

## THE HIGH COURT

2011 No. 10567 P.

BETWEEN

JOAN JONES

PLAINTIFF

AND

J &amp; N SHERIDAN LIMITED

(TRADING AS HEATHERFIELD NURSING HOME)

CONNOLLY HOSPITAL BLANCHARDSTOWN

THE HEALTH SERVICE EXECUTIVE

DEFENDANTS

**JUDGMENT of Mr Justice Garrett Simons delivered on 15 February 2019****INTRODUCTION**

1. This matter comes before the court by way of an application to rule upon an offer of settlement made in a fatal injuries claim. The principal issue for adjudication concerns the apportionment of damages for mental distress ("solatium") as between the statutory dependants of the deceased. In particular, the court has to consider whether it would be appropriate to direct that a part of the solatium be paid to the estate of a statutory dependant who has herself since died. This requires consideration of the question of whether damages for mental distress are, in effect, personal to a statutory dependant.

2. For the reasons set out herein, I have come to the conclusion that the just result in this case is that the entire of the solatium should be paid to the sole surviving statutory dependant.

**FACTUAL BACKGROUND**

3. These proceedings arise out of the death of an elderly resident of a nursing home, the late Kathleen Kenny. Mrs Kenny had been a resident of the first named defendant's nursing home prior to her death on 23 November 2009. The events leading up to Mrs Kenny's death can be summarised as follows. Mrs Kenny had been admitted to James Connolly Memorial Hospital, Blanchardstown, Dublin (the second named defendant) in October 2009. Mrs Kenny was discharged back into the care of the nursing home on 5 November 2009. However, Mrs Kenny returned to hospital on 23 November 2009, and passed away later that day. Mrs. Kenny was aged 89 years old at the date of her death.

4. Dr. Kieran Geraghty, Coroner for County Dublin, issued a report on 25 March 2010 recording the death as due to "health care acquired clostridium difficile infection".

5. As of the date of her death, Mrs Kenny had two statutory dependants within the meaning of the Civil Liability Act 1961, namely her niece to whom Mrs Kenny stood in *loco parentis*, Joan Jones; and Mrs Kenny's sister, Christine Sweeney (née Gallagher). Mrs Sweeney herself has since passed away on 5 August 2016.

**FATAL INJURIES CLAIM**

6. Proceedings were commenced by way of Personal Injury Summons dated 22 November 2011. The proceedings were instituted in the name of Joan Jones, as Mrs Kenny's executrix. The claim is for damages following the alleged negligence of the defendants, which it is said resulted in the wrongful death of Mrs Kenny. It is pleaded that the Plaintiff and the other statutory dependants of the deceased have "suffered severe mental distress and will suffer loss, damage and expenses".

7. The first named defendant, the nursing home, took over carriage of the proceedings on behalf of all the defendants. Liability is, seemingly, fully contested.

8. A notice of tender offer was submitted on 2 November 2015 offering a sum of €20,000 plus Circuit Court costs. A further offer of €28,000 (to include special damages of €7,890) together with Circuit Court costs was tendered. The plaintiff has indicated on affidavit that she is prepared to accept this further offer. The matter has come before the court for ruling.

**CIVIL LIABILITY ACT**

9. These proceedings arise out of a claim pursuant to Part IV of the Civil Liability Act 1961 (as amended). Under section 48, a judge is required determine such amounts (if any) as the judge shall consider reasonable compensation for mental distress resulting from the death to each of the statutory dependants. The payment is referred to as the "solatium".

10. In *Cubbard v Rederij Viribus Unitis and Galway Stevedores Ltd* (1966) 100 ILTR 40, Lavery J. stated that:

"The view I take of the section is that it is not intended to provide monetary compensation for every member of the family. [...] I think the section must be considered in the light of some real intense feeling of being grievously affected by the death."

11. As originally enacted under the Civil Liability Act 1961, this payment was capped at IR£1,000. This sum has since been amended pursuant to the Civil Liability (Amendment) Act 1996, and amounted to circa €25,400.

