

APPROVED

[2023] IEHC 651



THE HIGH COURT

2022 10 PIR

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

BETWEEN

C.

(A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND)

APPLICANT

AND

AN UNNAMED DRIVER

RESPONDENT

JUDGMENT of Mr. Justice Garrett Simons delivered on 27 November 2023

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 arising out of a road traffic

NO FURTHER REDACTION REQUIRED

accident. The assessment is subject to the Personal Injuries Guidelines adopted by the Judicial Council on 6 March 2021.

2. The injured party has not yet reached the age of eighteen years and is thus a minor or infant in the eyes of the law. Accordingly, the PIAB assessment will not become binding unless and until it has been approved by the court. The requirement for court approval is intended to safeguard the interests of the minor.
3. An unusual feature of the present case is that the court is being invited *to disapprove* the PIAB assessment, notwithstanding that the assessment has been formally accepted on behalf of the minor by his mother and next friend. The mother and next friend considers that the assessed damages are too low. Rather than reject the PIAB assessment herself, however, she seeks instead to have the court refuse to approve the assessment. This is done in an attempt to avoid the adverse costs implications which would otherwise arise in the event that the damages recovered in subsequent legal proceedings are less than the amount now available under the PIAB assessment.

STATUTORY FRAMEWORK

4. In most instances, it is a necessary first step to the pursuit of a personal injuries action 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.
5. The requirement to apply for an assessment of damages is provided for under the Personal Injuries Assessment Board Act 2003 (“**PIAB Act 2003**”).

Importantly, the legislation prescribes that a PIAB assessment can only ever become legally binding in circumstances where both the claimant and the respondent have accepted that assessment. The legislation does not purport to introduce a coercive jurisdiction, whereby the parties are obliged to submit to an adjudication on damages by PIAB. Rather, either party is fully entitled to reject the PIAB assessment.

6. (For completeness, it should be explained that a respondent may be *deemed* to have accepted the PIAB assessment in certain circumstances, but this does not detract from the principle that the parties are not obliged to submit to an adjudication by PIAB).
7. The outcome, in any particular case, of an application for an assessment of damages will, therefore, 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.
8. 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.
9. The circumstances in which court approval is required are prescribed under Section 35(1) and (2) of the PIAB Act 2003. 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 PIAB 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 PIAB Act 2003. On the facts of the present case, the injured child has not yet reached his age of majority. Were the personal injuries claim to have been resolved following the institution of legal proceedings (rather than at an earlier stage, i.e. by the acceptance of a PIAB assessment), then court approval would have been required pursuant to Order 22. It follows, therefore, that court approval is equally required before the acceptance of the PIAB assessment can become binding.

12. Importantly, court approval is only required where the PIAB assessment is *accepted* on behalf of the claimant by his or her next friend. If, conversely, the next friend wishes to *reject* the PIAB assessment on behalf of the claimant, he or she is entitled to do so unilaterally, i.e. without any application for court approval. In such a scenario, an authorisation will issue which will then allow the claimant to institute legal proceedings through his or her next friend.
13. There are, however, certain costs implications for a claimant who does not accept a PIAB assessment, which has been accepted by the respondent, and then fails to “*beat*” the amount of that assessment in subsequent legal proceedings. In such a scenario, special costs rules apply under Section 51A of the PIAB Act 2003 (as amended by the Personal Injuries Resolution Board Act 2022).
14. A claimant who fails to recover in legal proceedings more than that which had been available under the PIAB assessment is not only precluded from recouping the costs of the legal proceedings, but is also on hazard of having to pay the other side’s costs. Indeed, the next friend may have a personal liability in this regard. The rationale underlying these costs rules is, presumably, that the legal proceedings proved to be unnecessary: in circumstances where the *respondent* to the claim had accepted the PIAB assessment, the claimant could have recovered this amount without having to institute legal proceedings.
15. Section 51A of the PIAB Act 2003 is only triggered where the next friend has not accepted the PIAB assessment on behalf of the claimant. If, conversely, the next friend *accepts* the assessment, subject to court approval, and the court ultimately determines not to approve the assessment, then any legal proceedings instituted by the claimant thereafter are subject to the normal costs rules. These are to be found, principally, under the Civil Liability and Courts Act 2004;

Part 11 of the Legal Services Regulation Act 2015; and the recast Order 99 of the Rules of the Superior Courts.

