

APPROVED

[2022] IEHC 68



THE HIGH COURT

2017 No. 10588 P

BETWEEN

K.R.

(A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND)

PLAINTIFF

AND

SOUTH DUBLIN COUNTY COUNCIL

DEFENDANT

JUDGMENT of Mr. Justice Garrett Simons delivered on 21 February 2022

INTRODUCTION

1. This matter comes before the High Court by way of an application to rule a proposed settlement of a personal injuries action. The approval of the court is required in circumstances where the plaintiff has not yet reached the age of eighteen years, and, accordingly, is a minor or infant in the eyes of the law. The plaintiff will be referred to in this judgment as “*the injured child*”.

FACTUAL BACKGROUND

2. These proceedings arise out of an accident which occurred on 21 July 2014. The injured child, who was then aged seven years, had been playing with a friend on the public roadway near to his family home. There are a number of metallic gratings or drain covers located at the edge of the roadway, adjacent to the footpath. These allow for access to a drain or gully underneath. It is pleaded that one of these metallic gratings (“*the drain cover*”) had been left open for an unspecified period of time. Same subsequently fell closed upon the child’s left hand. The child suffered a significant crush laceration to the distal half of his left middle finger.
3. Having been initially treated at the emergency department of Tallaght Hospital, the child was subsequently referred to the plastic surgery service of Crumlin Hospital. The distal pulp on the digit was determined to be non-viable. A procedure was carried out under general anaesthetic whereby the left middle finger was formally terminalised at the level of the fracture in the distal end of the middle phalanx. The injured child made an uneventful post-operative recovery. He attended an outpatient clinic on a number of occasions, with his last review being on 18 November 2014. The injured child has not required treatment or follow-up for his injury since that date.
4. The injured child was most recently seen by a consultant plastic surgeon on 2 July 2015. The consultant provides the following opinion and prognosis:

“[The injured child] is a 7 year-old right-handed schoolchild who sustained a severe crush injury to his left middle finger while playing on his street. This resulted in compound fractures to the distal and middle phalanges of his left middle finger and a devitalized soft tissue envelope on the pulp of the digit. As a result of this the fingertip was considered non-viable and he required admission to hospital to have it formally shortened under general anaesthetic. He has made

an excellent recovery from this injury but unfortunately as a result has been left with a very significant and permanent cosmetic deformity in his left hand. The amputated left middle finger is obvious at a social distance and will remain to be so on a permanent basis. The distal aspect of the amputation stump is still swollen which adds to the cosmetic deformity and while this will likely improve with time it may be possible that he will require a surgical revision of this in the future. It is also possible to attempt to disguise such deformities with a prosthesis but this is usually not recommended, especially in a child as it can hinder function and is quite impractical.

Thus from a cosmetic point of view he has been left with a permanent significant deformity in his hand that is unlikely to require further intervention in the future. From a functional point of view [the injured child] has made an excellent recovery from this injury and it does not appear to have affected the function of the rest of his left hand and he has also recovered a full range of movement and sensation in the left middle finger stump itself. However he does have a central gap due to the loss of 2cms of middle finger when making a full fist with his left hand that can cause small objects (ex. coins) to fall out inadvertently. However, at his age one would hope that he will modify his hand function to accommodate this and that it would not prevent him from pursuing any manual based activity for hobby or occupation in the future. This injury however has left him with a permanent albeit mild functional loss in association with his cosmetic deformity. I also do not believe he will benefit from any intervention from a functional point of view for this injury in the future either.”

PROCEDURAL HISTORY

5. An application for the assessment of damages was made pursuant to the Personal Injuries Assessment Board Act 2003. In circumstances where the defendant local authority did not consent to an assessment being made, the Personal Injuries Assessment Board duly issued an authorisation to bring proceedings in respect of the claim on 20 September 2017.
6. The within proceedings were then issued out of the Central Office of the High Court on 23 November 2017. The exchange of pleadings was completed at a leisurely pace, with a defence not being delivered until 15 March 2019.

