APPROVED **[2022] IEHC 589**

THE HIGH COURT

2012 No. 4117 P

BETWEEN

A.B.

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE
C.D. (FATHER OF A.B.)
E.F. (UNCLE OF A.B.)

DEFENDANTS

JUDGMENT of Mr. Justice Garrett Simons delivered on 11 November 2022

INTRODUCTION

1. The within proceedings involve a claim for damages arising out of child sexual abuse. The plaintiff had been subjected to repeated sexual abuse by her father and uncle, respectively, when she was a child.

2. The principal judgment in these proceedings was delivered on 30 June 2022 and bears the neutral citation [2022] IEHC 376. As appears from the principal judgment, damages were assessed in an amount of €350,000. This supplemental judgment addresses the form of order to be made. In particular, it addresses

(i) the legal consequences of an earlier settlement agreement, and (ii) the allocation of legal costs.

REPORTING RESTRICTIONS

3. These proceedings are subject to an order pursuant to Section 27 of the Civil Law (Miscellaneous Provisions) Act 2008. The order precludes the publication or broadcast of any matter relating to the proceedings which would, or would be likely to, identify the plaintiff. This precludes, for example, the publication of (i) the names or addresses of the plaintiff and the two remaining defendants; and (ii) details of the general area where the parties now reside or had resided at the time of the sexual abuse.

SETTLEMENT WITH HEALTH SERVICE EXECUTIVE

4. The personal injuries action had initially been pursued against three defendants, namely the plaintiff's father, her uncle and the Health Service Executive ("*HSE*"). The claim as against the Health Service Executive was settled prior to the substantive hearing. The settlement was brought to the attention of the High Court (Cross J.) and an order was made striking out the proceedings against the Health Service Executive on 11 May 2021.

5. As appears from paragraphs 79 to 86 of the principal judgment, consideration of the implications of the settlement for the remaining defendants was deferred to allow the parties an opportunity to make submissions to the court. To this end, a short hearing was convened on 28 October 2022. The plaintiff was represented by solicitor and counsel. The plaintiff's father and uncle did not have legal representation. The father made submissions on his own behalf. The uncle

addressed the court too, and I also allowed his sister to make a short submission on his behalf in accordance with Practice Direction HC 72 (McKenzie Friends).

6. Counsel on behalf of the plaintiff accepted that, having regard to the broad definitions provided for under the Civil Liability Act 1961, the Health Service Executive is properly regarded as a "*concurrent wrongdoer*" for the purpose of determining the legal effect of the settlement. It was further accepted that the damages payable by the two remaining defendants should be reduced by the settlement sum of €130,000.

7. The plaintiff's father, the second named defendant, indicated that he was agreeable to the approach suggested by counsel on behalf of the plaintiff.

8. The position adopted on behalf of the plaintiff's uncle, the third named defendant, was very different. The uncle submitted that the Health Service Executive should be treated as liable for the *entire* of the damages suffered by the plaintiff in circumstances where the uncle alleged that he had been wrongfully convicted of child sexual abuse.

9. With respect, it is not open to a defendant, in the context of a hearing to finalise the form of order following upon the delivery of a reserved judgment, to seek to reopen the substantive proceedings. This is especially so in the present case where judgment had been entered against the uncle in default of appearance as long ago as 21 October 2013. No application was ever made to set aside the default judgment. The only issue outstanding at the hearing in May 2022 had been the assessment of damages. Moreover, the plaintiff's uncle has been convicted of the rape and sexual assault of the plaintiff by a jury in the Central Criminal Court. The conviction was upheld on appeal by the Court of Criminal Appeal, *Director of Public Prosecutions v. J.S.* [2013] IECCA 41. There is no

basis, therefore, for the plaintiff's uncle to seek to resist the consequential orders arising out of the principal judgment by asserting that he is innocent of the child sexual abuse.