16. Put otherwise, a claimant is shielded from the special costs rules where responsibility for the PIAB assessment not becoming binding on the parties resides with the court and not with the claimant's next friend. Of course, this shield is only ever available where court approval is actually required under Section 35 of the PIAB Act 2003.
17. In the present case—rather than simply exercise her right to reject the PIAB assessment herself—the next friend seeks to bring about a result whereby the assessment is not approved by the court, and the injured child is thereby shielded from the special costs rules.

INJURIES SUFFERED

18. The claim for personal injuries arises out of a road traffic accident which occurred on 26 December 2019. In brief, the vehicle in which the injured child had been travelling as a rear seat passenger collided with another vehicle. The injured child had been restrained in a booster seat but had managed to unfasten the seatbelt in the moments preceding the collision in order to retrieve a drink which he had dropped into the footwell.
19. The injured child suffered multiple lacerations to his face as a result of the accident. These were treated under general anaesthetic the day after the accident. The injured child remained in hospital for a period of three days.
20. The most up-to-date report in respect of the physical injuries is dated 2 April 2021. The facial scarring is described as follows:

“On examination he has a number of areas of scarring on his face. The main scar measures 6cm in length, and runs

transversely across his right cheek onto his nose. There are a number of other small scars on his nose. All the scars are pink in colour and are easily noticeable at conversational distance. They are, however, flat in relation to the normal surrounding skin.”

21. The consultant plastic and reconstructive surgeon offered the following opinion and prognosis:

“This six year old boy was involved in a road traffic accident on the 26/12/2019, which resulted in a number of facial lacerations as described. These required suturing under general anaesthetic, and as a result of this incident he will be left with permanent facial scars. The scars are currently pink in colour, but their appearance should improve as they mature in the coming 12 months. If they remain pink at that stage, they may benefit from a course of laser treatment (approximately six treatments at €200 per treatment). It is extremely unlikely that they will require any revisional surgery. [The injured child] himself is not particularly aware of his scars, but this may become an issue for him as he grows into his teenage and adolescent years.”

22. The injured child was examined by a consultant psychiatrist on 2 June 2021 on the instructions of PIAB. The report records that the child experienced physical and psychiatric injuries and psychological distress as a result of the road traffic accident. The report notes that the injured child continues to experience post-traumatic stress disorder. This diagnosis is cross-referenced to the WHO International Classification of Diseases (ICD-10) F43.1.

23. This class reads as follows:

“Post-traumatic stress disorder

Arises as a delayed or protracted response to a stressful event or situation (of either brief or long duration) of an exceptionally threatening or catastrophic nature, which is likely to cause pervasive distress in almost anyone. Predisposing factors, such as personality traits (e.g. compulsive, asthenic) or previous history of neurotic illness, may lower the threshold for the development of the syndrome or aggravate its course, but they are neither necessary nor sufficient to explain its occurrence. Typical features include episodes of repeated reliving of the trauma

in intrusive memories ('flashbacks'), dreams or nightmares, occurring against the persisting background of a sense of 'numbness' and emotional blunting, detachment from other people, unresponsiveness to surroundings, anhedonia, and avoidance of activities and situations reminiscent of the trauma. There is usually a state of autonomic hyperarousal with hypervigilance, an enhanced startle reaction, and insomnia. Anxiety and depression are commonly associated with the above symptoms and signs, and suicidal ideation is not infrequent. The onset follows the trauma with a latency period that may range from a few weeks to months. The course is fluctuating but recovery can be expected in the majority of cases. In a small proportion of cases the condition may follow a chronic course over many years, with eventual transition to an enduring personality change (F62.0)."

