THE HIGH COURT

[2013 No. 7674 P.]

BETWEEN

JUDE MILEY (A MINOR)

SUING BY HIS FATHER AND NEXT FRIEND,

GREVILLE MILEY

PLAINTIFF

AND

LORCAN BIRTHISTLE

DEFENDANT

RULING of Mr. Justice Barr delivered on the 19th day of April, 2016

Background

1. The plaintiff in this action is four years of age, having been born on 16th July, 2011. The defendant is sued as the agreed nominated representative for and on behalf of the hospital known as Our Lady's Hospital for Sick Children and the medical and nursing staff working there.

2. In this action, the plaintiff sues for damages in respect of personal injuries suffered by him in the course of a medical operation which it is alleged was negligently performed by a servant or agent of the defendant on 24th January, 2012. Liability for the plaintiff's injuries has been admitted by the defendant.

3. As a result of the operation, the plaintiff has suffered a prolonged hypoxic ischemic insult to his brain. This has left him with significant visual, cognitive, functional and behavioural deficits and difficulties.

4. Prior to the trial of the action, the defendants had made an interim payment to the plaintiff of €250,000. Just before the action commenced, the parties agreed damages in the sum of €1,800,000, in respect of future loss of earnings and future accommodation requirements for the plaintiff. The parties further agreed that for the purposes of the action, the plaintiff's life expectancy could be taken as being 70 years.

The Defendant's Application

5. After the opening of the case by counsel on behalf the plaintiff, and after the evidence in chief of one witness, who was taken out of turn, as he had travelled from Canada, the defendant made an application to adjourn the assessment of the plaintiff's future care needs until the plaintiff had had the opportunity to engage in behaviour management therapy which had been recommended by his doctors. The defendant submitted that the plaintiff's future care needs could be assessed for a period, which they suggested could be ten years or such shorter time as may directed by the court, and that his care needs thereafter could be determined at the review date, when these needs could be accurately assessed after he had had the benefit of behaviour management therapy.

6. The defendant argued that the plaintiff had submitted a claim for future care which stated that two carers would be needed from aged eighteen onwards. This need was apparently based on the behavioural difficulties which it was contended would be exhibited by the plaintiff at that time. The defendant argued that in circumstances where doctors had advised that the plaintiff should have behaviour management therapy and where there was a good chance that the plaintiff might make significant improvement as a result of such therapy, the need for two carers may not arise at all. This would only become apparent after the plaintiff had had the behaviour management therapy on a consistent basis for a reasonable period.

7. The defendant submitted that if the plaintiff's case was determined at the present time by a fixed lump sum award, this could cause a great injustice to the defendant, who might be asked to pay for the cost of future care at a level that may not prove to be necessary, in the event that improvement was made as a result of the behaviour management therapy.

8. The defendant submitted that it was in the interests of justice to adjourn the final adjudication of future care needs, until the therapy regime advised for the plaintiff had been given a chance to work. In addition, it was also argued that the plaintiff had been recently commenced on the anti-epileptic medication, Epilim, and it was submitted that this should be given a chance to see if it would bring about improvement in the plaintiff's condition.

9. In support of his application, the defendant noted that even the plaintiff's doctors recognised that it was too early to properly assess the plaintiff's future care needs. In a report dated 6th October, 2014, Prof. Gordon Dutton, Paediatric Neuro-opthalmic Surgeon, stated as follows in relation to the difficulty in predicting, at this time, the degree to which the plaintiff's visual difficulties will persist. He stated as follows:-

> *"The lower visual field impairment is permanent and can limit mobility. However, at this stage it is not possible to predict the degree to which the simultanagnostic visual dysfunction and the disability seeing fast moving targets, will interfere with development and to what degree they will persist, as there is potential for spontaneous improvement, the degree of which cannot be predicted…. At this early stage in development, the long term impact of the damage sustained cannot be accurately predicted, although the lower visual field impairment is likely to persist."*

10. In a follow-up report dated 25th February, 2016, which was based on a Skype conversation, during which he was able to observe the plaintiff's behaviour in his home for fifteen minutes, the doctor noted that the plaintiff has continuing visual difficulties. He noted that the fact that the plaintiff's anomalous visual behaviours had not abated between assessments, provided evidence that, while they may in the future abate to a degree owing to his growth and development, his visual disabilities were likely to persist in the long term. He stated that the conclusions in his earlier report were still valid.

