THE HIGH COURT

[2021] IEHC 124

[2017/9907P]

BETWEEN

BENJAMIN BLACKWELL (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND NATALIE BLACKWELL)

PLAINTIFF

AND

THE MINISTER FOR HEALTH AND CHILDREN, THE HEALTH SERVICE EXECUTIVE, THE HEALTH PRODUCTS AND REGULATORY AUTHORITY AND GLAXOSMITHKLINE BIOLOGICALS SA

DEFENDANTS

Judgment of Mr. Justice Kevin Cross delivered on the 23rd day of February, 2021.

1. The plaintiff was born on the 22nd October, 2004 and suffers from narcolepsy and cataplexy as a result, it is alleged from injections he underwent as a young child to prevent the spread of a perceived pandemic.

2. Narcolepsy is a severe permanent life altering condition of sudden unpredictable outbreaks of sleeping which can present and do present randomly throughout the day and can involve the plaintiff falling asleep while standing or in any other situation.

3. Cataplexy, is a sudden collapse of the muscles sometimes precipitated by emotions such as laughing which can result in plaintiff's knees buckling or his jaw locking preventing speech. Not all sufferers from narcolepsy also have cataplexy but the plaintiff does.

4. The seriousness of Benjamin's condition is not in doubt and to shorten matters I fully accept the details as to his condition as set out both in the determination of the mediator and also in the helpful submissions on behalf of the plaintiff made and prepared by Ms. Gleeson of counsel for the benefit of the mediator.

5. There are eighty cases at least involving alleged narcolepsy from the same alleged source which have been initiated in the High Court and Benjamin's case was the first to be litigated and after lengthy and complex negotiations between the parties a mediated settlement as to the liability aspect of this case which was also applicable to all the other cases was negotiated. Because of the risks of litigation in these cases it was agreed that each of the plaintiffs was entitled to 50% of the gross value of their cases together with a significant additional add on benefits. The settlement also provided that the defendants reserve the right in a number of the cases in which there were supposed issues such as the statute of limitations or causation to offer a sum less than 50%. The settlement was proposed to this court for approval and by order of the 4th November, 2020 I approved of the settlement.

6. Whereas, as stated above, the settlement provided for some of the plaintiffs a figure of less than 50% would be offered, in Benjamin's case the sum is 50%.

7. The relevant clauses of the settlement are as follows:

"6. Each client including the plaintiff in this case who accepts the settlement offer within the said period of two months will receive an additional sum of €25,000 (payable within fourteen days of communication of acceptance of the offer), which said sum will not be taken into account as part of the 50% of the full value (as agreed or determined) of each claim.

7. The plaintiff agrees to accept the terms of this agreement and will apply to have the settlement ruled by the High Court. The application should take place in two stages, liability first and then quantum. If quantum of damages in this case is not agreed, it will be determined pursuant to this agreement. The mediated settlement talks referred to at para. 8 will prioritise any infant plaintiffs and the agreement or determination will be ruled on as soon as possible thereafter. If the court does not accept any such quantum settlement, then the issue shall be referred back to the mediator or the retired judge as appropriate.

8. The plaintiff who accepts the defendant's offer will enter into mediated settlement talks with the defendant for the purposes of assessing the value of such claims and negotiating on their settlement on the basis of a liability percentage of 50% or any such other percentage as may be determined pursuant to para. 13. The parties shall accept the recommendations of the appointed Mediator in relation to the mechanism and acceptable timescales subject to the maximum period referred to at para. 9 below, to be followed for the purpose of assessing these claims for this purpose.

9. In the event that the parties cannot reach agreement with regard to the assessment and settlement of any particular case, then same shall be referred to the Mediator (Hugh Mohan SC) or such other person as the parties may agree for expert determination (on the basis of established principles of compensatory damages and on the basis of the papers alone) and the parties shall be bound by such determination subject to Clause 10 below. All such cases shall be disposed of within a maximum period of twelve months, unless that period is extended by agreement or by order of the Mediator at his discretion.

10. In the event that either party is dissatisfied with the decision of the Mediator they are entitled to appeal that decision to a retired judge of the Superior Courts, to be agreed between the parties who will decide on damages on the basis set out in para. 9 above and the parties shall be bound by such determination. If the parties cannot agree the identity of the retired judge, the retired judge shall be nominated by the Mediator.

