

APPROVED

[2022] IEHC 401



THE HIGH COURT

2022 No. 3 PIR

IN THE MATTER OF THE CERVICALCHECK TRIBUNAL ACT 2019

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

BETWEEN

J.M.
S.M.

(ON BEHALF OF THE STATUTORY DEPENDANTS OF THE LATE M.M.)

CLAIMANTS

AND

HEALTH SERVICE EXECUTIVE
MEDLAB PATHOLOGY LIMITED
CLINICAL PATHOLOGY LABORATORIES INC.

RESPONDENTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 18 July 2022

INTRODUCTION

1. This matter comes before the High Court by way of an application to approve a proposed settlement of a fatal injuries claim. The approval of the court has been sought in circumstances where three of the statutory dependants of the deceased are children under eighteen years of age. As such, they are regarded as “*infants*”

NO REDACTION REQUIRED

or “*minors*” in the eyes of the law and lack legal capacity to enter into a binding settlement agreement.

2. The application presents a novel jurisdictional issue as follows. The fatal injuries claim has been pursued, in the first instance, by the making of a claim to the CervicalCheck Tribunal. Put otherwise, the matter has not, yet, progressed as far as legal proceedings before the High Court. The novel issue which arises is whether, in the absence of such legal proceedings, the High Court nevertheless has jurisdiction to approve the proposed settlement on behalf of the minor statutory dependants.

PROCEDURAL HISTORY AND JURISDICTIONAL ISSUE

3. This application arises out of the tragic death of M.M. (“*the deceased*”). The deceased had been diagnosed with cervical carcinoma in January 2014. The illness was at an advanced stage, and it was too late to provide much more than palliative care. At the request of her family, the deceased was discharged from hospital in June 2014 and had been cared for in her own home by her two daughters. The deceased died in October 2014.
4. The deceased had previously undergone a smear test in September 2010 provided as part of a national cervical screening service (“*CervicalCheck*”). The family of the deceased contend that the manner in which the results of this smear test were reviewed was negligent, with the consequence that there was a failure to detect and diagnose a high-grade abnormal cell reading on the cytology slides taken from the deceased.

5. Two daughters of the deceased have brought a claim for damages arising out of what they say was the wrongful death of their mother. This claim has been brought on behalf of all of the statutory dependants of the deceased.
6. Generally, a claim for damages arising out of the wrongful death of a family member is pursued by way of legal proceedings under Part IV of the Civil Liability Act 1961. There is, however, an alternative procedural route open in the case of a claim seeking damages for negligence, breach of duty, breach of statutory duty or breach of contract arising from any act or omission concerning CervicalCheck. More specifically, such a claim may be submitted, in the first instance, to a dedicated statutory tribunal ("*the CervicalCheck Tribunal*") which has been established under the CervicalCheck Tribunal Act 2019 ("*the Act*"). It should be emphasised that a claimant is not obliged to pursue this procedural route: the CervicalCheck Tribunal's jurisdiction is consensual not mandatory. Section 13 of the Act provides that the CervicalCheck Tribunal shall hear and determine only claims in respect of which there is *agreement in writing* from each of the relevant parties to submit the claim for determination by the Tribunal.
7. Section 14 of the Act provides that the CervicalCheck Tribunal shall hear and determine claims in the same manner as the High Court hears and determines claims for personal injuries arising from alleged negligence, breach of duty, breach of statutory duty or breach of contract. It follows, therefore, that the provisions of Part IV of the Civil Liability Act 1961, which govern fatal injuries claims, are to be applied by analogy by the CervicalCheck Tribunal. Relevantly, the Civil Liability Act 1961 provides that any claim for fatal injuries must be for the benefit of all of the statutory dependants (as defined) and that the damages recoverable for mental distress are limited to an aggregate amount of €35,000.

This figure is referred to in the case law as “*the solatium*”. There is no statutory limit on claims for loss of financial dependency.