Findings of the court

10. The concept of "*concurrent wrongdoers*" is defined as follows at Section 11(1) of the Civil Liability Act 1961:

> "For the purpose of this Part, two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person (in this Part called the injured person or the plaintiff) for the same damage, whether or not judgment has been recovered against some or all of them."

11. Section 11(2) provides, relevantly, that it is immaterial whether the acts constituting concurrent wrongs are contemporaneous or successive.

12. The term "*damage*" is defined as including "*personal injury*"; the latter term is defined as including any impairment of a person's physical or mental condition. The concept of "*same damage*" is not separately defined under the Civil Liability Act 1961.

13. It is apparent from the personal injuries summons—and from the further and better particulars furnished on 29 January 2021—that the plaintiff's case had been that the Health Service Executive bears some responsibility for the personal injuries suffered by her. More specifically, the plaintiff's claim is that, as a result of the consecutive wrongs of the second and third defendants, and the Health Service Executive, respectively, she has suffered a significant psychological injury in the form of post-traumatic stress disorder. It is not, of course, suggested that the Health Service Executive has any liability for the criminal acts of the two other defendants. Rather, the gravamen of the complaint made against the

Health Service Executive is that, following the disclosure of the child sexual abuse, it failed to put in place a plan to safeguard and protect the plaintiff and failed to remove her from a neglectful, abusive and threatening situation. It is also said in evidence that the decision to return the plaintiff to the family home, following the disclosure of the child sexual abuse, added significantly to the plaintiff's trauma. It should be emphasised, however, that there is no suggestion that any further acts of child sexual abuse occurred following the involvement of the Health Service Executive.

14. As noted above, it is accepted on behalf of the plaintiff that the Health Service Executive should be characterised as a "*concurrent wrongdoer*" for the purpose of deciding what the implications of the settlement are for the remaining defendants. The two remaining defendants also accept this characterisation, with the plaintiff's uncle going so far as alleging that the Health Service Executive should be regarded as wholly responsible for the damage caused to the plaintiff.

15. Section 17(1) and (2) of the Civil Liability Act 1961 addresses the legal effect of a settlement against one concurrent wrongdoer as follows:

> "(1) The release of, or accord with, one concurrent wrongdoer shall discharge the others if such release or accord indicates an intention that the others are to be discharged.
>
> (2) If no such intention is indicated by such release or accord, the other wrongdoers shall not be discharged but the injured person shall be identified with the person with whom the release or accord is made in any action against the other wrongdoers in accordance with paragraph (h) of subsection (1) of section 35; and in any such action the claim against the other wrongdoers shall be reduced in the amount of the consideration paid for the release or accord, or in any amount by which the release or accord provides that the total claim shall be reduced, or to the extent that the wrongdoer with whom the release or accord was made would have been liable to

> contribute if the plaintiff's total claim had been paid by the other wrongdoers, whichever of those three amounts is the greatest."

16. The provisions of Section 17 have to be read in conjunction with Sections 34 and 35 of the Act.

17. The combined effect of these provisions is that where an injured party settles their claim as against one of a number of concurrent wrongdoers, the injured party is "*identified*" with the settling wrongdoer. The injured party's claim against the other wrongdoers is reduced. Relevantly, if the amount of the settlement is *greater* than the settling wrongdoer's proportionate share of liability, then this accrues to the benefit of the remaining wrongdoers in that the claim against them is reduced by the amount of the settlement. See, generally, *Defender Ltd v. HSBC France* [2020] IESC 37, [2021] 1 I.R 516 (at paragraphs 41 to 45 of the reported judgment).

18. Applying these provisions to the circumstances of the present case, the claim against the father and uncle would be reduced by the settlement amount of €130,000 *unless* this court were persuaded that this sum is less than the Health Service Executive's proportionate share of liability for the injury suffered by the plaintiff. Put shortly, if the amount of the settlement *exceeds* the amount which might otherwise have been recovered against the Health Service Executive had the claim against it not been settled, then this accrues to the benefit of the two remaining defendants. The amount of the damages payable by the remaining defendants is reduced by the amount of the settlement.

