

THE HIGH COURT

[2019 No. 4860 P.]

BETWEEN

**MEGAN CARA AUSTIN (A MINOR SUING BY HER GRANDMOTHER AND NEXT FRIEND
AINE WRENE)**

PLAINTIFF

AND

**HALLMARK BUILDING CONTRACTORS LIMITED, NATIONAL ASSET MANAGEMENT
AGENCY, JOHN BARRY AND ELAINE BARRY**

DEFENDANTS

**EX TEMPORE JUDGMENT of Mr. Justice O'Connor delivered on the 2nd day of March,
2020**

1. The infant plaintiff born in 2005 is now fourteen. According to the personal injuries summons issued on the 19 June 2019 the plaintiff climbed on the 5 January 2016, when aged ten, a wall and railing at Castleland Construction Site adjacent to the Willows where she lives with her grandmother and proposed third party.
2. The defence, dated the 1 August 2019, traverses the pleas of negligence and breach of duty including a plea that the first named defendant was negligent to have had spikes on top of the fence and thereby causing a trap. It is alleged that the plaintiff's left arm suffered a laceration of 7 centimetres by 5 centimetres and is now scarred.
3. The solicitor for the first named defendant in her grounding affidavit refers to the application to the Personal Injuries Assessment Board received on the 28 December 2017 which mentions the shortcut through the construction site and claims that the next friend and grandmother of the infant plaintiff ought to have properly supervised the plaintiff such that she would not trespass upon the construction site.
4. Counsel for the first named defendant, and the proposed third party and next friend of the infant plaintiff, referred to two Supreme Court judgments, *Johnston (A Minor) v. Fitzpatrick* delivered on the 11 July 1991 and *Darcy (A Minor) v. Roscommon County Council* [1991] WJSC-SC 2706.
5. In summary, the Supreme Court recognised the discretion of the judge hearing this type of application. In *Darcy*, Hederman J. iterated that it is undesirable that a solicitor for the defendant should be the person making the affidavit seeking leave to join the third party relative and next friend. In *Johnston*, Finlay C.J. said that there is not an inflexible rule and that, in the circumstances of that case, a direct affidavit from the defendant who witnessed the accident was necessary. Finlay C.J. left over the issue about the relevance of the third party being a next friend of the plaintiff.
6. Here, counsel for the first named defendant submits that the affidavit of the proposed third party and next friend sworn in reply to this application on the 14 November 2019 will be the basis of the application for the indemnity and contribution claim from the first named defendant. Counsel acknowledges that the first named defendant has no other evidence to offer in relation to the claim made against the third party. Therefore, the Court is left with the submission that the next friend and third party will be unable to

afford legal representation and will be under some pressure when prosecuting the infant plaintiff's claim with an independence of mind.

7. This Court has more faith than possibly the next friend third party in the administration of justice by the trial judge who, it is now acknowledged, will not hear any evidence other than that of the plaintiff and her next friend and any other liability witness to be called on behalf of the plaintiff at trial. I am not persuaded that the Court should exercise its discretion on the basis of an apprehension of the next friend not being able to exercise an independence of mind. The plaintiff and her next friend are represented by solicitors and counsel who will be able to assist the court. The trial judge will be cognisant of any potential pressure. The infant plaintiff child's interest will not be compromised. Therefore, I grant leave to issue the third party notice in the form of exhibits "CMcCD2" subject to the following further directions:-

- (1) The solicitors for the first named defendant will furnish an appearance to be completed by the third party with the third party notice and instructions as how to complete that notice of appearance.
- (2) The first named defendant should issue the third party notice within the standard time prescribed in these orders
- (3) Directions concerning the trial of the third party issue should be sought from the trial judge.
- (4) There is no need for the third party to deliver a defence subject to what the trial judge may direct.
- (5) Details of all witnesses to be called by the first named defendant in the claim against the third party with reports from experts intended to be called at the trial should be furnished to the third party or her solicitor at least 28 days before the date of trial. Such list of witnesses as to fact, to be called by the first named defendant, cannot include any witness as to fact who has not sworn an affidavit in this application to join the third party.