24. With respect, it is very difficult to reconcile the diagnosis of PTSD ascribed to the child with the actual symptoms recited in the report. None of the severe symptoms associated with such a diagnosis are recorded. Indeed, the injured child is recorded as having no current impairment of academic functioning nor in recreational functioning. His sleep disturbance is characterised as "*mild*".
25. It should also be noted that the first psychiatric report predates the current, more comprehensive, version of the diagnostic manual: ICD-11 for Mortality and Morbidity Statistics (Version: 01/2023).
26. At all events, the extent of the psychological injury suffered by the child has since been clarified by a second psychiatric assessment. This assessment was undertaken on 19 May 2023, that is, some three and a half years subsequent to the road traffic accident. The conclusions are set out as follows:

"Summary & Conclusion:

[The injured child] was six years old when he was a passenger in a car involved in a road traffic accident.

Physically he sustained facial lacerations resulting in facial scarring.

Following this accident, he experienced anxiety evidenced by travel and separation anxiety, irritability, secondary nocturnal enuresis (bed-wetting in a previously continent child), lack of confidence and anxiety about facial scarring.

In my opinion, the anxieties experienced by [the injured child] following this accident fulfilled diagnostic criteria for an Adjustment Disorder, *see Appendix 1*

He has received professional psychotherapeutic intervention which he found helpful in allaying his anxieties.

It is now over three years since the accident. His level of anxiety has reduced. He has residual travel anxiety and remains anxious about his facial scarring. However, his anxiety is no longer at a level to fulfil criteria for a clinical disorder.

I expect with the further passage of time, continued reassurance and support from her (*sic*) parents as well as continued exposure to safe travel, this anxiety will fully resolve.

At this stage it is difficult to predict, [the injured child's] future psychological adaptation, through his adolescent years, to resultant facial scarring."

27. As appears, the child is recorded as only ever having fulfilled the diagnostic criteria for an adjustment disorder, as opposed to a post-traumatic stress disorder.
28. There is some reference in the first psychiatric report to a facial twitch. Counsel confirmed that this has since resolved. Certainly, there is no reference to same having persisted in the second, more up-to-date psychiatric report.

PROCEDURAL HISTORY

29. PIAB issued its assessment on 29 September 2021. The assessment identifies the dominant injury as "*facial disfigurement*" and characterises this as falling within the "*severe*" category. General damages for pain and suffering are assessed at €60,000. The assessment was accepted on behalf of the injured child by his next friend on 30 September 2021.

30. The application pursuant to Section 35 of the PIAB Act 2003 initially came on for hearing on 10 October 2022. Thereafter, the matter was adjourned from time to time in order to allow the injured child's side to put certain additional information before the court. The court was subsequently furnished with up-to-date photographs of the facial scarring; an up-to-date psychiatric assessment; and a supplemental opinion of counsel. The application came on for hearing again on 13 November 2023. The injured child and his mother attended in court on that date, and I had an opportunity to view the facial scarring myself.
31. Counsel on behalf of the injured child accepts that an assessment of €60,000 in respect of the facial scarring is within the "*right realm*", and further accepts that were the facial scarring the only injury, then the assessment would be regarded as reasonable albeit not generous.
32. Counsel identifies the central issue to be decided by the court as being whether the assessment is insufficient based on the (supposed) failure of PIAB to apply an appropriate "*uplift*" in respect of the lesser, but nonetheless significant, psychological injury sustained. Counsel submits that PIAB, having gone to the trouble of having had the child assessed by a consultant psychiatrist, nevertheless failed to give any uplift in respect of the (then) finding of a post-traumatic stress disorder. It is further submitted that had the psychological injury been the dominant injury, it would have attracted damages of between €35,000 and €40,000. Applying a discount to reflect that this is not the dominant injury, it is submitted that an uplift of at least €20,000 should be applied. It is said that an appropriate level of overall damages for pain and suffering would be between €75,000 and €80,000.