The Mediator's determination will be equivalent to and have the same effect as a lodgement for the purpose of costs of the review. In the event the retired judge determines that the amount ordered is not altered in favour of the applicant party, the applicant party will bear the costs of the application to the retired judge. The retired judge shall be entitled to interfere with the decision of the Mediator only

when the retired judge concludes that the Mediator has made a decision that falls outside the range of what was reasonably open to him or her."

8. In this case the offer on liability having been approved when the court made its order on the 4th November, 2020 the parties entered into mediation as specified by the agreement and the mediator awarded a gross figure of €1,980,000 which netted down to a figure of €990,000.

9. The plaintiff's advisors are not satisfied with this award and have applied for a direction of the court as to whether the said offer should be accepted.

Jurisdiction or propriety of a ruling at this stage

10. The first issue is whether I have jurisdiction to enquire into the reasonableness of the offer and if so on what basis. In a different case involving a plaintiff who suffered from narcolepsy in which the defendants have stipulated an offer lower than the 50% I was asked by the plaintiffs to rule on that issue and I held that such a ruling was premature as the parties had not entered into mediation to determine a final percentage reduction.

11. Counsel on behalf of the defendant came to court on the second day of the application to state that while they did not dispute the jurisdiction they questioned the desirability of the court embarking on a ruling at this stage of the process for the reasons essentially outlined hereunder.

12. The group settlement of these cases by the parties under mediation as approved by this court is something to be warmly welcomed. Firstly, though perhaps of least importance such a settlement represents an enormous saving of court time. These cases would have taken a large number of weeks to be decided. Each of the cases would have had different issues and it may well be that even after determination of one case in relation to liability, other cases would also have to be litigated in full.

13. Secondly, and more importantly, the costs on all sides would be prohibitive especially for the plaintiff who would have the risks involved in unsuccessful litigation and would face a huge burden in processing extremely complex litigation totally under resourced compared to the defendants save of course that the plaintiffs were likely to have the benefit of lawyers willing to take these cases on the basis that they would not be paid were they unsuccessful.

14. Thirdly the settlement means that the cases do not have to be litigated and the resulting trauma to the individual plaintiffs and indeed their families is avoided.

15. In approaching the approval of the original settlement as to liability I was made aware of the possible difficulties each of the plaintiffs would face. I am conscious that every settlement including a mediated settlement contains clauses that are not necessarily well regarded by every party and every settlement involves compromises and especially settlements such as that ruled by the court in Benjamin's case. In particular settlements which involve the resolving of multiple litigation in order to be effective must involve a perceived benefit for all parties who must engage with the settlement.

16. Therefore, I conclude that the court must, at the very least, be slow to appear to interfere with what the parties have agreed and indeed the process whereby the parties have agreed to resolve their dispute.

17. I note that in Clause 7 of the settlement it is stated "*the plaintiff agrees to accept the terms of this agreement and will apply to have the settlement ruled by the High Court. This application should take place in two stages the liability first and then quantum. If quantum of damages in this case is not agreed, it will be determined pursuant to this agreement".*

18. Clause 9 states:

> *"In the event that the parties cannot reach agreement with regard to the assessment … the same shall be referred to the Mediator … and the parties shall be bound by such determination subject to Clause 10 below".*

19. Clause 10 provides:

> *"In the event that either party is dissatisfied with the decision … they are entitled to appeal that decision to a retired judge … and the parties shall be bound by such determination."*

Clause 10 further provides that:

> *"The Mediator's determination will be equivalent to and have the same effect as a lodgement for the purpose of costs of the review. In the event the retired judge determines that the amount ordered is not altered in favour of the applicant party, the applicant party will bear the costs of the application to the retired judge. The retired judge shall be entitled to interfere with the decision of the Mediator only where the retired judge concludes that the Mediator has made a decision that falls outside the range of what was reasonably open to him or her."*

From the foregoing it is clear that the parties accept that settlement, in infant cases, is to be ruled by the court. It may be that it was intended in the agreement in relation to adults that the ruling was merely a final court order and that approving of a settlement was only to apply in minor cases. However, Clause 7 is ambiguous. Clause 7 also states that the ruling will take place in two stages, first on liability and then in quantum. In Benjamin's case the issue of liability has already been ruled.

20. The agreement also envisages that if the plaintiff is not satisfied with the award of a mediator he should then go by way of appeal pursuant to the provisions of Clause 10 to a retired judge.