11. The defendant also referred to the reports furnished by Dr. Sarah O'Doherty, Clinical Psychologist in Paediatric Neuro-psychology. In her second report dated 2nd April, 2016, she stated that she had not done any further psychological assessment as the plaintiff had had five such assessments during the previous twelve months and for that reason she did not do any further testing. She suggested that a period of twelve months should be allowed to pass before carrying out the next test. She noted that the plaintiff had been commenced on Epilim in March 2016. She noted that the plaintiff was due to start primary school. She noted that tests carried out in 2015 found the plaintiff's cognitive profile to be within the borderline range (between low average and learning disability). His most recent assessment in early 2016, reported a similar level of borderline cognitive functioning based on the Leiter-R. She noted that the plaintiff's mother had reported that they had received intensive behaviour management input in New York in late 2015 and that this had helped reduce the behaviour of Jude biting himself and other people. However, she noted that that new behaviours, including spitting and hissing, seemed to have emerged to replace those behaviours. She noted that Jude and his parents had received no behaviour management support or input in Ireland.

12. Dr. O'Doherty noted that as a result of the ABI (acquired brain injury), the plaintiff had cortical visual impairment, severe receptive and moderate expressive language difficulties, microcephaly, cognitive deficits and significant behaviour problems. He was recently diagnosed with sub-clinical seizures and placed on anti-epileptic medication.

13. Dr. O'Doherty stated that it was only possible to do a limited assessment of the plaintiff given his young age:-

> *"I would stress that cognitive assessment of a child of four and a half years is limited on the basis that behavioural, social, emotional, cognitive and educational expectations of a child of this age are low. More comprehensive assessment becomes possible as a child gets older and leads to greater prediction of future functioning."*

14. Dr. O'Doherty stated that it was difficult to assess executive functioning in a child of the plaintiff's age, because expectations in that regard were limited. However, on the basis of her knowledge of the type and severity of the plaintiff's ABI and his current observed difficulties with working memory, attention, emotional control, inhibition and impulsivity, it was her opinion that the plaintiff has difficulties with executive functioning which will become increasingly obvious with age and increased expectations and will increasingly affect his social, emotional, behavioural, academic and cognitive functioning. She recommended that the plaintiff and his parents should participate in a behaviour management programme which would be carried out by a senior clinical child psychologist. It would be necessary for the plaintiff to undergo neuropsychological assessment by a paediatric clinical neuro-psychologist with expertise in the field of ABI. These assessments should be carried out every two years. She gave the following summary of the plaintiff's present condition:-

> *"In summary, Jude is presenting with a range of cognitive, social, emotional and behavioural difficulties arising from an ABI, he sustained as a six month old. Jude's ABI is permanent and it is my opinion that the impact of his underlying ABI will change and become more evident with development as demands and expectations increase. Jude and his parents will require ongoing intervention and support from a child clinical psychologist and neuro-psychologist for the remainder of his childhood to meet his changing needs."*

15. The defendant also referred to a report furnished by Dr. Christina Williams, Consultant Physician in Adult Neurological Disability Medicine. The doctor noted that one of the difficulties arising, had been a lack of continuity and consistency in the provision of appropriate therapeutic input. The periods of intensive co-ordinated therapy had been successful, but it had not proved possible to carry on the therapeutic regimes back at home and as a result, the plaintiff tended to lose ground. She noted that the plaintiff had problems sleeping, which, with professional help, were largely resolved, until the recent onset of difficulties in settling. There was now a need for further help with this issue. She noted that the plaintiff had exhibited behavioural problems, although these had been improving. She opined that it was perhaps since the arrival six months ago of his babysitter, that some behavioural issues had worsened. The doctor had the following to say in relation to the plaintiff's future care requirements:-

> *"It is difficult to be precise about Jude's likely care needs in the long term, but he is very unlikely to be able to live entirely independently of support. It is possible that with skilled therapeutic input, some of his behaviours can be modified but it seems likely that he will continue to require help/support in many areas of his life indefinitely. The issue will need to be kept under regular review and I defer to others over the amount and style of support which will be required. The unpredictability of Jude's behaviour may well necessitate to 1:1 care as he grows older, bigger and stronger."*

