

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION

BETWEEN:

\_\_\_\_\_

KD (A MINOR) BY DK, HIS MOTHER AND NEXT FRIEND

Plaintiff;

-and-

BELFAST SOCIAL HEALTH AND CARE TRUST

Defendant.

\_\_\_\_\_

GILLEN J

**Background**

[1] In this case the minor plaintiff is a severely disabled child with, inter alia ,

- spastic quadriplegic cerebral palsy
- epilepsy
- learning difficulties
- developmental delay with the right side being more severely affected than the left
- Inability to verbally communicate. He is dependent on others for everyday functional needs

as a result of sustaining two episodes of coliform meningitis in the early neo natal period .

[2] Liability is admitted and counsel had agreed substantial areas of the quantum subject to approval. Certain discrete areas of quantum fell for determination by me of which this judgment concerns one.

## The issue before the Court

[3] In an amendment to the amended Statement of Claim, the plaintiff seeks to recover administration costs relevant to the cost of services carried out on behalf of the plaintiff in dealing with the Office of Care and Protection (OCP) in the future. This involves liaising with all of the relevant parties in order to make any applications necessary including advising the relevant parties of the outcome and processing any payments paid out by the OCP to third parties etc.

[4] The list of responsibilities which it was anticipated would fall into this category were set out by Ms Fiona Sterritt Solicitor of Higgins Holywood Deazley, acting on behalf of the plaintiff in an affidavit at paragraph 14 in the following terms (“the tasks”):

“I envisage the main role and responsibilities of this task to be:

- (a) Liaising with the family and case manager in respect of all payments necessary whether on a monthly, quarterly, annual or one-off basis.
- (b) Receipt of all relevant documentation and exploring any issues or queries therein.
- (c) Obtaining authorisation to apply for payment.
- (d) Applications to the court in person and in writing.
- (e) Receipt of payments from the court.
- (f) Verification of monies received.
- (g) Payment to providers.
- (h) Confirmation of payments to the case manager and family with provision of receipts.
- (i) Liaising with providers, case manager and the family on queries arising in respect of payment.
- (j) Meeting with the family.

- (k) Instruction of an accountant on an annual basis to report and file monies received and paid annually with the annual periodical payment made by the defendant”.

[5] In the course of that affidavit Ms Sterritt indicated that it was originally the understanding of the plaintiff’s legal advisers that applications both present and future to the court for payment of monies in respect of care, equipment, therapy, costs, housing costs and expert fees would be the responsibility and within the remit of the appointed case manager. However she records that Mr John Walker who was instructed as case manager on behalf of the plaintiff on 2 April 2012 confirmed that the role of case manager would not include assistance to the plaintiff with such applications and that it was not the role of a case manager to be responsible for the financial welfare of the plaintiff. Ms Sterritt indicates that Mr Walker’s position was affirmed by the subsequent case management reports received from Ms Kydd and Ms Cossar on behalf of the defendant and plaintiff respectively.

[6] She goes on to state that since 2 April 2012 on instruction from the plaintiff’s family she has been responsible for and has undertaken six applications to date to the court to process payments in respect of the transitional care arrangement, past care, purchase of a portable hoist, purchase of motor vehicle and case management fees, together with attendances upon the Master, Official Solicitor and architects regarding authority for the potential purchase of a property on the plaintiff’s behalf. She indicates that to date she has applied herself for 21 hours at an hourly rate of £165 per hour giving a cost to the plaintiff of £3,465 plus VAT.

[7] It is Ms Sterritt’s contention that during the forthcoming months when the plaintiff is to be rehoused an additional allowance should be provided to deal with one-off matters arising in respect of the housing costs ie dealing with purchase, building contractors, architects, quantity surveyors and suppliers which will amount to a minimum of 15 hours.

[8] Finally Ms Sterritt then goes on to assert the basis of the hourly rate which she claims is allowable by the Taxing Master for such work together with an uplift of 65% in order to permit her to undertake the proposed role of financial controller.

[9] Ms Higgins QC, who appeared on behalf of the plaintiff, conceded that she was not claiming in this part of the case for the 21 hours of OCP related services that already had been provided to the plaintiff (I understand this will be part of the professional costs claimed in the action) but was claiming for the future services outlined by Ms Sterritt together with a figure for accountancy in respect of preparing the annual income and expenditure accounts.