7. For reasons which have not been explained, there was then a further period of delay in the progress of the proceedings. Indeed, it became necessary for each side to serve a notice of intention to proceed.
8. At all events, the defendant local authority ultimately made a number of offers to settle the proceedings. In each instance, the offer proposed an “*all in*” figure, i.e. an omnibus sum to cover both damages and legal costs. In fact, the offers went further, and proposed how the sum might be divided up. The detail of the offers is summarised below:

<u>Damages</u>	<u>Costs</u>	<u>Total</u>
€10,000	€10,000	€20,000
€12,500	€12,500	€25,000
€17,000	€13,000	€30,000

9. The second offer above was the subject of an application to the High Court (Simons J.) on 17 January 2022. Counsel for the injured child, very properly, brought the court’s attention to the proposed division of the “*all in*” figure of €25,000 as between damages and legal costs.
10. The court expressed a concern that the amount proposed for legal costs appeared high relative to the level of damages. The matter was put back, by analogy with the principles in *Landers v. Dixon* [2015] IECA 155; [2015] 1 I.R. 707, to allow the solicitor acting for the injured child to put in material to assist the court in assessing what the appropriate amount for legal costs should be.
11. An affidavit was subsequently filed by the injured child’s solicitor exhibiting a bill of costs, and fee notes from counsel, the forensic engineer and the consultant plastic surgeon, respectively. The affidavit explains that the offer has increased by €5,000 to €30,000. It is proposed that the injured child would receive a total

of €17,000 by way of damages, with the balance of €13,000 to be paid to the solicitor in respect of legal costs.

12. The injured party's solicitor was afforded an opportunity to address the matter further, through counsel, at a short hearing on 14 February 2022. Counsel indicated that he did not require the matter to be adjourned further to allow consideration of the judgment in *E.M. (A minor) v. R & A Leisure Ltd* [2022] IEHC 66.

CHRONOLOGY

13. The chronology of events is summarised in tabular form below.

21 July 2014	Date of accident
29 January 2015	Engineer's report
2 July 2015	Consultant plastic surgeon's report
20 September 2017	PIAB issue authorisation to bring proceedings
23 November 2017	High Court proceedings issued
4 January 2018	Defendant's notice for particulars
5 January 2018	Replies to notice for particulars
8 January 2018	Appearance entered on behalf of defendant
15 March 2019	Defence delivered
10 June 2020	Defendant's notice of intention to proceed
17 July 2020	Notice of trial (No trial date ever fixed)
4 December 2020	Plaintiff's notice of intention to proceed
17 January 2022	Application to rule proposed settlement of €25,000
14 February 2022	Improved offer of €30,000 (all in)

REQUIREMENT FOR COURT APPROVAL

14. The injured child has not yet reached the age of eighteen years, and, accordingly, is a minor in the eyes of the law. This has important implications for the conduct of the proceedings, and, in particular, for any potential settlement of same.

15. A minor or infant lacks legal capacity to pursue legal proceedings on their own, and may only sue as plaintiff by their “*next friend*”. This quaint term refers to an adult who has consented to carry on proceedings on behalf of a minor plaintiff. The next friend is typically a close relative of the minor plaintiff. Here, for example, the next friend is the injured child’s mother.
16. The next friend is not a party to the proceedings, but rather acts on behalf of the minor plaintiff. The next friend is responsible for the progress of the proceedings, and has authority to give instructions to the solicitor acting on behalf of the minor plaintiff. Importantly, the next friend is potentially liable to pay the costs of the defendant(s) in the event that the proceedings are unsuccessful. Part of the rationale for requiring the nomination of a next friend is to ensure that there is an identified person with legal capacity against whom a costs order may be enforced.
17. The role of next friend is an onerous one, and, for this reason, there is an express requirement under the Rules of the Superior Courts that a written authority to the solicitor be signed and filed in the Central Office before the name of any person shall be used in any cause or matter as next friend. It is essential that the solicitor explain to a putative next friend that they will have a potential liability to pay the costs of the other side.
18. The next friend does not have authority to settle or compromise the proceedings on behalf of the minor plaintiff. No settlement is valid without the approval of the court. This is provided for under Order 22, rule 10 as follows:
 - “(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.

- (2) No money (which expression for the purposes of this rule includes damages) in any way recovered or adjudged or ordered or awarded or agreed to be paid in any such cause or matter in respect of the claims of any such infant or person of unsound mind, whether by verdict or by settlement, compromise, payment into Court or otherwise, before or at or after the trial, shall be paid to the plaintiff or to the next friend of the plaintiff or to the plaintiff's solicitor unless the Court shall so direct."

19. Accordingly, if the next friend of a minor plaintiff considers that proceedings should be settled, it is necessary to make an application to court for approval of the proposed settlement.
20. 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 requirement for court approval also constitutes a safeguard against possible error on the part of the legal advisors acting on behalf of the minor 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.
21. Where a settlement or compromise has been approved by the court, the claim will be regarded as fully and finally settled, and the minor plaintiff will be bound by same. It will not be open to the minor plaintiff to seek to reagitate the claim on reaching their age of majority.