16. The defendant referred to a report dated 22nd February, 2016, furnished by Ms. Amy Faulkner, Occupational Therapist. She noted that the plaintiff had attended one to one occupational therapy with her for a six week (one hour/week) block in November/December 2015 and then for a subsequent block from January/February 2016. She noted that over the course of the two OT blocks, Jude had made progress in relation to his attention and concentration skills. The plaintiff still presented with moderate attention difficulties. However, with consistent behaviour management, he was managing well. She further noted that the plaintiff's parents required ongoing and intensive support around managing the plaintiff's behaviour. She recommended that the plaintiff should have ongoing occupational therapy treatment in blocks of six weeks. There should also be an annual OT review to plan and measure outcomes. The defendant also referred to a report dated 19th January, 2016, furnished by Ms. Claire Salley, Paediatric Speech and Language Therapist. She noted that the plaintiff's most recent neuro-psychological assessment was completed in NYU Langone Medical Centre and indicated that the plaintiff's intellectual functioning was in the extremely low range (severe); however, the plaintiff had had a previous psychological assessment in 2014, in Enable Ireland, Sandymount, that indicated that the plaintiff's intellectual functioning was within the borderline or low average range. Due to differing results on psychological assessments, the range of the plaintiff's intellectual functioning was currently unclear; she recommended that the results of the language assessment should be interpreted with consideration of his intellectual functioning when this information was available.

17. Ms. Salley recommended that the plaintiff receives intensive speech and language therapy addressing his speech delay, his severe receptive language deficits, and his moderate expressive language deficits, including his word finding deficits. The plaintiff also required speech and language therapy to address his feeding difficulties. It was felt that feeding difficulties should be addressed in conjunction with occupational therapy to fully address his needs. The plaintiff was currently attending regular speech and language therapy at Therapy Tree.

18. The last of the plaintiff's reports, to which the defendant referred, was a report dated 31st October, 2014, furnished by Mr. Apurba Chakraborty, Occupational Therapy and Care Consultant. In this report, Mr. Chakraborty stated that the plaintiff was currently very young to establish the full range of cognitive impairment at that stage. However, he stated that the extent of brain injury documented in the medical records and microcephaly usually resulted in significant impairment in a broad range of cognitive functions. The plaintiff's behaviour had been particularly challenging. His parents described his hyperactivity and restlessness as concerns.

19. Mr. Chakraborty went on to state that Jude was in his formative years at that time. Ideally, his long term care needs should be reviewed again when he was older, preferably at secondary school age. To assist the court in projecting the plaintiff's future needs, based on his current clinical and social presentation, Mr. Chakraborty made certain recommendations for the future. He stated that this may need review as more evidence unfolded over the next few years. He had the following to say in relation to future care:-

> *"Jude has had a severe brain injury in early childhood. He is still in the formative developmental stage with regard to his sensory – motor, language and cognitive functions. In addition to the organic developmental changes occurring in childhood through to early adulthood, the social – educational experience would also influence his cognitive – behavioural functions. It would not be until early adulthood that his full potential is identified because the development of cognitive functions is not complete in the childhood years."*

20. Mr. Chakraborty went on to say that based on the severity of the brain injury identified in the plaintiff's medical records and based on Jude's current presentation and based on the author's experience in neuro-rehabilitation, he was of the view that on the balance of probability, the plaintiff would require care and support all his life. He went on to set out a care plan for the plaintiff. He recommended that there should be a review in two years from the date of the report, which would mean that a further review should be carried out in or about October 2016. In the report, he recommended that the plaintiff would need one carer in adulthood.

21. In an updated report in December 2015, Mr. Chakraborty gave an assessment of the plaintiff's care needs going forward. However, he stated that further information would be beneficial to establish his long term needs. He went on to state that the plaintiff was in his formative years as a child and under normal course of development, his executive/functional skills would not be fully developed at this stage. However, the issue of cognitive impairment as described in the report, indicated that Jude was behind his peers with regards to the development of such skills. It was important to highlight that the executive functional skills are important cognitive skills that one needed to successfully plan, organise and manage daily living activities as an adolescent and an adult. With the level of intellectual disability that the plaintiff had, he would likely require significant support with daily living as an adolescent and an adult. In relation to the plaintiff's care requirements from age eighteen years onwards, Mr. Chakraborty expressed the following view:-

> *"After the age of eighteen years, he would require full external support during the day and night. Based on the severity of his brain injury and his current presentation, he is likely to require support on a 24 hourly basis to ensure his safety, quality of life and enabling him to be fully inclusive and engaging in the social and occupational areas of his life. The support workers would need to enable Jude to engage in meaningful vocational as well as leisure activities in addition to running of the household and maintenance activities. He would likely to require support with planning and organising for future planning and financial activities.*
>
> *If Jude's sleep improves, when he becomes an adult, he would be able to be supported by a sleep-in carer at night. If not, he would need a waking carer. If his challenging behaviour does not improve significantly, he is likely to need 'double-up' care during the day when he mostly displays the physical agitations and challenging behaviour. As the behaviour is unpredictable, it would be difficult to predict the timings and need for support from the second carer. Therefore, unless there is indication from other experts that his behaviour would improve significantly and consistently, I would illustrate costings for a second carer available throughout the day time when Jude would be actively engaging in activities, both indoors and outdoors."*

22. The defendant submitted that it was clear from this report that it was the plaintiff's anticipated behavioural problems which were the basis for the assertion that he would require a second carer from aged eighteen years onwards.