[10] Mr Elliott QC, who appeared on behalf of the defendant, contested this matter in principle making the following points:

- Virtually all of the services contended for by Ms Sterritt were services properly to be provided by the case manager in respect of whose services it has been agreed that payment will be made by the defendant.
- That any such claim in any event falls within the bracket of that of a controller appointed by the High Court in Northern Ireland pursuant to the provisions of Article 101(1) of the Mental Health (Northern Ireland) Order 1986 and. The provisions of Order 109 of the Rules of the Court of Judicature (Northern Ireland) 1981. No controller has been appointed, and that if such an application were to be made it would be adjudicated upon in the conventional manner and not by this court which was convened to determine the issue of compensation.
- The plaintiff's claim has already been made on the basis that the plaintiff's settlement or award will be managed by the OCP at an initial cost of £315 and thereafter at an annual cost of £315 which is undisputed by the defendant.

## **Discussion**

[11] I am dealing with this matter purely on the basis of the principle involved in the assertion that provision should be made for the administration costs incurred by a solicitor in the circumstances outlined by Ms Higgins. I have not heard any evidence on the matter and no factual finding can be made by me in this instance in the absence of appropriate evidence.

[12] I commence my approach on the principle by reminding myself that the proper measure of damages is that which will place the plaintiff, as far as reasonably possible, into the position he would have been in but for the injuries he sustained. A plaintiff is entitled to recover for any expense which he can show resulted from the injury. Not all of these expenses can be classified strictly as medical. Thus since the 1980s in England and Wales an appropriate item of recovery consists of the fees which the Court of Protection charges to manage a fund represented by damages awarded to a plaintiff suffering from mental disability, generally as a patient. With increasing claims for brain damage caused by tortious injury such awards have become common. Fees are also incurred, and are in addition recoverable by a plaintiff who is under the jurisdiction of the Court of Protection, to his or her professional receiver for administering the damages. (See for example Willbye v Gibbons [2004] PIQR p15 CA).

[13] I recognise that there may well be essential tiers of management in caring for someone such as the plaintiff especially where that person has no one other than the professionals to guard their interests. A solicitor may have a role to play in such

matters. In principle I see no reason why in addition to the fees of the OCP a plaintiff will not be able to recover the cost of instructing his or her own solicitors in relation to the plaintiff's continuing dealings with the OCP provided those tasks are appropriate for a professional lawyer to perform and fees are found to be reasonable by the OCP or if necessary as assessed by the Taxing Master.

[14] Consequently it will be necessary for a court in many instances to weave its way through the tangle of sometimes overlapping tiers of management to ensure that there is no double counting in the nature of compensation awarded and that the tasks have been appropriately assigned. This case probably provides an illustration of such an instance. I turn now to the professional input potentially to be engaged.

[15] A case manager will undoubtedly perform certain necessary tasks on a long-term basis. Evidence will be necessary before me to establish which of those tasks submitted by Ms Sterritt could be equally well carried out by a reasonable case manager. I will need to scrutinise such evidence.

[16] Secondly, the OCP itself will carry out certain work which has already been accounted for by a figure in this case and which I must be certain are not likely to overlap with any of the tasks set out by Ms Sterritt.

[17] I would assume that an accountant could also be performing some of these tasks and that the selection of an accountant should not be beyond the capacity of a family member in most cases without requiring a solicitor to do this.

[18] Fourthly, the question of a controller arises. I understand that the conventional approach in Northern Ireland, practised for some years, is that a controller is never appointed whilst the child is a minor in order to avoid depletion of the minor's financial position. The Master of the Queen's Bench Division deals with such cases in the same manner as with any other less disabled minor. I am unaware of the statutory basis for that practice and it may change in the wake of the Bamford Inquiry ie the Mental Health and Learning Disability Review which occurred between 2003 and 2008. I also understand that a new Mental Capacity Welfare and Finance Bill may be in the offing in 2014 which may deal with this matter but in the meantime minors under a mental incapacity are dealt with by the Master in the Queen's Bench Division and I shall approach this case with that in mind. Until the child is 18 I must ensure that the tasks set out by Ms Sterritt do not overlap with the role of the Master.

[19] Thereafter a controller will normally be appointed. I envisage that a controller will be appointed in this case after application to the court once this child becomes 18. That will involve costs. Conventionally the role of a controller has often been that of a family member. Thus in England in Lewis v Shrewsbury NHS

Trust LTC 14/6/2007 a reduction of one-third was made for the conventional costs of a family member undertaking such tasks. In Northern Ireland experience tells me that controllers are very often suitable parents or family members but at times it can involve additional services of a solicitor for specific tasks. Obvious instances are where a conveyance is required, the drawing up of a will, creating rights of residence etc or more generally where a suitable family member cannot be found. Such work is currently perused by the Office of Care and Protection and appropriate fees are paid drawn usually from the general damages of the patient. If the figure cannot be agreed by the Office of Care and Protection, the assistance of the Taxing Master is usually invoked.