22. Order 22, rules 10 (3) and (4) provide that no money agreed to be paid in respect of the claims of an infant, i.e. a minor plaintiff, shall be paid to the plaintiff, or to the next friend of the plaintiff, or to the plaintiff's solicitor, unless the court shall so direct. The court has discretion to make such directions as it may think fit, and may direct that a payment be made to the plaintiff's solicitor in respect of costs.
23. In most instances, a defendant will, as part of the proposed terms of settlement, consent to an order directing it to pay the minor plaintiff's costs as adjudicated under Part 10 of the Legal Services Regulation Act 2015. This ensures that the amount of costs is subject to independent oversight by the Office of the Chief Legal Costs Adjudicator.
24. The proposed terms of settlement in the present case are unusual in that it is not envisaged by the parties that there will be any formal adjudication on costs. Instead, it had initially been suggested that one-half of the settlement in respect of the minor plaintiff's personal injuries claim is to be paid in respect of costs. This court, in the discharge of its obligation to protect the interests of the minor plaintiff, must consider whether the amount suggested to be paid in respect of costs is reasonable.

WHETHER OFFER OF SETTLEMENT IS REASONABLE

25. The reasonableness of an offer of settlement is assessed by considering what the likely outcome would be were the claim to proceed to full hearing before a trial judge, and comparing that hypothetical outcome to what would be paid under the offer of settlement. This exercise 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. If liability is in issue, then the amount of the proposed settlement may be less than the notional “*full*” value of the claim. It may nevertheless be sensible to accept this discounted sum, rather than to allow the case to go to trial and run the risk that liability would be decided in favour of the defendant; no damages would be recovered; and costs awarded against the minor plaintiff.

26. 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 minor 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.
27. In the present case, there is a real likelihood that the personal injuries claim would be dismissed. The gravamen of the case made against the defendant local authority is that it had been negligent in installing drain covers, which were not lockable, in an area where the local authority knew or ought to have known that children play. It is also alleged that the local authority had been negligent in implementing a “*dangerous design*” for drain covers, and had failed to carry out regular inspections so as to discover the hazard presented by an open drain cover.
28. The expert engineering evidence from the local authority’s side is such that the alleged negligence is unlikely to have been made out at trial. It seems that the drain cover had been installed some 30 years prior to the date of the accident; that drain covers of this type had been a common feature of housing estates at

the time; that this particular drain cover had been properly constructed and was in good condition as of the date of the accident; and that it had not been standard practice to fit locks to drain covers because the presence of a lock might prevent access to the drain in an emergency situation. It seems that the Greater Dublin Regional Code of Practice for Drainage Works 2006 had stated that lockable frames and gratings were not permitted. More recently, however, it seems that the practice has changed, and modern drain covers are now fitted with a lock.

29. Given the logistical and financial impediments to the wholesale replacement of drain covers throughout the city, it seems unlikely that a trial judge would find that the local authority had been negligent in not replacing the drain covers at the locus of the accident with a modern lockable design. There is also an issue in respect of contributory negligence, having regard to the age of the child and the obvious danger of “*playing*” with the open drain cover.
30. Given the likelihood that the personal injuries claim would be dismissed, it was inevitable that any offer of settlement by the defendant would be discounted to reflect this reality. Before turning to consider the latest offer, it is helpful to consider what the notional “*full*” monetary value of the claim would have been. The monetary value, at its very height, would have been €40,000. This amount has been estimated as follows. The book of quantum published by the Personal Injuries Assessment Board provides the following guidance in respect of the assessment of damages for the type of injury suffered by the child in the present case:

“Loss of Single Digits

There are several factors that need to be considered when calculating the assessment. Such factors would include dominant hand, appearance, use of any remaining stump, age, gender and occupation impacts.”

31. An amount of up to €51,100 is suggested for the partial loss of a person's middle finger. Having regard to the report of the consultant plastic surgeon (summarised at paragraph 4 above), the injury in the present case is not at the higher level of this suggested scale. The injury is not to the child's dominant hand. The report states that the injured child has made an excellent recovery from a functional point of view; that the injury does not appear to have affected the function of the rest of his left hand; and that he has recovered a full range of movement and sensation in the left middle finger itself. The report also offers the opinion that the injury would not prevent the injured child from pursuing any manual based activity for hobby or occupation in the future.
32. The amount of damages likely to be awarded by a trial judge (absent issues on liability and causation) would not exceed €40,000. On the hypothesis that the claim succeeded at trial, an award of costs would likely be made in favour of the minor plaintiff on the Circuit Court scale.
33. The latest offer of settlement is an "*all in*" figure of €30,000. This represents a discount on the notional "*full*" value of the claim, i.e. €40,000 together with Circuit Court costs. Subject to a modification to the apportionment as between damages and costs (discussed under the next heading), I am satisfied that this represents a fair and reasonable offer and should be approved. The amount is more than the injured child is likely to recover were the matter, instead, to go to trial. As discussed at paragraphs 27 to 29 above, there are very real difficulties in respect of liability and causation. The most likely outcome were the matter to go to trial is that the claim would be dismissed, and an award of legal costs made in favour of the defendant.