23. The defendant also referred to a number of medical reports which had been obtained on behalf of the defendant. In a report dated 30th November, 2015, Dr. Gillian Fortune, Clinical Psychologist, stated at para. 5.6 that the full impact of the plaintiff's brain damage and the environmental limitations imposed upon him will only become fully apparent as he grows older. Paediatric neuropsychological assessment should be conducted at approximately two year intervals between the age of six years and eighteen years to identify the plaintiff's learning needs and to identify any additional social, behavioural and emotional needs that may arise as a consequence of his disability as he grows older.

24. In her second report dated 29th March, 2016, Dr. Fortune noted that the plaintiff had not received prior behavioural therapy. She went on to state at para. 4.2 that the plaintiff's complex presentation following brain injury, with significant behaviour problems, required a structured programme of behaviour management to be delivered on a fortnightly basis over a two year period in the first instance, in order to adequately address the plaintiff's behaviour problems.

25. Dr. Fortune stated that in her opinion, Mr. Chakraborty's opinion on the level of future care needed at a level of two carers was somewhat premature. She stated as follows at para. 4.5 of her report:-

> *"In sections 5.15 and 5.16 of his report, Mr. Chakraborty, commented on Jude's care needs in adulthood based on his 'current presentation' advocating the need for 24 hour support from two carers. Given the uncertainty surrounding Jude's current behavioural presentation in the absence of any consistent psychological input and the apparent discrepancy between Jude's level of intellectual functioning and his parents' current understanding of same used to inform this report, Mr. Chakraborty's care predictions in adulthood would appear to be premature."*

26. Dr. Fortune further stated in relation to the claim for a second carer, that as the plaintiff was only four years of age, he needed psychological therapeutic input appropriate for his age. This would enhance his behaviour and quality of life.

27. In her third report dated 4th April, 2016, Dr. Fortune stated that in her clinical experience, the plaintiff was likely to benefit significantly from a structured behaviour management programme. Unfortunately, he did not appear to have actually received any direct psychological therapy to date, despite multiple psychological assessments conducted over the previous eighteen months amounting to an over-exposure to psychometric testing resulting in what appeared to be *"test fatigue"* in his most recent assessment in New York in October 2015. She went on to give the following opinion in relation to his likely presentation in the future:-

"Jude has demonstrated a varied but reasonable level of intellectual functioning despite significant attention problems, which means that he has the cognitive capacity to benefit from such a behaviour management programme over time. With improvement in Jude's behaviour problems over time, he will have greater opportunity to benefit from other therapies and schooling, which would serve to maximise his physical, language and cognitive development in the longer term. His quality of life and that of his parents and siblings are likely to be enhanced with consistent behaviour management. With appropriate behaviour management input, he is likely to manage with the assistance of one carer rather than two to ensure his physical safety and well being."

28. Finally, the defendant referred to medical reports furnished by Dr. Bryan Lynch, Consultant Paediatric Neurologist. In particular, the defendant referred to the following paragraphs from the third report furnished by Dr. Lynch dated 4th April, 2016:-

"The kind of behaviour exhibited in the video are common in children with learning disability. They are certainly immature and challenging behaviours, but this kind of behaviour at this age (four years, eight months), in a child with learning disability is no more predictive of future problems than would tantrums in an intellectually normal two year old.

I understand that the plaintiff's expert witnesses have suggested that Jude will require two persons to supervise him at all times in the future, including his adult life. I do not believe that this will be the case. I would expect that, with appropriate behavioural management and intervention, this kind of behaviour will significantly improve. I believe that he may require supervision in some kind of sheltered environment, not necessarily one on one, but is not likely to require the constant attention of two people."

29. The defendant submitted that the following conclusions arose from a careful consideration of the medical reports in the case thus far:-

(a) The medical witnesses seemed to agree that the trajectory thus far in relation to the plaintiff's recovery was unexpected in a positive sense. He was doing better than initially anticipated.

