1. **SURESH CHAND**

v.

HERMANT KUMAR

2. **ANJILINI LATA SEN**

v.

YAKUB KADIR

3. **SHAILESH NARAYAN**

v.

RAJENDRA RAM

[HIGH COURT, 1989 (Palmer J) 14 July]

Civil Jurisdiction

Practice (Civil)- compromise of actions- approval of settlement in favour of person under disability- function of the Court- procedure to be followed- High Court Rules 1988 Order 80 rule 8.

The approval of the High Court was sought for three settlements of personal injury actions reached on behalf of infants. The High Court, declining to approve the settlements, stressed that before such settlements would be approved the Court had to be satisfied that in all the relevant circumstances, which had to be placed before the Court, the settlements were for the benefit of the infants concerned. The Court also deprecated the practice of negotiating such settlements inclusive of legal costs.

Cases cited:

Beavan v. Pengelley [1968] NSWR 707
Karvelas v. Chikirow 26 FLR 381
McLennan v. Phelps (1967) 86 W.N. (Pt. 1 (NSW) 86
National Westminister Bank Ltd v. Barbour [1974] 1 All ER 1188
Sztockman v. Taylor (1979) VR 572

R.I. Kapadia for the Plaintiffs
P.I. Knight for the Defendants

Applications for approval for infants' settlements in the High Court.

Palmer J:

Each of these 3 actions is for damages for personal injuries sustained by an infant in a motor accident.

These matters came before me on application for approval of settlement reached between the Plaintiff and Defendant in each case. Counsel for the Plaintiffs and the Defendants respectively are the same in each case. In view of this and of what I propose to say it is convenient to deal with all 3 matters together at this stage.

The requirement of the Court's approval is laid down in Order 80 Rule 8 of the High Court Rules 1988, which is as follows:-

> "Comprise, etc, by person under disability
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> Where in any proceedings money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court, whenever entered into or made, shall so far as it relates to that person's claim be valid without the approval of the Court."

In each case the Plaintiff seeks -

> "An Order that this action be settled for a sum of (the sum is stated) inclusive of costs and for an order that the said sum be paid out to the Public Trustee of Fiji and that after payment of legal costs and special damages incurred by the mother and next friend of the plaintiff, the balance sum be held by The Public Trustee in trust for the plaintiff and be invested by him and in his discretion be used for the education, benefit, welfare and advancement of the plaintiff until the plaintiff reaches the age of 21 years when the whole amount be paid out to him."

This is not strictly speaking correct. The Court should not be asked to order the parties to settle. It should be asked, if they have settled, to approve the settlement and make any consequential orders. I will treat these applications as having sought such approval and orders.

Each application is supported by an affidavit by the Plaintiffs next friend, drawn in identical terms in each case, and annexing medical reports.

These matters first came before me on a Motions day. I adjourned them for further argument because of some concern I had as to the manner in which these applications were made. I have two concerns in particular:-

1. The material that should be placed before the Court; and
2. The question of costs.

As Counsel expressed some surprise at my comments it may be helpful if I were to elaborate on these concerns and indicate my proposed future practice as to these type of applications. Incidentally, my concerns are not as novel as Counsel would have me believe.

In 1985 Rooney, J. drafted a circular to the profession on the subject - I don't know whether it was ever issued - in which he said:-

> "The current thinking appears to be that the Court has no function in the matter other than to approve the compromise without question."

If that still is the thinking it is totally wrong.

The basic starting point is that in such matters, where infants are concerned, the Court acts as *parens patriae*. In actions brought by persons under disability the Court stands ready to protect such person against any disadvantage he may suffer as a result of such disability. The Court performs one of its highest functions when looking after those who are not able to look after themselves.

In matters such as the present there is only one question: is what is proposed for the benefit of the child?

The Court's approach to the practice to be followed is well set out in the Supreme Court Practice 1985 (The White Book") at para 80/10 - 11/4:-

> "On the return day, the solicitors (and, in exceptional cases, counsel) for the parties attend. The first question to be considered is that of liability; the Master should be told whether the defendant admits or does not dispute liability, and if he does dispute liability, whether and to what extend such liability can be established. For this purpose, in accident cases, the circumstances of the accident should be briefly described. Each party should put his version before the Master, who should be told the age (and occupation) of the infant, the date and place of the accident, what evidence can be adduced and what witnesses can be called on behalf of the plaintiff and the defendant; if there are any police reports or notes of evidence or depositions in any criminal proceedings or in an inquest they should be produced or referred to, and, if there has been any prosecution, against whom and with what results. If counsel has advised on liability, his opinion should be placed before the Master. In all, the Master should be put in possession of all the available material in the case, so as to enable him to form his own opinion as to the plaintiff's chances of success in the action, as to the probable extent of such success, and as to the degree or percentage of contributory negligence on the part of the plaintiff or the deceased.
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> The second question to be considered is that of the quantum of damages. For this purpose, in accident cases, there should be placed before the Master medical reports of both sides describing the nature and extent of the plaintiff's injuries, and their probable effect on the general health, education, enjoyment of amenities and earning power of the infant. The medical reports should be brought up to