DISCUSSION

33. This matter comes before the High Court by way of an application pursuant to Section 35 of the PIAB Act 2003. The function of the court is to evaluate the adequacy of the assessment of damages made by PIAB. In essence, the court must decide whether the assessment of damages should be accepted on behalf of the injured child, or whether, alternatively, the claim for personal injuries should be pursued by way of legal proceedings.
34. This entails the court 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 PIAB assessment. 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.
35. 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 level of damages typically awarded in personal injuries proceedings and attempt to identify potential weaknesses in the claim which may affect the outcome of the proceedings. Counsel on behalf of the injured child 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 PIAB assessment resides with the court alone.
36. It should be emphasised that the court is not engaged in some sort of judicial review of the correctness or otherwise of the PIAB assessment. It is not necessary to identify some error in principle on the part of PIAB in order for the court to refuse to approve the PIAB assessment. Rather, the court must make its

own evaluation of the personal injuries claim. The court will often have more information available to it than PIAB will have had. For example, in the present case, the court has had the benefit of viewing the facial scarring and of considering a more up-to-date psychiatric assessment.

37. The proper approach to be taken to cases involving multiple injuries is described as follows in the Personal Injuries Guidelines:

“In a case of multiple injuries, the appropriate approach for the trial judge is, where possible, to identify the injury and the bracket of damages within the Guidelines that best resembles the most significant of the claimant’s injuries. The trial judge should then value that injury and thereafter uplift the value to ensure that the claimant is fairly and justly compensated for all of the additional pain, discomfort and limitations arising from their lesser injury/injuries. It is of the utmost importance that the overall award of damages made in a case involving multiple injuries should be proportionate and just when considered in light of the severity of other injuries which attract an equivalent award under the Guidelines.”

38. In *Zaganczyk v. John Pettit Wexford* [2023] IECA 223, the Court of Appeal approved of the approach advocated in *McHugh v. Ferol* [2023] IEHC 132 whereby it was stated that a fair and transparent means of assessing what the uplift should be in any given case is to categorise each of the additional injuries according to the bracket that it would have fallen into had it been the main injury, and then discount the award to allow for the temporal overlap of the injuries. The Court of Appeal emphasised that it is important not to lose sight of the global impact of all the injuries on the particular plaintiff concerned. A plaintiff is entitled to be compensated for all the suffering they have endured.
39. The Court of Appeal has emphasised the importance of *proportionality* in assessing damages. Whatever individual categories of injury a plaintiff may have suffered, and whatever the values attributable to those categories may be,

the court must strive to take a holistic view of the plaintiff and endeavour to place the plaintiff's particular constellation of injuries and their cumulative effect on the plaintiff within the spectrum in a way that is proportionate both to the maximum and awards made to other plaintiffs.

40. The dominant injury in the present case is the facial scarring. It is necessary, therefore, to evaluate this aspect of the personal injuries claim first, before going on to consider the nature of the uplift required to compensate for the psychological injury.
41. Having viewed the injured child's facial scarring, I have concluded that it is properly characterised as falling into the category of "*serious scarring*" for the purposes of the Personal Injuries Guidelines. This category is described as follows:

"Where the worst effects have been or will be reduced by plastic surgery leaving some cosmetic disability and where the psychological reaction is not great or, having been considerable at the outset, has diminished to relatively minor proportions. Will include cases where the scarring is visible at conversational distance."

42. The indicative bracket for damages for this category of injury is between €30,000 and €60,000. I would place the present case in the mid-range of this bracket, i.e. approximately €45,000. Whereas the facial scarring is visible at conversational distance, the disfigurement is not substantial.
43. In addition to this dominant injury, the child also suffered psychological injury. The up-to-date psychiatric assessment report indicates that whereas the anxieties experienced by the injured child following the road traffic accident had fulfilled the diagnostic criteria for an adjustment disorder, his anxiety is no longer at a level to fulfil criteria for a clinical disorder.

44. Having regard to this report, it would not reasonably be open to the trial judge to award damages on the basis of a diagnosis of PTSD. The Personal Injuries Guidelines state as follows:

“B. Post-Traumatic Stress Disorder (PTSD)

Cases within this category are confined to those in which there is a specific diagnosis of a reactive psychiatric disorder following an event which creates psychological trauma in response to either experiencing or witnessing a terrifying event. Symptoms may include distressing memories of the traumatic event, nightmares, flashbacks, sleep disturbance, avoidance, mood disorder, suicidal ideation and hyperarousal. Symptoms of hyperarousal can affect basic functions such as breathing, pulse rate, and bowel and/or bladder control.”