21. The first issue that arises in this case is that if, as is the case, the plaintiff is dissatisfied with the award whether I have any jurisdiction absent the plaintiff exhausting the mechanisms of the agreement to rule on it and if I have jurisdiction whether, as the

defendant contends I should embark on a ruling now before the agreement is exhausted by the appeal process to a retired judge.

22. Mr. McCullough urged that the application is akin to a s.63 application in order to protect the infant plaintiff in view of the potential penalties in case of an application to the retired judge. It must be stated that this application is not a s. 63 application. It is not a question of the court ruling on a lodgement made by one of the parties to litigation or indeed ruling on an offer made by a party to litigation.

23. This is an award made by an expert mediator under an agreement approved by the court. This is an award which is stated in the settlement to be final save for an appeal to a retired judge.

24. If a court were to treat the determination by expert mediators merely as offers made in litigation to be approved or otherwise, it would have in my view a serious and potentially detrimental effect on the success of the settlement achieved with such effort by the parties and approved of by the court. Clearly any settlement or indeed award involving a minor does require scrutiny and ruling by the court and Clause 7 specifically allows for such a ruling. The circumstances in which a court would or could or should overturn or disprove of any award by a mediator in the settlements must be limited. I conclude that at the very least these circumstances must be limited to the discretion offered to the retired judge in Clause 10 i.e. "*where the retired judge concludes that the mediator has made a decision that falls outside the range of what was reasonably open to him or her".*

25. I find that in view of the potential penalties in costs in relation to an appeal to the retired judge and further as this is the first case to be determined and that no objection to jurisdiction has been stated by the defendants, that I will treat the application on its merits to set out in general my views on the award limited to a finding as to whether the mediator "*has made a decision that falls outside the range of what was reasonably open to him or her".*

26. My decision that I have jurisdiction and my decision to embark upon this application is taken only on the basis that jurisdiction is not disputed and on the fact that this is the first case to go through the process so the view of the court as to how such awards should be dealt with can be understood. It is conceded by counsel on behalf of the defendant that there is some ambiguity in this carefully thought out settlement. In general I find that as a matter of policy the normal wording of this mediated settlement should be followed and in the event of dissatisfaction with the mediator's decision an appeal should be made to the retired judge. However, in this case I will embark upon the application on its merits.

The merits

27. The mediator's award was broken down as follows:

"(a) General damages €350,000

(b) Loss of earnings €850,000

(c) Retrospective care/special damages €130,000

(d) Future care €400,000

(e) Aids and appliances €250,000

(f) Total €1,980,000

(g) Less €50% €990,000

(h) Determination: €990,000 (excluding ex gracia payment of €25,000)"

28. The plaintiff objects that:

(a) The sum of €350,000 for general damages is too low and that €400,000 should have been awarded

(b) That the sum of €850,000 which was the net figure awarded after a 15% reduction for *Reddy v. Bates* (i.e. €1 million gross was awarded for loss of earnings) was insufficient and that a sum of between €1,3000,000 and €1,480,000 should have been allowed which figure should not include any allowance for *Reddy v. Bates.*

(c) That the award of €400,000 for future care was insufficient and a sum of €689,900 should have been awarded on the basis of €23.95 per hour or €11,745 per anum be awarded.

The test I will adopt is the test contained in Clause 10 i.e. whether "*the mediator has made a decision that falls outside the range of what was reasonably open to him or her".*

A. General damages

29. As there are in this case significant special damages it is not disputed that the "cap" applies and that the time of the decision of the award and to date the cap stands at €500,000.

30. In her very eloquent submissions counsel for the plaintiff has outlined the serious nature of the injuries sustained by the plaintiff all of which I accept. The plaintiff however accepts the case is not of a class that reaches the "cap" but argues for a figure of €400,000 rather than €350,000.

31. The PIAB book of quantum is entirely unhelpful in relation to these unusual injuries and whereas I believe €400,000 would not be at all unreasonable I do not find that the award of €350,000 was in the words of Clause 10 "outside the range of what was reasonably open …" Neither of course would an award of €400,000 have been outside of the range.