> date. A list of the items making up the claim (if any) for special damage should also be produced. In actions under the Fatal Accidents Act, it is essential to inform the Master of the age, occupation and earnings of the deceased, the ages of the widow and the dependent children, the amount (if any) of the deceased's estate, and the extent to which his widow and children were "dependent" upon him for their support, and any other facts which go to show what is the pecuniary loss."

In re Barbour's Settlement; National Westminister Bank Ltd v Barbour [1974] 1 All E.R. 1188 Megarry J said this at p. 1191 (b):

> "When the court is asked to give its approval on behalf of minors to a compromise of a dispute, the court has long been accustomed to rely heavily on those advising the minors for assistance in deciding whether the compromise is for the benefit of the minors. Counsel, solicitors, and guardians ad litem or next friends have opportunities which the court lacks for prolonged and detailed consideration of the proposals and possible variations of them in relation to the attitudes of the other parties and the apparent strength and weakness of their respective claims. When the matter comes before the court, the terms of settlement are in final from and the time for consideration is of necessity less ample. The court accordingly must rely to a considerable extent on the views of those whose opportunities of weighing the matter have been so much greater. Expressing a view on whether the terms of a proposed compromise are in the interests of a minor is a matter of great responsibility for all concerned. The solicitors must see that all the relevant matters are put before counsel, that the right questions are asked, and that the guardian ad litem or next friend of the minor fully understands and weighs counsel's advice when it is given. Counsel has to discharge what in my judgment is one of the most important and responsible functions of the Bar, that of helping those unable to help themselves; and the guardian ad litem or next friend must understand the advice given and carefully weigh the advantages of the proposed compromise to the minor against the disadvantages."

And ibid, at (h):-

> "Let me make it clear that plain speaking and not obliquity is the characteristic that the court expects in both question and answer in these cases, and all the more so because the guardians ad litem or next friends who have to consider the problem are so often laymen who ought not to have to unravel lawyers' nods and becks and wreathed smiles."

These observations are at least as apposite to the situation in Fiji.

And finally, at p. 1193:-

> "It may be that the great responsibilities of those who act on behalf of minors are today not so well known or fully understood as they once were. Yet they remain of high importance in the due administration of justice. They provide an important illustration of what all lawyers know, namely, that justice according to law is a co-operative process to which solicitors, counsel and judges all make their contributions. No judge can perform his duties adequately and efficiently without the great assistance from counsel and solicitors that is traditional. The gratitude for this assistance that is sometimes expressed from the Bench is genuine indeed; and correlative to that gratitude is the duty of the Bench to take whatever steps may be appropriate to see that the ancient standards are fully maintained. That reason alone, apart from anything else, suffices to show why I have adjourned this case into court for judgment."

Clearly, one of the things the Court needs is a candid and realistic statement as to the prospects of success. The parties may feel some inhibition about putting their cards on the table, in case the settlement is not approved and the matter goes to trial. Blackburn J. (as he then was), in Karvelas v Chiktrow 26 F.L.R. (Federal Law Reports) 381 spells out in very simple terms at p. 382 how this problem may be overcome:-

> "In every such case, the considered opinion of an experienced practitioner, based on full instructions, should be placed before the court. Where the sum involved is a large one, the opinion of counsel should be exhibited to an affidavit. In a smaller claim (such as this one) it may not be necessary to get the opinion of counsel, and the opinion of the plaintiff's solicitor may be sufficient. If the opinion is an exhibit, it can be withheld from the defendant; if it is expressed by a solicitor in an affidavit, the copy affidavit should not be delivered to the defendant's advisers.
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> In every case, the affidavit should show that the correct instructions were given to counsel, or, as the case may be, that the solicitor considered the correct question, namely whether the compromise proposed would be for the benefit of the infant. In the case before me, the affidavit correctly showed that that was the question considered. It is not sufficient (as sometimes occurs) to tender an opinion that the compromise is "satisfactory" or "reasonable".
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> Any details of the instructions the disclosure of which to the defendant would, in the event of the court's not approving the compromise, be an embarrassment to the plaintiff, should be similarly withheld from the defendant."

