6 PIR

**IN THE MATTER OF SECTION 35 OF THE PERSONAL INJURIES
ASSESSMENT BOARD ACT 2003**

BETWEEN

PATRICIA NOONAN

**(ON BEHALF OF THE STATUTORY DEPENDANTS OF THE LATE JAMES
NOONAN)**

APPLICANT

AND

ELECTRICITY SUPPLY BOARD

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 June 2022

INTRODUCTION

1. This matter comes before the High Court by way of an application to approve an assessment of damages made by the Personal Injuries Assessment Board. The assessment has been made in respect of a claim for damages arising out of the

NO REDACTION REQUIRED

death of Mr. James Noonan (“*the deceased*”). The deceased had been employed for a time by the respondent, the Electricity Supply Board.

2. The deceased’s widow, Mrs. Patricia Noonan, asserts that the deceased had been repeatedly exposed to asbestos fibres during the course of his employment with the respondent and that this exposure caused him to suffer a terminal malignant mesothelioma. Mrs. Noonan seeks to recover damages against the respondent for the loss of her husband. The claim is made on her own behalf and on behalf of the deceased’s children and grandchildren.

STATUTORY FRAMEWORK

3. Part IV of the Civil Liability Act 1961 creates a right of action where the death of a person is caused by the wrongful act of another. Only one action for damages may be brought against the same person in respect of the death, and the action shall be for the benefit of all of the statutory dependants (as defined). Relevantly, this class includes the spouse, children and grandchildren of the deceased. An action of this type is usually referred to by the shorthand a “*fatal injuries claim*”.
4. It should be explained that, under section 49 of the Civil Liability Act 1961 and an implementing Ministerial Order, the aggregate amount of damages which can be recovered for “*mental distress*” in a fatal injuries claim is currently capped at €35,000. The combined total of damages awarded to individual dependants for mental distress resulting from the death cannot exceed this amount. This head of damages is referred to in some of the case law as the “*solatium*”.
5. In most instances, it is a necessary first step to the pursuit of a fatal injuries claim that the claimant make an application to the Personal Injuries Assessment Board

(“*PIAB*”) for an assessment of damages. This procedural step must be completed prior to the institution of any legal proceedings. There are a number of exceptions to this requirement: it does not apply, for example, in cases of alleged medical negligence.

6. The outcome, in any particular case, of an application for an assessment of damages will depend on the attitude of the claimant and the respondent. If either party rejects the amount of damages as assessed by PIAB, then the claimant will be authorised to bring legal proceedings and to pursue their claim before the courts. Similarly, if PIAB decides, in the exercise of its statutory discretion, not to make an assessment of damages in the particular case, the claimant will again be authorised to bring legal proceedings.
7. The other potential outcome, of course, is that both the claimant and respondent might decide to accept an assessment of damages made by PIAB. In such a scenario, the assessment will become binding on the parties and the respondent may thereafter be subject to an “*order to pay*” (as defined). This is subject to the proviso, however, that in certain circumstances it will be necessary first to obtain court approval of the assessment of damages.
8. The circumstances in which court approval is required are prescribed as follows under section 35(1) and (2) of the Personal Injuries Assessment Board Act 2003:

“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 Civil Liability Act 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.”

9. The combined effect of these two subsections is to ensure consistency of approach to the protection of vulnerable persons as between (i) the assessment of damages procedure under the Personal Injuries Assessment Board Act 2003, and (ii) legal proceedings before the courts.
10. To elaborate: the approval of the court is required in order for a proposed settlement of legal proceedings, which involve a vulnerable person, to be effective and enforceable. For example, Order 22, rule 10 of the Rules of the Superior Courts provides that no settlement of proceedings, in which damages are claimed by or on behalf of an infant or a person of unsound mind, is valid without the approval of the court. The requirement for court approval is intended to ensure that the interests of vulnerable persons, such as a minor or a person of unsound mind, 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 requirement for court approval also constitutes a

safeguard against possible error on the part of the legal advisors acting on behalf of the vulnerable person.