19. It is not necessary, for the purpose of the resolution of the present proceedings, to embark upon a detailed assessment of the wrongs alleged to have been done by the Health Service Executive and their contribution, if any, to the overall

injury suffered by the plaintiff. This is because the amount of the settlement (€130,000) is so large relative to the overall assessment of damages. The damages have been assessed at €350,000. The amount of the settlement is equivalent to 37 per cent of the assessed damages. The only circumstance in which the Health Service Executive would have to contribute more than the amount actually paid in settlement would be where the court determined that the HSE's proportionate share of liability for the injury suffered by the plaintiff exceeded 37 per cent. There is nothing in the evidence before the court which would justify the allocation of such a significant part of the blame to the Health Service Executive.

20. The evidence goes no further than establishing that the events in the years immediately following the initial disclosure of—and cessation of—the child sexual abuse caused further trauma to the plaintiff. Crucially, there is no suggestion that any further sexual abuse occurred subsequent to the Health Service Executive's involvement. Rather, the complaint is that the decision to allow the plaintiff to return home repeatedly following the disclosure of her sexual abuse added significantly to her trauma. See, in particular, Dr. Cryan's report of 8 March 2012.

21. It is sufficient for the purpose of the exercise under Section 17 of the Civil Liability Act 1961 to find that whatever limited contribution, if any, the alleged shortcomings on the part of the Health Service Executive might have made towards the trauma suffered by the plaintiff, it is minuscule relative to the trauma caused by the father and uncle. The most significant psychological injuries suffered by the plaintiff were caused by the criminal acts of her father and uncle. The severity of the child sexual abuse and the psychological injury caused by

same have been set out in detail in the principal judgment and need not be repeated here. The amount, if any, which the Health Service Executive would have been liable to contribute to the plaintiff's total claim of €350,000 would fall well short of the sum of €130,000 actually paid by way of settlement.

22. Accordingly, the application of Section 17 of the Civil Liability Act 1961 to the circumstances of the present case has the effect of reducing the damages recoverable against the father and uncle by €130,000. This leaves a balance of €220,000.

23. For completeness, it should be recorded that neither the father nor the uncle sought that liability for damages be apportioned between them *intra se*. In other words, neither suggested that the other was responsible for a greater share of the damage suffered by the plaintiff. Accordingly, the appropriate order is that the balance remaining after allowance is made for the settlement with the Health Service Executive, namely the sum of €220,000, be awarded jointly and severally as against the two remaining defendants.

24. Both the father and the uncle made submissions as to their financial ability to discharge the award of damages. The father explained that his only income is a pension and that his dwelling house is in his name and that of his wife. It was also suggested that his son has a beneficial interest in the dwelling house as a result of his having paid part of the mortgage. The uncle, through his sister, submitted that whereas he owns a dwelling house and lands, he is heavily indebted. It was suggested that his indebtedness is in excess of €50,000.

25. As explained at paragraphs 77 and 78 of the principal judgment, the financial ability of a defendant to pay damages is not a factor which is to be taken into account at the time of the assessment of damages. It may be, that, as a matter of

practicality, in some cases a successful plaintiff will be unable to recover any or all of the damages awarded to them. This does not, however, affect the assessment of damages. The court hearing the claim for damages must assess damages in accordance with the well-established principles. Thereafter, it is then open to the plaintiff to seek to enforce the judgment through the various procedural mechanisms available (including, for example, by way of judgment mortgage or the sequestration of assets). It may be that, in response to the invocation of any of these procedural mechanisms, third parties might assert that they have proprietary rights. For example, it has been suggested that both the father's spouse and son may have a proprietary interest in the dwelling house. It is not a matter for this court, in the context of the assessment of damages, to anticipate, still less to adjudicate upon, any such potential dispute. Rather, such disputes are a matter for another day.

26. Accordingly, judgment in the sum of €220,000 will be entered against the second and third named defendants jointly and severally.