(b) There seemed to be agreement among the witnesses that it was too early to properly assess the extent of the plaintiff's cognitive impairment.

(c) The plaintiff has been extensively tested to date, perhaps overly tested resulting in *"test fatigue"* and therefore, a period of years should be allowed to elapse before he is further tested.

(d) It was accepted that the plaintiff was functioning lower than expected for his cognitive profile, which was at the borderline between low average in learning disability but that functionally, he seemed to be performing below his potential.

(e) There appeared to be agreement that there was a behavioural element to this failure to meet his cognitive potential.

(f) It was agreed that there were difficulties with behaviour/impulse control and that this was having an impact on the plaintiff and, more critically, this was the factor which would determine the future care regime.

(g) The witnesses were agreed that the behaviour difficulties were untreated to date, or were certainly inadequately treated to date. This view was supported by the reports furnished by Christina Williams, Dr. O'Doherty and Dr. Fortune.

(h) The medical witnesses agreed that the plaintiff's behavioural difficulties should be treated. The defendant stated that the extent of success of that treatment was the critical issue and could not be known at this time. It was submitted that the past indications were positive, in that each time the plaintiff has gone for intensive sessions of therapy, he had improved, but then unfortunately, he slipped back because the therapy was not followed up.

(i) The defendant stated that he was prepared to fund the therapies that are required and all are agreed that there was a need for fairly intensive ongoing assessment and involvement in the plaintiff's treatment in any event. In other words, this was not a situation where, if a lump sum was given, the plaintiff could go away and would never have to interact with all the medical services again. It was necessary in his best interests that such intervention be maintained.

30. Based on the medical reports reviewed, the defendant submitted that it would be contrary to the interests of justice to proceed to reach a final award on future care, when significant therapy was outstanding, which could fundamentally affect the number of carers that would be required during the plaintiff's adult life.

31. The defendant submitted that the court had jurisdiction to grant an adjournment on terms, pursuant to O. 36, r. 34 of the Rules of the Superior Courts, which is in the following terms:-

"The Judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such time, and upon such terms, if any, as he shall think fit."

32. In the alternative, it was submitted that the court had an inherent jurisdiction to grant an adjournment and defer the final adjudication of the level of future care costs, where this was necessitated in the interests of justice.

33. In support of this submission on jurisdiction, the defendant referred to a number of cases. The defendant referred to *Corroon (a minor) v. Pillay's General Hospital Limited* (Unreported, Barton J., 29th October, 2014), where the plaintiff had received previous periodic settlements in 2010, 2011 and 2013. Those agreements had provided that on the review date, the plaintiff should, at his election, be allowed to proceed for a lump sum award or by way of a periodic payment order. Notwithstanding that right of election, the defendant submitted that having regard to the uncertainties in the case concerning the type and amount of care that the plaintiff would require, the extent of the aids and appliances which he would require, and the issue in relation to what was best for the plaintiff in terms of accommodation and the uncertainty in relation to his life expectancy, in these circumstances, the defendant made an offer that the case should proceed by way of a provisional award and that the matter be reviewed further at a later date.

34. In relation to the issue of the court's jurisdiction, Barton J. indicated that unless there was some legal disability on the part of the plaintiff, the court had no jurisdiction to interfere or pronounce on a question such as that which had been raised by the defendant. He then proceeded as follows:-

"However, the court does have such a jurisdiction in the case of minors, or persons who are under a legal disability.

That matter is not contested nor challenged in any way, and quite properly so."

35. The judge further referred to the issue of jurisdiction in the following terms:-

> *"Again it is not contested nor is it contended otherwise but that the court has a jurisdiction in the circumstances to deal with the issue which is now before it, namely whether the plaintiff's case should proceed as one in which damages should be assessed once and for all or alternatively, whether a periodic payment should be made and that the case proceed on that basis."*

36. Barton J. went on to state that the court had to try and find a balance between the wishes of the family, the wishes of the plaintiff, and the offer which was put before the court. He stated that unfortunately the wishes, concerns and feelings of the mother, and of the family and of the plaintiff himself, perhaps, were not necessarily in the plaintiff's best interests. He reached the conclusion that it was in the best interest of the plaintiff to proceed in the way proposed by the defendant. He expressed his conclusion in the following terms:-