34. There is an additional complication created in respect of legal costs by the fact that the proceedings have been brought in the High Court rather than the Circuit Court. Even if the injured child succeeded on liability and causation, it would be open to the defendant to seek a differential order on costs in accordance with the principles in *McKeown v. Crosby* [2021] IECA 139.

PAYMENT OF COSTS TO SOLICITOR

35. The child's claim for personal injuries is one which should have been brought in the Circuit Court and not the High Court. This is because the potential monetary value of the claim, at its very height, would have been €40,000. The costs to be paid out to the solicitor from the settlement figure must reflect this reality. It is important to emphasise that, in accordance with the criteria prescribed under Part 10 and Schedule 1 of the Legal Services Regulation Act 2015, recoverable costs are to be assessed by reference to work actually done. Put otherwise, the figure for costs is not to be put forward in the abstract.
36. The legal and factual issues arising in these proceedings were all ones which are well within the capability of a competent junior counsel. Some involved the application of well-established principles of the law of negligence to the particular facts of this case. There was no need to retain senior counsel for this case; and there was certainly no need to retain two counsel. The reasonable recoverable costs should be confined to one counsel.
37. The principal legal issue arising was whether negligence could be established against the local authority. The resolution of this issue turned largely on the expert engineering evidence. This has been summarised at paragraph 28 above. Counsel will have had to consider the rival reports of the respective side's

engineers, and to form a view on the prospects of persuading a trial judge that the local authority had been negligent.

38. Counsel will also have had to consider the medical evidence with a view to estimating the notional “*full*” value of the claim. The prognosis in respect of the physical injury is straightforward. This is not a case where, for example, there had been a requirement for ongoing medical treatment or subsequent surgical procedures. There are no difficulties in assessing the long-term physical consequences of the injury.
39. The work involved would have been neither complex nor time-consuming. The documents to be reviewed by counsel were small in number, consisting primarily of a single short medical report, and two engineering reports. The injured child’s engineer’s report is very short, running to approximately 700 words and a number of photographic stills.
40. Counsel prepared a short opinion setting out his views on the proposed settlement. Counsel also prepared a very short affidavit to ground the application to rule the proposed settlement.
41. An application to rule a proposed settlement is uncontested and the judge will normally have read the papers in advance. The hearing time involved will be very short, usually no more than ten minutes. The recoverable costs should reflect this reality.
42. Having regard to the nature, extent and value of the work involved, the reasonable amount recoverable in respect of counsel is €1,665 (plus VAT). The precise breakdown of this figure is set out towards the end of this judgment. The figures allowed in respect of the negotiation fee, opinion for the ruling application, grounding affidavit and the hearing of the ruling application, reflect

the fact that there is considerable overlap in the work entailed in these items. For example, the issues analysed in the opinion would have been directly relevant to the negotiation of the settlement.

43. The reasonable amount of fees for this work must be in proportion to the higher level of fees which would have been recoverable had the case gone to trial. The brief fee which would have been allowed for this case would have been in the region of €1,500 (plus VAT). The fact that the case settled before a hearing date had even been fixed had the consequence that the work actually required of counsel was less. Counsel will not, for example, have had to set aside time for a scheduled hearing or have had to prepare for the examination of witnesses. The costs recoverable must reflect this reality.
44. Turning next to the solicitor's fees, the figure proposed in the solicitor's affidavit filed on 8 February 2022 suggested a fee of €6,000 (plus VAT). The nature of the work done by the solicitor is summarised as follows in the bill of costs:

“To Professional fees in connection with the above matter to include but not limited to the attached Activity Sheet, to include taking of instructions, submission of claim, investigation of claim, briefing engineer to report, obtaining engineers report and advising client regarding liability, agreeing to take on the execution of the case on a ‘no win no fee’ basis, arranging medical report, obtaining medical reports, submission of matter to PIAB, correspondence with PIAB, correspondence with Defendants insurers who declined liability, receipt of Authorisation, briefing Counsel for advice, advising client in relation to liability, issuing High Court proceedings due to the severity of injury, service of proceedings, of Appearance, receipt of Notice for Particulars, Replies to Notice For Particulars,, receipt of Defence, briefing Counsel to advise on proofs, receipt of Advice on Proofs, setting case down for trial, further correspondence with Defendants leading to compromise negotiations, taking of next friend's instructions in relation to same, recommendation of settlement to High Court in view of previous rulings and issues on liability, attendance at ruling and completion of matter”.