B. Loss of earnings

32. The principle applicable to all issues of special damages is as outlined by this court and affirmed by the Court of Appeal in the *Gill Russell* case. First the figures and the basis for those figures as are advanced by a plaintiff must be examined in order to see if they are reasonable. If these figures are reasonable then they are followed. It is only if the

figures are not reasonable that you then examine the defendant's figures on the basis for that calculation.

33. Accordingly, contrary to what some people may think a fair approach is not to add the plaintiff's figures to the defendant's figures and divide by two or to take some figure at random between the two contrasting figures. That is entirely unfair and contrary to the principles of damages and is overly paternalistic.

34. The question of loss of earnings for a minor who never has worked is a much more difficult operation than most awards of special damages. Of necessity awarding future loss of earnings involves a degree of speculation that is not required in most other awards of special damages. Of relevance in such considerations is of course the plaintiff's educational and family background and how a plaintiff has coped with his illnesses to date and accordingly what if any employment is likely to be open to him or her and compared to what might have been the case had the injury not occured.

35. In this regard I have had the benefit of the parties' submissions and the detailed reports including the report of Professor Wass. The mediator of course also had the benefit of these documents.

36. The mediator found, as he was entitled to that the basis for the loss advanced by the plaintiff was too pessimistic as to Benjamin's likely future employment. The mediator also found that the contentions of the defendants were not sufficiently realistic and the mediator allowed a figure of €1 million euro for loss of earnings less 15% totalling €850,000.

37. The plaintiff urged a gross sum of up to €1,480,000 should be awarded. It should be pointed out that if a reasonable *Reddy v. Bates* deduction were allowed the net figure would be €1,258,000, a difference of €408,000 between the figures. This is not insubstantial. The plaintiff submits that no deduction for *Reddy v. Bates* should have been made as Professor Wass allowed in her formula deductions from her baseline figure. However, I am not convinced that Professor Wass's deductions are identical to those imagined in *Reddy v. Bates* and a 15% deduction is not unreasonable. The defendants however suggested a total sum of €426,000. Mr. McCullough characterised the figure of €1 million arrived at by the mediator as being "plucked out of the air" and while in such calculations there was almost always going to be an element of "plucking from the air", I do not find any error in principle in the mediator's findings under the heading of loss of earnings. The mediator is criticised for not approaching his determination in a forensic and reasoned manner of a court judgment. This is not what he was doing and I do not believe that his reasoning could be said to be arbitrary and I do not find that the figure he arrived at of €850,000 is "outside of the range". Accordingly, I do not believe that this finding can be interfered with either.

Costs of future care

38. The mediator awarded the sum of €400,000 under this heading. The plaintiff argued for €689,900 on the basis of ten hours a week at 49 weeks per anum. The defendant

submitted that there was very little care required but put a figure of €114,000. The mediator accepted that "a figure does have to be allowed for future care but I believe given all I have read and considered the plaintiff is resourceful and independent-minded and is likely to keep such care to a low level. I would allow the figure of €400,000 such sum to include any case management."

39. The plaintiffs submit that the mediator's award is irrational as he allowed past care at approximately €11,000 per anum and that the plaintiff's own figures for future care amount to just less than €12,000 per anum.

40. I do not find that the mediator reasoning to be irrational. Clearly while Benjamin was young he required the real and probably round the clock care that his parents provided and this was allowed for. It is open to the mediator to find that the type of care Benjamin will require going into the future will from time to time be significantly less and he may well, as the mediator found be likely "try to keep care to a low level".

41. Benjamin will in all probability marry or settle down with someone and while his spouse might be entitled to care on an over and above case basis which would not be charged for on a commercial or euro and cents basis, I do not find that just because the mediator allowed a sum of €11,000 per anum to date that he was obliged to allow the same or slightly higher into the future.

42. I find accordingly that while a higher figure for care was open to the mediator I do not find that the sums awarded fall "*outside the range of what was reasonably open to him or her".*

43. For the reasons as previously outlined in order to ensure that this desirable and comprehensive agreement is worked, I do not encourage further applications by this route however if a plaintiff wishes to make any such application they should be made on notice to the defendants.

44. Without in any way interfering with the jurisdiction of a retired judge on appeal from the mediator and without in any way wishing to fetter his or her discretion to set aside the award if he or she believes that it did indeed fall outside the range, it follows from the above that in my view the award did not fall outside the range and should not be interfered with. I await submissions from counsel as to how to proceed.

Signed: Mr. Justice Kevin Cross

No Redactions Required