> *"But I cannot escape coming to a conclusion other than that it would be in the best interest of the plaintiff at this juncture, and I stress at this juncture, especially given his age, that the case proceed on the basis of a periodic payment of the type suggested by and offered indeed by the State, by the defendants on behalf of the State, namely for five years, until the remainder of the plaintiff's claim should be decided now by the court for the next five years."*

37. In *O'Neill v. National Maternity Hospital* [2015] IEHC 160, the plaintiff was seven years of age at the time of the ruling. The defendant made a formal offer to assess damages for a period of ten years, or such shorter period as the plaintiff might require. The plaintiff did not want to accept this offer and wanted the case to proceed to a final award. In applying for the making of a provisional award, the defendant relied on the fact that there were a number of uncertainties in the case. There was a difference between the plaintiff and the defendant in relation to the plaintiff's life expectancy by a factor of eight years. In relation to future care costs, a number of propositions had been advanced on behalf of the plaintiff. These were comprised in a number of schedules of annual cost which varied between €115,573.20 and €182,342, annually. In relation to the cost of care between the time of the trial and when the plaintiff would reach nineteen years of age, this was advanced in the sum of €72,441.60 annually. As against that, the defendant's carer placed the annual cost of care between the time of trial and the age of eighteen years at approximately €21,500 and after that age a figure which was just short of €26,000 per annum. Aids and appliances were estimated by the plaintiff to be €445,561, whereas the defendant estimated these at €37,069. Accommodation costs were claimed by the plaintiff in the region €900,000 - €1,300,000. The defendant estimated the cost of accommodation requirements at between €60,000 - €80,000.

38. The defendant made an offer that there should be an interim order for the assessment of damages due to the plaintiff for a period of ten years or, if that was not agreeable to the plaintiff, then for such shorter period as the plaintiff might require. Barton J. held that the defendant's application was not an offer to settle or compromise all or part of the plaintiff's claim, so it did not come within the provisions of O. 22, r. 10 of the Rules of the Superior Courts. In relation to the question of jurisdiction, Barton J. stated that in the Corroon case, he had been exercising an inherent jurisdiction, which required the court to approach the determination of the matter on the basis of what was in the plaintiff's best interests. He noted that in that case there had been no issue between the parties as to the nature of the jurisdiction being exercised. The learned judge went on to say the following in relation to the jurisdiction which he was exercising in the case before him:-

> *"This is an action between the infant plaintiff and the defendant. Absent the defendant's application coming within the meaning of O. 22, r. 10 it is the inherent jurisdiction and not that in wardship which the court is exercising in the determination of the matter now before it."*

39. Barton J. noted that the defendant also invoked the provisions of O. 36, r. 34, as enabling the court to make an order directing the assessment of damages for a ten year period or thereabouts, and adjourning the balance of the action for determination to that time. He noted that a not dissimilar application had been made on foot of that Order in *Russell v. Health Service Executive* [2014] IEHC 590. He noted that the defendant's submission had been rejected by Cross J.

40. Barton J. further noted that it was submitted by the plaintiff that the court could not be given and had not acquired a jurisdiction arising out of what had been described as an ad hoc process, to make the kind of orders sought by the defendant. Insofar as there was an inherent jurisdiction in the court enabling it to entertain an application such as that made by the defendant, it was submitted on behalf of the plaintiff that that was to be exercised sparingly and only in the most exceptional circumstances. Barton J. came to the following conclusion at para. 60 of his judgment:-

> *"That the court has made periodic payment orders in previous cases and, indeed, has adjourned the trial of cases, sometimes for years, such as in Corroon where the plaintiff had also sought a final assessment of damages in accordance with the law as it now stands, could all be said to be examples of an exercise by the court of the jurisdiction conferred on it under O. 36, r. 34. However, such orders have generally been made in the context of the parties agreeing to have the action dealt with in that way or where there was, as in Corroon, factors and circumstances which were exceptional. That such a jurisdiction exists to intervene in exceptional circumstances was also recognised by Cross J. in Russell v. Health Service Executive where he held that exceptional and what he described as almost unimaginable factors would have to ensue to prevent a plaintiff, who is well advised by solicitor and counsel, to have his case determined in accordance with the law."*