LEGAL COSTS

27. The default position under Section 169 of the Legal Services Regulation Act 2015 is that a party who has been "*entirely successful*" in proceedings is normally entitled to recover their legal costs against the losing parties. The court does, of course, retain a discretion to make a different form of costs order. The type of criteria to be taken into account in the exercise of that discretion are prescribed in a non-exhaustive list as follows (at subsection 169(1)):

    (a) conduct before and during the proceedings,

(b) whether it was reasonable for a party to raise, pursue or contest one or more issues in the proceedings,

(c) the manner in which the parties conducted all or any part of their cases,

(d) whether a successful party exaggerated his or her claim,

(e) whether a party made a payment into court and the date of that payment,

(f) whether a party made an offer to settle the matter the subject of the proceedings, and if so, the date, terms and circumstances of that offer, and

(g) where the parties were invited by the court to settle the claim (whether by mediation or otherwise), whether one or more than one of the parties was or were unreasonable in refusing to engage in the settlement discussions or in mediation.

28. As explained by the Court of Appeal in *McFadden v. Muckno Hotels Ltd* [2020] IECA 153, impecuniosity is not included as one of the prescribed criteria. See paragraphs 11 and 12 of the judgment as follows:

> "Thirdly reliance is placed on the respondent's financial circumstances, which it is submitted this court can take into account. The proceedings were taken because his employment at the time was threatened, and he has since been dismissed; the WRC has found his dismissal to be unfair, although that decision is currently under appeal. It is said that he is currently unemployed and that a costs order would lead to 'financial hardship'. It is submitted that this is a factor that can be taken into account even if a litigant has legal representation – it is not reserved to lay litigants.
>
> No binding or persuasive precedent is cited to support the proposition that the court should take into account the possibility that a costs order against the respondent would lead to financial hardship. Section 169 (1) at (a) - (g) sets out a non-exhaustive list of matters that the court can take into account if departing from the normal rule. Impecuniosity is not one of the matters listed. It is something that may engender sympathy for an unsuccessful litigant, and it may be that a costs order against the respondent will affect

> his ability to continue to engage legal representation, although this is not in fact said and indeed there is no evidence before the court to show financial hardship. I do not consider that it is a good reason for not granting the appellant its costs in the instant case. Were this court to decide to make no order as to costs of the appeal solely on the ground of impecuniosity in my view it would run contrary to the intent of the legislature as expressed in s.169. However I would leave to another occasion the question of whether there may be circumstances in which impecuniosity may be taken into account."

29. On the facts of the present case, the plaintiff has been entirely successful in her proceedings and would normally be entitled to recover her legal costs against the defendants.

30. The plaintiff's uncle submitted that the legal costs should be borne entirely by the Health Service Executive. This submission was advanced on two grounds as follows. First, it is asserted that the uncle did not commit the acts of child sexual abuse. Secondly, it is asserted that the uncle does not have the financial ability to pay a costs order. The plaintiff's father also asserted that he does not have the financial ability to pay a costs order.

31. For the reasons outlined above under the previous heading, it is not open to the uncle, in the context of a post-judgment application, to revisit the substantive findings in the case. In particular, it is not open to the uncle to gainsay the finding that he is guilty of sexual assault and rape. The allocation of legal costs falls to be determined on the basis that the uncle and father both subjected the plaintiff to sexual abuse when she was a child.

32. The plaintiff will have incurred significant legal costs in pursuing her claim for damages. These legal costs include, significantly, the costs of a full day's hearing in May 2022. This hearing was confined to the assessment of damages in circumstances where judgment had previously been entered against the uncle

and where the father chose not to contest liability. It was nevertheless necessary for the plaintiff, in support of her claim for damages, to give detailed evidence in respect of the psychological injury caused to her by the sexual abuse and to call medical evidence from two consultant psychiatrists. The plaintiff retained solicitor and counsel to present her claim for damages. The plaintiff is *prima facie* entitled to recover all of these legal costs from the defendants.