12. (The current maximum amount payable for mental distress is €35,000, as amended by Ministerial Order. However, this current amendment came into effect after the commencement of the proceedings, and therefore does not apply to these proceedings. Section 49(1A)(b) of the Civil Liability Act 1961, as inserted by Section 2(1)(b) of the Civil Liability (Amendment) Act 1996, stipulates that the amount set out in the Ministerial Order—presently €35,000—shall have effect in relation to any cause of action that accrues while the Order is in effect (i.e. the new limit will apply to dependants of those who are fatally injured from 11 January 2014 onwards).

13. It is common case that—as of the date of Mrs Kenny’s death—there were two surviving statutory dependants. Ms Jones qualifies as a person to whom Mrs Kenny stood in *loco parentis*. Section 47(2)(c) of the 1961 Act provides that “a person in *loco parentis* to another shall be considered the parent of that other”. In *Hollywood v Cork Harbour Commissioners* [1992] 1 IR 457, O’Hanlon J. interpreted this section to include “any situation where one person assumes the moral responsibility, not binding in law, to provide for the material needs of another.” This relationship continues even into the adulthood of the child. O’Hanlon J., at page 466 of the report, went on to find that the dependent party:

“need not be a child but may be an adult and that the relationship between the parties need not be a blood relationship of the kind which would in ordinary circumstances subsist between the ‘members of the family’ referred to in s 47, sub-s 1 of the Civil Liability Act, 1961.”

## DISCUSSION

14. The first issue to be addressed is whether the overall settlement is a reasonable one. In circumstances where there is no claim for actual financial dependency in respect of Mrs Kenny’s death, the claim is confined to the statutory damages for solatium, and special damages in respect of the funeral costs. As explained above, the solatium is capped at circa €25,400. The special damages are agreed in the sum of €7,890. This means that the total value of the claim is in the order of €33,290.

15. The offer of settlement is in the sum of €28,000 together with Circuit Court costs. In circumstances where liability is disputed, this is a reasonable settlement.

16. Turning now to the apportionment of the solatium, I should first record that I am satisfied—on the basis of the affidavit evidence before the court—that both her niece (to whom Mrs Kenny stood in *loco parentis*), and her sister, had very close relationships with Mrs Kenny. Had the matter come on for ruling prior to Mrs Kenny’s sister’s death, I would have been minded to direct that some payment be made to both individuals. However, the fact that Mrs Kenny’s niece is now the only surviving dependant is a consideration to which I should have regard. The payment of damages for mental distress is, as the judgment in *Cubbard v Rederij Viribus Unitis and Galway Stevedores Ltd* (cited above) indicates, intended to reflect the suffering of an individual. It is personal to the individual. In this regard, Mr Paul Burns, SC for the Plaintiff has drawn a loose analogy with the treatment of a claim for general damages in a conventional personal injuries action. A claim for general damages cannot be pursued subsequent to the death of a plaintiff. The position is, of course, different in relation to other heads of claim, such as special damages. See section 7(2) of the Civil Liability Act 1961.

“(2) Where, by virtue of subsection (1) of this section, a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include exemplary damages, or damages for any pain or suffering or personal injury or for loss or diminution of expectation of life or happiness.”

17. On balance, I think that the justice of this case is best served by directing that the full amount of the payment be made to the sole surviving statutory dependant. I think that a payment to the estate of Mrs Kenny’s deceased sister would not be appropriate. First, I think that Mrs Kenny’s niece has a stronger claim in any event given that Mrs Kenny stood in *loco parentis* to her. Secondly, I think that given the personal nature of compensation for mental distress, it is more appropriate that same should be paid to the surviving statutory dependant rather than to the estate of a statutory dependant who has since deceased.

18. Whereas it is, of course, possible that had a payment of damages been made to Mrs Kenny’s sister during her lifetime, the sister might well have decided to pass that on to her own family members, an order directing that the payment be made to Mrs Kenny sister’s estate might—fortuitously—have the result of fulfilling what might have been the sister’s own intentions. This is, however, speculation only.

19. In conclusion, I think that the appropriate course of action is to direct that the payment be made to the surviving statutory dependant, namely Mrs Kenny’s niece.

## PROPOSED ORDER

20. Accordingly, I will make an order, first, ruling that the proposed settlement is reasonable and should be accepted, and, secondly, directing that after the sum €7,890 in respect of special damages has been paid, the balance of the €28,000 is to be paid to Mrs Kenny’s niece, Joan Jones, the Plaintiff herein.