41. Barton J. continued at para. 70 of his judgment:-

> *"Whilst it is the view of the court that the ability to make proper provision for those unfortunate enough to suffer catastrophic injuries in appropriate cases by way of structured settlements or periodic payments of damages is desirable, even on the ground alone of minimising the risk of under compensation to the victim of an actionable wrong, and as has been provided for in the legal framework established in other jurisdictions, including Northern Ireland, it is not, in absence of agreement between the parties, permissible for the court, otherwise than in the most exceptional of circumstances, to proceed thus rather, and having due regard to the separation of powers, that is a properly a matter for the legislature. Order 36, rule 34 was not intended to provide nor should it be construed in such a way that it becomes a vehicle to carry into effect periodic payment orders as a means of assessing damages in the absence of and as a substitute for a statutory framework established for that purpose."*

42. Barton J. concluded by stating that in the absence of a statutory framework to provide for structured settlements and/or the making of periodic payment orders, there being no agreement between the parties as to how best to proceed, and absent any

exceptional circumstances or factors which would warrant the court in the exercise of its inherent jurisdiction intervening in the best interests of the plaintiff otherwise than in accordance with the expressed wishes of the plaintiff's mother and next friend, the court would refuse the application.

43. In relation to the decision in *Russell v. HSE*, the defendant submitted that only a suggestion had been made by counsel on behalf of the defendant in that case that a PPO should be made. However, no formal application had been made for such relief. The suggestion was made that a PPO should be adopted on the basis of the uncertainties existing in that case. However, counsel for the defendant submitted that the uncertainties in that case were, in no way, comparable to the uncertainties arising in the present case. It was submitted that the dictum of Cross J., to the effect that it would need exceptional and almost unimaginable circumstances to exist in order to impose a PPO on a plaintiff, was obiter dictum.

44. It was further submitted that insofar as Barton J. had referred to the decision of the Supreme Court in *North Western Health Board v. W. (H)* [2001] IESC 9, this was not a parallel case as it involved forcing an invasive procedure on the plaintiff and his parents and as such was wholly different to the jurisdiction of the court to order that the case should proceed by way of a PPO.

45. While it was accepted that the plaintiff had a right to proceed in accordance with the rules of court, the rules themselves allowed the court to manage its own procedures. The rules did not give an unbridled right to the plaintiff for a lump sum award.

46. It was submitted that if, in this case, the plaintiff had applied to the court stating that there was a diagnosis of significant behavioural difficulties, but that these may be ameliorated by therapy and if he stated that he needed an adjournment to allow for this therapy to be carried out, counsel submitted that the plaintiff would be given an adjournment to allow this to happen, or would be given the option to proceed by way of a PPO. It was submitted that the same treatment should apply for the defendant in similar circumstances.

47. Counsel for the defendant stated that they were seeking an adjournment on terms. In this regard, they suggested a period of ten years, but would accept a shorter period, if necessary. It was submitted that the court should not force a lump sum award on the parties when there was significant therapy outstanding. It was submitted that O. 36, r. 34, gave the court the necessary jurisdiction to adjourn the trial on such terms, if any, as it thought fit. The defendant stated that he was seeking a split trial, involving an assessment of the plaintiff's present needs for a number of years and a postponement of the question of his future needs until a later date. Counsel asked rhetorically, whether the court bound by the wishes of the parents; counsel stated that the court was not so bound. It was submitted that the plaintiff's parents made the case that if they want a lump sum award, they can insist upon it. Counsel said that that was not correct; the court can make its own decision on the issue. The plaintiff's parents represented only one side of the argument. It was submitted that the court was entitled to look to the wishes of the parents, but these cannot override the genuine concerns as to the lack of clarity in relation to future recovery and future care costs. It was submitted that the plaintiff's parents could not override what was in the best interests of the plaintiff, or in the interests of justice. It was submitted that the court must look to the interests of justice and manage its procedures to achieve that end. The court must look objectively at what constituted the interests of justice. If that was done, counsel submitted that there should be an adjournment for ten years, or for a shorter period of perhaps two to three years, to allow a diagnosis to be established after the therapy had been put in place.

48. Counsel for the defendant stated that she was not seeking a PPO where the court would assess an annuity payable to the plaintiff over his lifetime. She was asking the court to assess the plaintiff's needs for ten years, or such shorter period as may be directed by the court, and that the balance of his future care costs should be left to be determined on the adjourned date. Counsel stated that if exceptional circumstances were required, such circumstances existed in the present case. There was uncertainty as to the level of recovery which may be made by the plaintiff as a result of the behaviour management therapy. This would determine his need for carers for the rest of his life. It was submitted that the plaintiff's own experts were of opinion that it was too early to reach a final decision on this aspect. It was submitted that this was unique to the present case, because in the other cases cited, the disability had already crystallised. It was on this basis that it was submitted that the court should grant an adjournment and defer the assessment of the plaintiff's future care costs until the behaviour management therapy has been given a reasonable opportunity to work.