In future applications I will expect to have the material placed before the Court that is indicated in the foregoing, except that in view of local circumstances I will not expect, or at least not insist upon, Counsel's opinion.

On the question of costs the apparent local practice of including an unquantified amount of costs in the overall settlement figure, as was done in these cases, is not one which in my opinion should be continued.

I refer to the judgment of Moffitt J. in the Supreme Court of New South Wales in Beavan v. Pengelley, (1968) NSWR 707:-

> "If there is a settlement which has been entered into which is in any way conditional in the sense that the solicitor is forced at the same time to consider his own interest as well as the interest of the infant, he is put firstly in an embarrassing and impossible situation and in addition the Bench cannot approach the matter with the same confidence that it otherwise would. I think it is undesirable that the amount of the costs be agreed upon or be negotiated at the same time as the amount of the verdict. This has been dealt with at considerable length in a considered judgment in Sydney by O'Brien, J., in McLennan v. Phelps (1967) 86 W.N. (Pt. 1 (NSW) 86. Inter alia, he said "The practice which is here demonstrated, and which is of recent origin, whereby offers are made by an insurance office to a plaintiff of settlement upon the basis of a lump sum inclusive of costs, seems to me, in the type of litigation with which I am here concerned, to have undesirable features, to some aspects of which I should advert. Whilst it might suit the convenience of the office to engage in settlements on such a basis, it must frequently place a solicitor for a plaintiff in an invidious position, especially when regard is had to recent events and publicity. He is left to extract from the lump sum, exclusively upon his own explanation to his client, a sum representing costs for which the defendant is required to indemnify the plaintiff by reason of his success in the action, but in the assessment of which the solicitor for the office has, in fact, refused to take any part or refrained from doing so. This, of course, refers to the assessment of costs on a party and party basis, which will usually form the bulk of costs assessed on a solicitor and client basis. There is thus removed from the case that strong element of assurance of the fair estimation of costs which is normally provided when an assessment is reached of party and party costs between the solicitor for the plaintiff and the solicitor for the defendant whose client is to pay such costs. A fair-minded solicitor is, therefore prompted by such a form of settlement to understate his proper remuneration and reimbursement in an endeavour to maintain and demonstrate the honourable standards and reputation both of himself

and of his profession; or, alternatively, he may be obliged, for the assessment of the proper costs to be charged to his client, and for his own protection, to the necessity, which is neither economical in his client's interests, or conducive to the expedition of litigation, to prepare and deliver an itemised bill and to present it for taxation to the proper officers of the Court. Perhaps more importantly, there is inherent in such forms of settlement a temptation to that possible small minority of the profession which, recent experience has shown, can be prone to a temptation to deduct sums which exceed those properly chargeable for costs; this is the very thing to which the Court in recent months and the professional bodies themselves have devoted so much time and anxiety and which has been productive of so much disillusionment and regret. Where the settlement involves an infant and the practice to which I refer is adopted, the judge, upon whom the duty falls of considering the settlement and the orders thereby sought, is presented with unnecessary and, I think, improper difficulties."

Then later he said: "I regard the practice, therefore, to which I refer, as unsatisfactory, and in actions in which an infant is involved and in which the practice is adopted, I have come to the view that I will not, except where there are special circumstances, undertake the sanction of the settlement and the making of the consequential orders usually sought."

I agree, and have in Sydney in an earlier case agreed, with what His Honour said and other judges of this Court have expressed similar views .....

I think the proper course is to agree to the amount of the verdict for the infant, subject to the approval of the Court, the verdict, of course, carrying the right of costs to be taxed if not agreed upon. The verdict should then be submitted for approval of the Court. Thereafter it is proper that there be negotiation, and agreement as to the costs when the parties are at arm's length. In this way it is entirely separated from the settlement of the infant's claim. No doubt it is in the interests of both the solicitor for the plaintiff and the solicitor for the defendant that the costs then be agreed rather than submitted to the delay and cost of taxation. However, if the solicitors can then agree there was no reason why it should not be deferred until after approval of infant's verdict. If they cannot agree, then to insist on a prior agreement as a term of the negotiation or a term of the settlement of the infant's claim, is but to demonstrate the vice of the general procedure which requires the prior settlement of costs."

It is perhaps no accident that within a month of the delivery of that judgment the Supreme Court of New South Wales issued the following Practice Note (1967, 1NSWR 276):-

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"Settlement of Claims for Damages for Infants

The practice according to which a defendant makes an offer of a sum inclusive of costs in settlement of any action for damages is to be deprecated, as it tends to place the plaintiff's solicitor in a position

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in which his personal interest conflicts with that of his client. Such settlements should therefore not be entered into by solicitors.