8. The claimants submitted a claim to the CervicalCheck Tribunal in April 2021. Following a mediation in November 2021, a settlement agreement was reached between the claimants and the third named respondent, Clinical Pathology Laboratories. The claim is to be struck out against the other respondents with no order.
9. The greater part of the compensation payable under the settlement agreement is in respect of the loss of financial dependency suffered by the children of the deceased. In addition, an amount of €35,000 is to be paid in respect of the claim for damages for mental distress resulting from the death of the deceased. This represents the maximum amount recoverable under statute. The proposed division of this figure of €35,000 as between the children and grandchildren of the deceased is discussed under the next heading below. Before turning to that task, however, it is necessary first to address the jurisdictional issue.
10. As explained earlier, the CervicalCheck Tribunal is required to hear and determine claims in the same manner as the High Court hears and determines claims for personal injuries. The position which has been reached in the present case is broadly analogous to a proposed settlement of a fatal injuries claim which is pending before the High Court. In certain cases, the approval of the court would be required before such a settlement could become effective. The role of the court in deciding whether or not to approve a proposed settlement of legal proceedings 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.”

11. On the facts of the present case, court approval for the proposed settlement would have been required had the fatal injuries claim been pursued by way of legal proceedings rather than a claim before the CervicalCheck Tribunal.
12. The jurisdictional issue which arises has been accurately summarised as follows in the written legal submissions filed on behalf of the claimants:

“[...] the Tribunal is granted extensive powers to hear and determine relevant claims and to make awards in respect of them. Where the Tribunal has made an award, following its having heard and determined a claim, the making of said award must be confirmed or approved of by this Honourable Court.

However, what does not appear to be provided for is a situation such as arises in this case, whereby the parties have themselves agreed to compromise a claim and reach a settlement. In such a scenario and where there are minor dependants, it is not at all clear that there is any jurisdiction vested in the Tribunal to rule such a settlement.”

13. There is no express provision made under the Act for the CervicalCheck Tribunal to approve a proposed settlement of a claim. Moreover, the existence of such a jurisdiction would be inconsistent with the general tenor of the legislation which is to the effect that any determination of a claim is always subject to confirmation by the High Court. Even where an award has been accepted by a claimant and has not been appealed by any other party, it is still necessary for an application to be made to the High Court to confirm the determination made by the CervicalCheck Tribunal. Section 14(3) of the Act provides that the High Court shall confirm the determination unless the court considers that it is not in the interests of justice to do so.
14. Whereas a decision on whether or not to approve a proposed settlement does not have the status of a formal determination of a claim, it nevertheless involves an adjudication which is intended to safeguard the position of the statutory

dependants. It would be more in keeping with the overall objectives of the legislative scheme for that adjudicative function to be carried out by the High Court rather than by the CervicalCheck Tribunal. Were it otherwise, a final adjudication on the rights of the statutory dependants would have been made by a non-judicial body. It is apparent from the legislation that the Oireachtas did not intend the CervicalCheck Tribunal to carry out the administration of justice, even in a limited capacity. Rather, the final determination of any claim for damages was to remain with the High Court. (For the *indicia* of the administration of justice, see *Zalewski v. Workplace Relations Commission* [2021] IESC 24).

15. The proper procedure to be followed, therefore, is that an application for approval of a proposed settlement of a claim should be made directly to the High Court. Having regard to the supervisory role which it has under the CervicalCheck Tribunal Act 2019, the High Court enjoys an implicit jurisdiction to rule upon a proposed settlement of a fatal injuries claim in circumstances where there are vulnerable, dissenting or absent family members involved. The existence of this jurisdiction is recognised under Order 22, rule 10(10) of the Rules of the Superior Courts.

CONSIDERATION OF THE PROPOSED SETTLEMENT

16. 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.