33. There is nothing in the conduct of the proceedings which would justify a departure from the default position under Section 169 of the Legal Services Regulation Act 2015, namely that the successful party should recover their costs. Whereas the father did indicate in his submissions at the hearing in May 2022 that he had made some sort of offer to settle the proceedings, the sums involved fell far short of the damages ultimately awarded. More specifically, the father asserted that he had made an offer to pay €10,000 by way of compensation to the plaintiff and had carried out certain works for the benefit of the plaintiff to the value of between €10,000 and €12,000. The damages ultimately awarded as against the father and uncle jointly and severally are €220,000. Having regard to the inadequacy of the sums supposedly offered by the father, the plaintiff acted entirely reasonably in pursuing her claim to full hearing.

34. The supposed impecuniosity of both the father and uncle does not provide a good reason for refusing to make a costs order in favour of the plaintiff. As with the assessment of damages (discussed earlier), there is a distinction between the question of principle as to whether costs should be awarded against a party, and the separate question as to whether such costs are likely to be recovered in practice. There is no principled reason why the plaintiff should not be entitled to a costs order in her favour. The fact, if fact it be, that there may be difficulties

thereafter in recovering all or any of the legal costs from the defendants does not provide a basis for refusing to recognise that the plaintiff has had to incur legal costs in pursuing her well-founded claim for damages.

35. There may, perhaps, be exceptional cases where the impecuniosity of the paying party might potentially be a relevant consideration. It might, for example, be relevant in the context of public interest litigation against a public body. The financial ability to satisfy a costs order is not, however, a relevant consideration in a personal injuries action between private parties which presents no novel issue of law.

36. An adjustment will be made to the costs order, however, to reflect the fact that the plaintiff has recovered certain costs against the Health Service Executive. Counsel on behalf of the plaintiff confirmed, at the hearing on 28 October 2022, that the settlement with the HSE included provision for the payment of certain legal costs. Accordingly, I propose to make an order that the plaintiff is to recover as against the two remaining defendants all of the costs of the proceedings incurred since the date of settlement, i.e. 11 May 2021. These costs will include the costs of the substantive hearing in May 2022 and the costs of the hearing on 28 October 2022. The costs are to include the costs of two counsel. In addition, the plaintiff already has the benefit of certain costs orders arising out of, for example, the judgment in default of appearance.

CONCLUSION AND FORM OF ORDER

37. Judgment will be entered against the second and third named defendants, jointly and severally, in the sum of €220,000. This sum represents the balance

remaining after the award of general damages of €350,000 has been reduced in accordance with the provisions of Section 17 of the Civil Liability Act 1961.

38. An order will also be made, pursuant to Section 169 of the Legal Services Regulation Act 2015 and Order 99 of the Rules of the Superior Courts, directing that the plaintiff is to recover, as against the second and third named defendants, the costs of the proceedings from 11 May 2021 onwards. These costs will include the costs of the trial of the action in May 2022 and the costs of the hearing on 28 October 2022. The costs are to include the costs of two counsel. The costs are also to include all reserved costs from 11 May 2021 and the costs of discovery, if any. In addition, the plaintiff will continue to retain the benefit of any previous costs orders made in her favour in the proceedings.

39. All such costs to be adjudicated upon, in default of agreement between the parties, pursuant to the provisions of Part 10 of the Legal Services Regulation Act 2015. The parties are to have liberty to apply if any issue arises as to the extent of the costs covered by the order.

40. As the remaining defendants do not have the benefit of legal representation, I take this opportunity to remind them that they have a right of appeal to the Court of Appeal. Any such appeal must be lodged within the time-limits prescribed under Order 86A of the Rules of the Superior Courts.

Appearances

John Shortt, SC and Frank Martin for the plaintiff instructed by John J. Quinn & Co. (Longford)
The second and third defendants appeared as litigants in person

Approved