Where the plaintiff is an infant, approval of settlement will be withheld if it is not made clear that the amount of damages was first agreed upon, with costs to be agreed or in default of agreement

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taxed; and that if, at the time approval is sought, costs have been agreed, that they were the subject of subsequent and independent negotiation."

Other Courts in Australia have expressed similar views. See e.g. in Victoria: Sztockman v.Taylor (1979) V.R. 572.

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The Court is also obliged to give directions as to the money recovered, by virtue of Order 80 Rule 10. In the present cases the settlements provide that the money be paid to the Public Trustee. I think this is proper and removes one potential area of conflict for the parties and difficulty for the Court.

Counsel for the Plaintiffs submitted that the Public Trustee would check the bill

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of costs with the parents and approve it if they do, and that therefore the Court needs to have no worry about it. The argument overlooks two factors:-

Firstly, by the time the Public Trustee comes into the matter the amount of the settlement has been fixed. Therefore, at the time when the same comes before the Court for approval the Court does not know how much of the total amount

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agreed upon will go to the infant and how much to the Solicitor.

Secondly, it overlooks the provisions of Order 62 Rule 28 of the High Court Rules 1988, which provides in subrule (2) as follows:-

"Unless the Court otherwise directs the costs payable to his barrister and solicitor by any plaintiff in any

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proceedings to which this rule applies by virtue of paragraph l(a) or (b), being the costs of those proceedings or incident to the claim therein or consequent thereon, shall be taxed under rule 26; and no costs shall be payable to the barrister and solicitor of any plaintiff in respect of those proceedings except such amount of costs as may be certified in accordance with this rule on the taxation

> under rule 26 of the barrister and solicitor's bill to that plaintiff."

If there is such a practice as Counsel represents, then it is in breach of the Rules. In saying this I am of course not casting the slightest doubt on the Public Trustee's *bona fides* or skill and experience in such matters. As I said, I do not even know whether the practice referred to in fact exists. However, the rules are perfectly clear and unless the Court otherwise orders are mandatory. The agreement of the next friend is quite irrelevant, except insofar as rule 26 (2) has application. Those matters are the Court's responsibility.

This reinforces the proposition that the verdict should be agreed first, without reference to the costs. The correct approach in my view is this:

The verdict is agreed first, party-party costs are then agreed, or in the absence of agreement are taxed in the normal way and paid by the Defendant since they follow the event. If the Plaintiff's solicitor accepts these in full satisfaction of his total claim for costs against his client that is the end of the matter and Order 62 Rule 28 has no further application. If the Plaintiff's Solicitor does not accept the party-party costs in full satisfaction then his solicitor - client bill must be taxed. Sub-rule (3) of Rule 28 envisages that this is done at the same time as the taxation of the party-party bill and the taxing officer is obliged to certify in accordance with that subsection, which is as follows :-

> "(3) On the taxation under rule 26 of a barrister and solicitor's bill to any plaintiff in any proceedings to which this rule applies by virtue of paragraph 1 (a) or (b) who is his own client, the taxing officer shall also tax any costs payable to that plaintiff in those proceedings and shall certify:-
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> (a) the amount allowed on the taxation under rule 26, the amount allowed on the taxation of any costs payable to that plaintiff in those proceedings and the amount (if any) by which the first mentioned amount exceeds the other, and
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> (b) where necessary, the proportion of the amount of the excess payable respectively by, or out of money belonging to, any party to the proceedings who is an infant or incapable, by reason of mental disorder of managing and administering his property and affairs or the widow of the man whose death gave rise to the proceedings and any other party."

I propose to follow the authorities (including the Practice Direction) cited above.

Counsel for the Plaintiff has urged upon me that there has been a longstanding practice in Fiji of approving these settlements in the terms sought namely for an

overall named sum "inclusive of legal costs" and he has provided me with copies of a number of orders made over several years in just such terms by various Judges of this Court. I do not know of course what had been placed before the Judge in each such case. It is a matter of regret for me if I should be differing in this matter from other Judges of the Court, but, as I have endeavoured to express, I have a very clear view of the Court's obligations and of the correct procedure to ensure their appropriate discharge.

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The result in the present case is that I decline to approve the settlement in each case. However, rather then dismiss it, when I have not considered it on its merits, I will adjourn each case *sine die* with liberty to the parties to restore it for hearing should it be desired to proceed in the light of this judgment.

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(Applications adjourned sine die.)

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