45. There is a seeming conflict in the medical evidence in the present case with the first psychiatric report making a diagnosis of post-traumatic stress disorder, whereas the second psychiatric report has downgraded the diagnosis to an adjustment disorder. The trial judge is likely to attach more significance to the second report. It is based on a much more recent examination of the child and is more comprehensive than the first report. The second report indicates that the child’s level of anxiety has reduced. The child is reported as stating that he never dreams about the road traffic accident and that he is less worried about travelling by car. There has been only modest intervention: the child received play therapy and therapy in school.
46. The trial judge is likely, therefore, to characterise the case as falling within the category of “*minor psychiatric damage*” as follows:

“(d) Minor psychiatric damage

A full recovery will have been achieved. Considerations affecting the level of the award should include those listed above. In cases where only modest or no intervention was required in terms of treatment, damages should be very much

to the lower end of the bracket. Other considerations affecting the level of award will include:

- (i) Duration of injury;
- (ii) Impact of the injury on daily activities;
- (iii) Extent of any treatment undertaken;
- (iv) Whether sleep was affected and if so to what extent.”

47. The indicative bracket for damages for this category is between €500 and €15,000.
48. (For completeness, in the unlikely event that the trial judge were prepared to characterise the injury as a post-traumatic stress disorder, he or she is likely to place it in the “*minor*” category. The indicative bracket for damages for this category is between €500 and €10,000.)
49. It is next necessary to consider the appropriate “*uplift*” to be applied to the assessment of damages for the dominant injury in order to ensure that the child is compensated for the global impact of all the injuries suffered. On my estimate, the dominant injury, namely the facial scarring, would attract damages of approximately €45,000. The “*uplift*” in respect of the psychological injury cannot reasonably be expected to attract more than €15,000. This is the top end of the applicable bracket, even before any discount is applied. The “*uplift*” is more likely to be in the region of €5,000 to €10,000.
50. It is unlikely, therefore, that the overall damages, which might be recovered were the claim to be pursued by legal proceedings, would exceed the PIAB assessment of €60,000. In the circumstances, there is no practical benefit to the injured child in pursuing his claim by way of legal proceedings. He is unlikely to achieve an award of general damages in excess of €60,000, and there is a real risk that he

would recover less than that sum. Accordingly, it is in the child's best interests to accept the PIAB assessment of €60,000 for general damages.

CONCLUSION AND FORM OF ORDER

51. The assessment of damages made by PIAB on 29 September 2021 is hereby approved pursuant to Section 35 of the Personal Injuries Assessment Board Act 2003. A sum of €60,000 is to be paid into court for the benefit of the applicant. The balance of the assessment of damages, i.e. the sum of €8,688.60, is to be paid out to the next friend's solicitor in the manner indicated in the PIAB assessment. The sum of €2,640 in respect of future treatment is to be paid out to the next friend to hold for the benefit of the child.
52. An ancillary order will be made, pursuant to Section 35(3) of the Act, directing that the costs incurred by the next friend, on behalf of the applicant, in respect of the approval application are to be borne by the respondent. Such costs are to be adjudicated under Part 10 of the Legal Services Regulation Act 2015 in default of agreement. 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.
53. Finally, having regard to the fact that the applicant is a minor and having regard to the discussion in this judgment of "*sensitive personal information*" (as defined), the following reporting restrictions are imposed pursuant to Section 45 of the Courts (Supplemental Provisions) Act 1961 (as amended by Section 40 of the Civil Liability and Courts Act 2004). Nothing is to be published or broadcast in respect to these proceedings which is likely to lead members of the public to

identify the child to whom the proceedings relate. For the avoidance of doubt, there are no restrictions on reporting any matter which appears in this judgment.

Appearances

Michael Byrne SC and Mark J Byrne for the plaintiff instructed by H J Ward LLP