[20] Order 109 rules 75-77 of the Rules of the Court of Judicature (NI) 1980 makes provision for costs in cases where controllers are appointed. Where relevant they provide as follows:

*“Costs generally*

75.-(1) All costs incurred in relation to proceedings under this Order, and not provided for by way of remuneration under Rule 39, shall be in the discretion of the Court and the Court may order them to be paid by the patient or charged on or paid out of his estate or paid by any other person attending or taking part in the proceedings.

...

*Costs of unnecessary employment of solicitor etc, not to be allowed*

77.-(1) No controller for a patient other than the Official Solicitor, shall, unless authorised by the Court, be entitled at the expense of the patient's estate to employ a solicitor or other professional person to do any work not usually requiring professional assistance.

(2) Where two or more persons having the same interests in relation to the matter to be determined attend any hearing by separate legal representatives, they shall not be allowed more than one set of costs of that hearing unless the court certifies that the circumstances justify separate representation.”

[21] Accordingly, Order 109 clearly recognises that there will be circumstances in which a controller may require professional assistance which will have to be paid

for. Where such an event is likely and the court awarding compensation is in a position to make an informed conclusion to this effect I can see no reason why the award should not include such a heading. Why should the estate of the patient have to bear this depletion if its advent was foreseeable at the time of the award? However in such circumstances the careful scrutiny of the court is required. Whilst Order 109 is concerned with the obligation of the court to protect the estate of the patient it nonetheless is a signpost to the care that a court should exercise before committing a defendant to pay in advance costs that may prove to be unjustified. There should not be an unexamined assumption that the conventional approach of appointing a controller within the family will not be followed. The court would have to be satisfied that the probabilities are that a family member in this case would be unable to carry out the type of task regularly performed by such controllers for the rest of the plaintiff's life (albeit with professional assistance from time to time) and that the tasks both in terms of the substance and time described by Ms Sterritt are appropriate for such a professional in the circumstances of this case. The court must not provide a charter for unnecessary employment of professional services.

[22] There may well be occasions where it is not possible for a suitable parent or family member to take on such a role and a professional person such as a solicitor might be required. This may be such a case depending upon the view that I would take of the parent and family members of this child. But once again it will be necessary to closely peruse the evidence in general and of the solicitor concerned to ascertain why it is that certain of the tasks will not be performed by a parent/family member or other party already engaged.

[23] The position in England and Wales is currently set on a different statutory basis. There is a Court of Protection (which does not obtain in Northern Ireland) and the appointment of a mental health receiver within the meaning of Section 94 of the Mental Health Act 1983 who looks after the financial affairs of the patient in many instances. The costs of such Court of Protection and the receiver at an hourly rate are conventionally made the subject of the compensation based on the hours that the receiver will deploy (see for example Dorrington v Lawrence [2001] All ER (D) 145 at paragraph (81) et seq). Similarly in Crookdake v Drury [2003] EWHC 1938 (QB) at para (21) an agreed sum of £80,000 was paid in relation to the appointment of a receiver and his administration of the funds.

[24] It is of course trite law that the plaintiff cannot recover twice for the same loss. It is a matter fraught with difficulty. It seems to me that it is not improbable that a solicitor in this case will have to play a certain role in administering the affairs of this child in the aftermath of this case and it will be the role of this court, in the absence of agreement, to determine a figure together with an appropriate multiplier which does not overlap with the various other players e.g. case manager, accountant, parents, Master, Office of Care and Protection etc. I also entertain the possibility that

a Periodical Payment Order will be put in place in this case and that as suggested by Ms Higgins in her skeleton argument a claw back provision could be perhaps inserted in the event that the solicitor was not appointed or did not carry out the work anticipated at all or at an appropriate fee.

### **Conclusion**

[25] In principle therefore I accede to the application by Ms Higgins that it is an appropriate head of damages in this case to consider that a solicitor may play a role in the future administration of this child's affairs in the particular circumstance of this family and that compensation on this basis should be calculated provided I am satisfied on the evidence that such tasks will be in fact performed by a solicitor. The amount of such figure is also a matter to be determined by the court after hearing evidence. That I am told that there has not been a specific provision made for such an eventuality in cases in the past in Northern Ireland does not deflect me from doing so in this case although I make it clear that this is a matter to be considered on a case by case basis and different cases may have different outcomes. My finding does not provide a precedent for such provision being made in every case unless there is an evidential basis for a solicitor being so deployed.