11. The same safeguards apply to the assessment of damages procedure, by virtue of section 35 of the Personal Injuries Assessment Board Act 2003. The operation of the section is somewhat opaque. In order to determine whether court approval is required for a PIAB assessment, it is necessary to consider whether court approval would have been required for the settlement of legal proceedings arising out of the same claim. This involves consideration of what would have happened if, counterfactually, the claim for damages had not concluded with the parties accepting the PIAB assessment, but had instead been pursued by way of legal proceedings. If court approval would have been required before an offer of settlement in those hypothetical legal proceedings could become effective, then court approval is equally required for the PIAB assessment.
12. On the facts of the present case, had Mrs. Noonan (the deceased's widow) and the Electricity Supply Board (the deceased's former employer) not both agreed to accept PIAB's assessment of damages, then Mrs. Noonan would have been authorised to bring legal proceedings pursuant to Part IV of the Civil Liability Act 1961, i.e. a fatal injuries action. In the event that the parties to those proceedings had reached a settlement, then court approval would have been required to the extent that the settlement affected the position of any qualifying relatives of the deceased who had not yet reached their age of majority. It follows, therefore, that court approval is required before the acceptance of the PIAB assessment can become effective.

13. For completeness, it should be acknowledged that, in my judgment in *Wolohan v. McDonnell* [2020] IEHC 149; [2020] 1 I.R. 394; [2020] 2 I.L.R.M. 483, I had expressed the view, *obiter dicta*, that the effect of subsection 35(1) of the Personal Injuries Assessment Board Act 2003 appeared to be that it is *always* necessary to seek court approval before an assessment can be accepted in the context of a (proposed) fatal injuries claim, even in those cases where there are no minors involved. Having had an opportunity to consider the legislative provisions in more detail for the purpose of the present proceedings, I am satisfied that these *obiter dicta* overstate the position. Whereas subsection 35(1) might appear to apply the requirement for court approval to all fatal injuries claims, its legal effect is cut down by the provisions of subsection 35(2). The latter subsection ensures that the requirement for court approval of an assessment of damages is contingent on such approval being necessary were the claim to be pursued by legal proceedings. This creates an exact symmetry between those claims which are to be resolved by the acceptance of a PIAB assessment and those which are to be resolved by an offer of settlement following the bringing of legal proceedings.
14. Put otherwise, section 35 of the Personal Injuries Assessment Board Act 2003 does not itself prescribe the circumstances in which court approval for a PIAB assessment is necessary. Rather, it provides that if court approval would have been required before an offer of settlement in hypothetical legal proceedings arising out of the same claim could become effective, then court approval is equally required for the PIAB assessment. It is necessary, therefore, to look beyond the wording of section 35 in order to determine whether court approval is required. If, for example, there were to be an amendment to Order 22 of the

Rules of the Superior Courts, which amendment changed the circumstances in which court approval is required in the context of legal proceedings, then this would also affect the operation of section 35.

DECISION ON WHETHER TO APPROVE PIAB ASSESSMENT

15. The role of the court in deciding whether or not to approve a proposed settlement in a fatal injuries action where the statutory dependants include children under the age of eighteen years has been summarised as follows in *Cooney v. Health Service Executive* [2021] IEHC 754 (at paragraphs 35 to 39):

“As with any civil litigation, it is open to the parties to a fatal injuries claim to negotiate a settlement of the proceedings. It will, however, be necessary to apply to court for approval of a proposed settlement in the following two circumstances. The first is where any of the statutory dependants are minors, i.e. individuals under the age of eighteen years. Whereas it is open to adult dependants to enter into a binding settlement, a minor dependant does not have the legal capacity to do so. See, generally, *Wolohan v. McDonnell* [2020] IEHC 149; [2020] 1 I.R. 394; [2020] 2 I.L.R.M. 483.

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.

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.

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.

The second scenario in which court approval is required is where one or more of the adult statutory dependants objects to the proposed settlement. As discussed under the previous heading above, 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. It is, in principle, open to an adult statutory dependant to object on the basis that the terms of settlement are unfair to them when compared to the other statutory dependants. Whereas the representative plaintiff has carriage of the proceedings; in the event of a dispute, it is a matter for the court to rule upon the appropriateness of the settlement.”