45. As appears from the foregoing, the solicitor's work had been largely confined to the curation of the case, and liaising between the injured child's mother, counsel and the engineer. The only legal work of any significance which appears to have been done without the assistance of counsel had been the drafting of the replies to the request for particulars. This is a very short document, running to less than two pages and less than 200 words. The replies involved the provision of basic information which would have been readily available from initial instructions and from the single medical report. The replies cannot have taken even an hour to prepare. More broadly, the paperwork generated by the case, including the medical and engineering reports and pleadings, is minimal and runs to less than 50 pages.
46. I have concluded that the reasonable amount recoverable in respect of the solicitor's fee is €2,000 (plus VAT). This figure reflects the reality that the burden of the work in this case has been shared with counsel. Counsel drafted the personal injuries summons; prepared the necessary affidavit for the application to approve the proposed settlement; provided written advices on liability and causation; and negotiated the proposed settlement. Whereas it is legitimate for a solicitor to seek such assistance from counsel, the corresponding reduction in the work which has had to be done by the solicitor himself should be reflected in the fees charged by him personally.
47. The figure of €2,000 equates to twenty hours work at a notional rate of €100 (plus VAT) per hour. This represents a more than fair approximation of the amount of time likely spent on the case by the solicitor, and the value of that work. Much of the higher value work had been done by counsel, and this outlay is recoverable separate to the solicitor's professional fee.

48. No allowance has been made in respect of any fees or expenses incurred in respect of the application to PIAB, having regard to the provisions of section 51B of the Personal Injuries Assessment Board Act 2003.
49. Turning finally to the fees in respect of the experts, the appropriate sums are as follows. A fee of €400 is recoverable in respect of the consultant plastic surgeon's report.
50. A figure of €650 (plus VAT) will be allowed in respect of the engineer's site inspection and report. (A separate fee is allowed in respect of photographic prints). The suggested fee of €2,440 (plus VAT), which is based on an hourly rate of €305, is unreasonable having regard to the minimal nature of the report provided by the engineer. The report runs to less than 700 words and does not engage to any meaningful extent with the principal issue in the proceedings. The report does not, for example, examine in any detail the appropriate standards and regulations applicable to the installation of drain covers. This had been the principal issue in respect of liability, and had been addressed in the defendant local authority's engineering report.
51. The work actually done by the injured child's engineer seems to have been confined to an inspection of the site of the accident; the taking of photographs; and an examination of the hinged drain cover. This should not have taken more than two to three hours.

CONCLUSION AND FORM OF ORDER

52. The proposed settlement of the proceedings for an "*all in*" figure of €30,000 is approved, subject to the following directions pursuant to Order 22, rule 10 of the Rules of the Superior Courts. An amount of €6,788.11 is to be paid to the minor

plaintiff's solicitor in discharge of legal costs. This figure is inclusive of VAT and outlay (including counsel).

53. The balance of the figure of €30,000, i.e. an amount of €23,211.89, is to be paid into court, and to be held to the credit of the minor plaintiff until he reaches the age of eighteen years.

SCHEDULE OF COSTS

	FEE	VAT	
Outlay			
Personal injuries summons	190.00		
Stamp on ex parte docket	20.00		
Stamp on affidavit (x 2)	40.00		
Commissioners' fees	20.00		
Stamp on notice of intention to proceed	60.00		
High Court accountant's office	230.00		
City Law Agency (filing)	207.20		
Post, telephone, miscellaneous	100.00	23.00	
Photographs / Maps (engineer)	190.46		
Counsel			
Drafting personal injuries summons	250.00		
Negotiation fee	300.00		
Advice on Proofs	275.00		
Ex parte docket	40.00		
Grounding affidavit	150.00		
Brief fee on ruling	350.00		
Opinion	300.00		
VAT on counsel's fees		382.95	
Experts			
Engineering report	650.00	149.50	
Consultant plastic surgeon	400.00		
Solicitor	2,000.00		
VAT on solicitor's fees		460.00	
Subtotals	5,772.66	1,015.45	
Total (Including VAT)			6,788.11

Approved
Gerrit S. Mans