### **Addendum**

[26] Subsequent to handing down the above judgment, I heard evidence in this matter from three sources namely:

- A statement from Fiona Sterritt, Solicitor of Higgins, Hollywood, Deazley, the solicitors on record for the plaintiff.
- An affidavit and oral evidence from Patrick Mullarkey, Solicitor.
- Evidence from the Official Solicitor, Ms Brenda Donnelly.

[27] Ms Sterritt made the following points:

- It was originally the understanding of the plaintiff's legal advisors that applications both present and future to this court for payment of monies out in respect of care, equipment, therapy costs, housing costs, expert fees and all other associated costs of the plaintiff would be the responsibility and within the remit of the appointed case manager. Mr Walker, the case manager in this case, has indicated that it is not the role of a case manager to be responsible for the finances of the plaintiff. This position has been affirmed by the subsequent case management reports received from Ms Kydd and Ms Cossar on behalf of the defendant and plaintiff respectively.



- She has carried out work on a number of applications to the court to process payments in respect of the transitional care arrangements, past care, purchase of equipment etc. These are all costs which will be measured at the end of the case and if not agreed between the parties will be subject to taxation of the Master. I therefore am not taking them into account.
- During the child's minority the matter will go before the Master subsequent to settlement and from adulthood a financial controller will be appointed to assume the responsibility on an on-going basis before the Office of Care and Protection. Ms Sterritt envisaged that the main roles and responsibilities would include:
  - (a) Liaising with the family and case manager in respect of all payments necessary.
  - (b) Receipt of all relevant documentation and exploring issues or queries therein.
  - (c) Obtaining authorisation to apply for payment.
  - (d) Application to the court in person and in writing.
  - (e) Receipt of payments from the court.
  - (f) Verification of monies received.
  - (g) Payment to providers.
  - (h) Confirmation of payment to the case manager and family with provision and receipts.
  - (i) Liaising with providers, case manager and the family on queries arising in respect of payments.
  - (j) Meeting with the family.
  - (k) Instruction of an accountant on an annual basis to report and file monies received and paid annually with the annual periodical payment made by the defendant.
- In addition Ms Sterritt believed that during the coming 18 months when the plaintiff is to be rehoused an additional allowance should be provided to deal with one off matters arising in respect of the housing costs.

- She contended that the hourly rate of the solicitor involved in these matters should bear an uplift of 65% to undertake the proposed role of financial adviser.

[28] Mr Mullarkey is an experienced solicitor who specialises in clinical negligence cases. Understandably, he told me that he was one of only a handful of solicitors with the same experience in such cases. He has not acted as a controller and recognises this is a novel claim. In the course of his evidence the following points emerged:

- Work is sometimes carried out for plaintiffs who are incapacitated after the case has been settled for no specific fee. Where however, larger pieces of work are done, this is paid out of the general damages though as a solicitor he is wary of depleting general damages to cover one off expenditures.
- Once an award is made the family need to be appraised as to what is to happen in the future. This involves a meeting with the Master/Office of Care and Protection/solicitor to set up a paper trail with the court office particularly re vouching documentation for the various tasks that need to be carried out.
- A Periodical Payments Order (PPO) creates different issues from lump sum awards. A regime has to be established whereas in the case of a lump sum, after settlement “the solicitor steps away” usually.
- He believed that this case had a number of different circumstances from the norm because of the nature of the settlement in terms of duration and requirements on a yearly basis.
- It was his view that certain supervisory work would be required by a partner in the firm supervising the assistant solicitor who of course would carry the burden of the work. He analysed the hours that would be required and felt that Ms Sterritt had made a reasonable assessment of the work that needed to be done. In terms he saw a yearly figure at 30 hours per annum as amounting to £4,675 plus VAT. That was the figure that the plaintiff has now put forward. In addition there were a number of one off items which he also costed and which I again accept as the figure put forward on behalf of the plaintiff.