17. On the facts of the present case, the deceased was survived by her four adult children, her five grandchildren and by four of her siblings. One of these siblings, A., has died since the claim was submitted to the CervicalCheck Tribunal in April 2021. In accordance with the principles in *Jones v. J. & N. Sheridan Ltd* [2019] IEHC 82, no claim for a share of the *solatium* has been advanced on behalf of A.'s estate. The surviving siblings of the deceased have all executed waivers and do not seek to recover any damages.
18. Importantly, the only claim for loss of financial dependency is that advanced on behalf of three of the deceased's four adult children. No claim in this regard is made in respect of the deceased's grandchildren. The three adult children have full legal capacity and it is thus a matter for them to decide whether or not to accept the amount provided under the settlement agreement in this regard. Court approval is not required in respect of this aspect of the settlement agreement.
19. The position in respect of the fourth adult child is different. The first named claimant has explained on affidavit that the family members had lost contact with their brother, J., and have not heard from him for upwards of eighteen years. In circumstances where, as in the present case, one of the statutory dependants is not on notice of a proposed settlement of a fatal injuries claim—and by definition has not had an opportunity to object to same—it may be necessary to bring the matter before the court. This is certainly the position where the absent statutory dependant is an immediate relative of the deceased, such as a child. The Civil Liability Act 1961 provides that only one action for damages may be brought against the same person in respect of the death, and that the action shall be for

the benefit of all of the statutory dependants. It is important, therefore, that reasonable steps have been taken to ensure that all statutory dependants are aware of the making of a claim and are afforded an opportunity to object to a proposed settlement.

20. On the facts of the present case, I am satisfied that reasonable efforts have been made to contact J. I am also satisfied that, given that J. has been estranged from his family for almost two decades now, it is unlikely that he would have had a viable claim to receive damages for either loss of financial dependency or mental distress. The settlement agreement does not therefore adversely affect his interests.
21. Turning next to the grandchildren of the deceased, the position is as follows. Three of the five grandchildren, namely, E., R., and J., are under the age of eighteen years. As such, they lack legal capacity to enter into a binding settlement agreement and it is, therefore, necessary for the court to consider whether their interests are properly protected under the settlement agreement.
22. There is no claim for loss of financial dependency on behalf of any of the grandchildren. The grandchildren's interest in the settlement is thus confined to a right to be considered for a share of the overall *solatium* of €35,000. Under the terms of the settlement agreement, it is proposed that each of the grandchildren should be allowed a sum of €4,000. The balance of the €35,000 is to be divided between the three adult children (excluding J. who is estranged from his family).
23. I am satisfied that this represents a generous allocation from the perspective of the three minor grandchildren and one which would not be exceeded were this court to refuse to approve the settlement agreement, which would have the

consequence that the fatal injuries claim would then have to be pursued before the CervicalCheck Tribunal. It is unlikely that the CervicalCheck Tribunal would award a higher figure to the grandchildren. 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.

CONCLUSION AND FORM OF ORDER

24. For the reasons explained above, court approval of the proposed settlement is only required insofar as it affects the interests of the absent son, J., and the minor grandchildren, E., R., and J. I am satisfied that the respective interests of these statutory dependants are properly protected by the settlement agreement and same is hereby approved. An order will be made directing that a sum of €4,000 each is to be paid into court for the benefit of the three minor grandchildren to be held on their behalf until they reach the age of eighteen years.
25. It is a term of the settlement agreement that the claimants are to recover their legal costs as against the third named respondent. These costs are to include any reserved and discovery costs; the costs of the mediation (to include a fee for both junior and senior counsel); and the costs of the application to have the settlement agreement approved by the court. The quantum of the costs is to be adjudicated, i.e. measured, under Part 10 of the Legal Services Regulation Act 2015 in default of agreement.

26. The parties have liberty to apply to this court if any further procedural issues arise.
27. Finally, having regard to the legislative policy underlying the provisions of section 20 and section 28 of the CervicalCheck Tribunal Act 2019, the personal details of the deceased and the statutory dependants have been redacted from this judgment.

Appearances

Patrick McCullough (with Pearse Sreenan, SC) for the claimants instructed by Brian Long Solicitor (Cork)

Approved
Gemma S. Mans