16. The same principles apply, with necessary modifications, to the approval of a PIAB assessment under section 35 of the Personal Injuries Assessment Board Act 2003.
17. It should be explained that there is a significant distinction between the legal position of a young relative of a deceased person who had been financially dependent on the deceased (for example, a son or daughter under the age of eighteen years) and one who was not (for example, a grandchild under the age of eighteen years who is supported by their own parents). The former may have a very large claim for loss of financial dependency, whereas the latter’s claim is confined to a right, in principle, to share in the solatium of €35,000.
18. On the facts of the present case, the deceased was survived by his wife, his three adult children, and his four grandchildren. A fifth grandchild was born posthumously and does not qualify, therefore, to participate in the division of the solatium.

19. Importantly, the only claim for loss of financial dependency is that advanced on behalf of the deceased's widow. No claim in this regard is made in respect of the adult children or the grandchildren. The deceased's children are of full age and were financially independent at the time of the deceased's death.
20. In circumstances where there is no claim for loss of financial dependency on behalf of a minor dependant or any other person lacking legal capacity, the approval of the court is not required for this aspect of the PIAB assessment. It is a matter for the deceased's widow to decide for herself whether to accept the provision made under the PIAB assessment for her loss of financial dependency. The PIAB assessment has made provision for a sum of €325,704 in this connection and the deceased's widow has confirmed that she accepts the assessment.
21. The court does, however, have a role in respect of the division of the solatium. This is because three of the statutory dependants, i.e. three of the four qualifying grandchildren, are under eighteen years of age and thus lack legal capacity. The requirement for court approval is intended to protect their interests. In the absence of any claim for loss of financial dependency on their behalf, the extent of any potential claim on the part of these minor dependants is limited to a right, in principle, to share in the division of the solatium. Under the terms of the PIAB assessment, each of the four qualifying grandchildren is to receive the sum of €2,500. I am satisfied that this represents a generous allocation and one which would not be exceeded were this court to refuse to approve the assessment, which would have the consequence that the fatal injuries claim would then have to be litigated. A trial judge is unlikely to award a higher figure to the grandchildren.

22. Whereas the precise division of the solatium will depend on the particular circumstances of any given case, it is fair to say that, as a general proposition, a surviving spouse and the children of a deceased are normally regarded as having suffered greater mental distress than more distant relatives, such as grandchildren. In many cases, the solatium will be confined to the surviving spouse and the children.
23. It is a moot question as to whether a court, ruling on an approval application pursuant to section 35 of the Personal Injuries Assessment Board Act 2003, would have jurisdiction to direct a different division of the solatium than that proposed under the PIAB assessment. On a literal reading of section 35, the court is confined to a decision either to affirm or reject the assessment but cannot modify its terms. Certainly, the court would not have jurisdiction to modify the amount allowed in respect of other heads of claim such as, for example, loss of financial dependency.
24. In the event, it is not necessary to rule on this jurisdictional issue for the purpose of resolving the present case. This is because I am satisfied that, viewed from the perspective of the minor dependants, the proposed division of the solatium is more than reasonable. Had the fatal injuries claim gone to trial, it is unlikely that any of the grandchildren would have been allocated €2,500 each. Indeed, it is more probable that no allocation would have been made in their favour. There is, therefore, no benefit from their perspective in rejecting the PIAB assessment. As to the position of the adult dependants (including the eldest grandchild), Mrs. Noonan has confirmed, on affidavit, that the family are satisfied with the division of the solatium proposed under the PIAB assessment.

CONCLUSION AND FORM OF ORDER

25. The assessment of damages made by PIAB is hereby approved pursuant to section 35 of the Personal Injuries Assessment Board Act 2003. A sum of €2,500 each is to be paid into court for the benefit of the three qualifying grandchildren who are under the age of eighteen years. The balance of the assessment of damages, i.e. the sum of €366,424, is to be paid out in the manner indicated in the PIAB assessment.
26. An ancillary order will be made, pursuant to section 35(3) of the Act, directing that the costs of the approval application incurred by the applicant, Mrs. Noonan, are to be borne by the respondent, the Electricity Supply Board. Such costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement.
27. I will also direct that, in compliance with Order 22, rule 10(11)(f) of the Rules of the Superior Courts, the Registrar is to send a certified copy of the court order by ordinary prepaid post or by email to the Personal Injuries Assessment Board.

Appearances

William Maher for the applicant instructed by Michael Collins & Co. Solicitors

Approved
Gemma S. Mans