[29] Ms Donnelly made the following points during the course of her evidence:

- She pointed out the two stages of this case i.e. until the patient was 18 and thereafter from 18 until the end of life during which a controller would be necessary. The earlier period would be dealt with by the Master.
- Invariably what happens is that the parents, solicitor, court funds office, stockbroker and Official Solicitor convene a meeting where the future is mapped out dealing with matters such as purchase of property, purchase of vehicle, care needs etc. The Official solicitor is present because during the minority the purchase of the house etc. is in her name. A controller is appointed once the child achieves his majority. The likelihood is that the Master will request the Official Solicitor in some cases to attend at the house of the minor, compile a report about expenditure, speak to the parents and thereafter the Master will authorise further spending whilst the child is a minor.
- Disbursements when the child is an adult will be made through the Court Office. Ms Donnelly indicated that where no family can be appointed or where the family members are unsuitable, she is in the fall back position but only of last resort. The trend is to outsource such duties.
- In England controllers are often solicitors. However, a direct debit system is often built up which precludes a necessity for expert input in most instances. The Master often instructs the setting up of direct debits for the various parties that require to be paid. In other words by the start of a controllership she would envisage a proper regime with checks already having been set up.
- Normally a regime is set up that will last and is checked by the Office of Care and Protection. Each year the controller will lodge accounts with the Office of Care and Protection. An accountant would be a prudent expert to retain in a matter such as this.
- In her experience the professional uplift suggested in this case was rather high.

## **Conclusion**

[30] I consider that there will be cases of this genre which will require assistance from a solicitor in the initial stages for a short term but after the system has been set up the majority of the tasks can be carried out by a non-legal controller who will usually be a family member etc. There will obviously be one-off requirements for conveyance of the house/drafting of a will etc. but the yearly routines will normally be outside the requirements of a solicitor.

[31] Two matters are relevant to this general proposition. First, most parents/spouses or other family member will be capable of the administration of most of the tasks which have been set out by Ms Sterritt. It will not require a solicitor or legally trained person to carry out such tasks. Moreover, the Master and the Office of Care and Protection are not adversaries. They are there to assist in administering the funds of the patient. The controller will therefore find a very experienced, receptive and sympathetic ear when dealing with these matters.

[32] Secondly, a different culture pervades this kind of case in Northern Ireland. One of the main reasons put forward by the Law Society for non-specialist firms being able to carry out clinical negligence cases is because we have a system here of small family orientated solicitors as opposed to the large anonymous firms that often deal with these cases in England and Wales. Many of these cases are therefore dealt with by the family solicitor who is well known to the family concerned and, as Mr Mullarkey pointed out, the good will of the relationship often extends to advice being given without payment. Of course that will not apply where major steps require to be taken and hours of work must be paid for in those circumstances.

[33] I have listened to the plaintiff in this case and I consider that rather more assistance will be required in her case than normal. She has accepted her role with this child in a singularly selfless and courageous manner. Unlike many cases she is a young woman who, albeit with two first class caring and loving grandparents, is essentially dealing with this matter on her own without the benefit of a partner or spouse. She obviously finds the prospect daunting.

[34] Accordingly, I consider that she will require greater help than in the normal circumstances at least in the early stages of setting up the system. Accordingly, it is my view that she should have two years full value of solicitor input in order to set up the system/appointing the controller etc. The unexamined assumption in the evidence before me was that the mother could not become familiar with many of the non-legal steps to be carried out particularly since they will all be part of a system that is up and running. However, she must be brought into the frame on these occasions so that she will become au fait with the system and how it is implemented. Matters such as changing the car, checking her bank account, recurrent purchase of daily needs for her child, purchasing replacement equipment, paying bills etc. are all part of the role of a mother in any family life and they will all have to become familiar matters to her over a period of time. Under the aegis of a solicitor for two years I am satisfied that she will be able to deal with most of the duties that arise as is the case in other instances. She will have the assistance of a care manager for those matters that are appropriate for the care manager, an accountant can be employed for the accounts (and provision should be made for this) and the ear of the Master and the OCP. After the two year period that I have indicated will be dealt with largely by the solicitor, I intend to make some small provision for additional

solicitor services thereafter which will largely be for the purpose of common sense advice from time to time. These are services which I am satisfied will usually be performed in most instances by a very junior member of the staff or even a member of staff without legal qualification. Rarely if at all will a partner ever need to be involved.

[35] In summary my conclusions are as follows:

- Two years solicitor's fees should be made available at the cost promulgated by Mr Mullarkey, which I understand to be £4,675 plus VAT per annum.
- Thereafter, a figure of £1250 per annum plus VAT will be made available for additional solicitor services. This can be capitalised applying the appropriate multiplier. This recognises that some years very little help will be necessary but in others some additional help will be required.
- The one off items promulgated by Mr Mullarkey seem to me to be appropriate and as I understand the position these amounted to a figure between £8492.92 and £10,051.25 plus VAT.
- I make it clear that full approval will require to be given by the Master and the Office of Care and Protection for each of these payments to the solicitor. In terms therefore full justification will have to be provided by the solicitor for the work carried out in each instance, the same to be referred to the taxing Master in the event of dispute.