49. The defendant stated that the difference in the amount of the care costs between funding for two carers as opposed to one carer, was extremely large. Taken at its high watermark, the plaintiff was putting forward a claim for future care with two carers for life at €16,125,000. This was assuming a real rate of return of 1%. The defendant's figure for future care for one carer, at the same rate of return, amounted to €7,359,000.00. The defendant argued that where there was such a great discrepancy in the figures, which could only be accurately assessed following the behaviour management therapy, it was reasonable and in the interests of justice to defer the assessment of such damages until a time when the plaintiff has had a chance to undergo the therapy.

The Plaintiff's Response

50. The plaintiff resisted the defendant's application by asking three questions: (i) What is the defendant's application?; (ii) What is the jurisdiction to make such an order?; and (iii) Should the court exercise its jurisdiction (assuming that it has such jurisdiction) to grant the application?

51. The plaintiff submitted that the defendant was unclear in the type of order that it wanted. At certain points in the argument, it appeared that they were seeking a PPO. At other points, they referred to the making of an interim award. However, it was submitted that they were not, in actual fact, seeking an interim award but a provisional award. An interim award was a payment that was made to a plaintiff in advance of the trial of the action. It may or may not be based on any evidence, but tended to be made in circumstances where liability was not in issue between the parties and there was a pressing need on the part of the plaintiff for a certain sum of money in advance of the hearing of the action. What the defendant was asking for was, in effect, a provisional award. This is made where the court makes an award of damages, but due to the existence of a particular uncertainty at a future point in time, the court permits the plaintiff to return at a future date if the future event transpires.

52. In the course of subsequent argument, counsel for the defendant clarified that what was being sought was an adjournment of the assessment of future care costs until the behaviour management therapy had had a chance to work, at which time it would be known whether the plaintiff's behavioural difficulties were of such a nature as to require two carers. The defendant accepted that the adjournment would have to be on terms that the defendant would pay the cost of the required therapy and the care costs until whatever review date should be directed by the court.

53. Turning to the second question, which concerned the jurisdiction of the court to make an order in the terms sought by the defendant, the plaintiff submitted that the court did not have jurisdiction to make the order sought by the defendant. In support of the proposition that no such jurisdiction existed at common law, the plaintiff referred to the decision of the *Privy Council in Fournier v. Canadian National Railway Company* [1927] A.C. 167. In that case, a trial jury had found the defendant guilty of negligence, but

instead of awarding a lump sum in damages, they awarded an annuity to be paid annually to each of the children of the deceased until each of them should reach the age of eighteen years. On the application of the appellant, the trial judge capitalised the annuities awarded into a lump sum and entered a verdict for that amount with costs. The action was appealed to the Privy Council. In the course of his judgment, Atkinson L.J. held that what the jury had done was *"quite improper and illegal".* He held that where a jury had improperly awarded an annuity by way of damages, instead of a lump sum, the judge should redirect the jury; he had no power to enter judgment for the capitalised amount of the annuity.

54. The plaintiff also referred to the decision in *Wells v. Wells* [1999] 1 AC 345, where in the course of his judgment, Steyn L.J. dealt with the power which the English courts had to make periodic payment orders. He noted that under the Damages Act 1996, the court only had the power to make such orders if the parties agreed. The plaintiff submitted that if the courts had a general inherent jurisdiction to make such orders at common law, they would not have needed the agreement of the parties. However, it was clear from the judgment of Steyn L.J. that the courts did not have this jurisdiction:-

> *"It is true, of course, that there is statutory provision for periodic payments: see section 2 of the Damages Act 1996. But the court only has this power if both parties agree. Such agreement is never, or virtually never, forthcoming. The present power to order periodic payments is a dead letter. The solution is relatively straightforward. The court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases. Such a power is perfectly consistent with the principle of full compensation for pecuniary loss. Except perhaps for the distaste of personal injury lawyers for change to a familiar system, I can think of no substantial argument to the contrary. But the judges cannot make the change. Only Parliament can solve the problem."*

55. In support of the proposition that the Irish Courts do not have jurisdiction at present to make PPO's or provisional awards, the plaintiff submitted that the report of the Working Group on Medical Negligence and Periodic Payments (the Quirke report) which had reported in 2010, had advocated that the Oireachtas should make provisions for periodic payment orders and provisional awards by legislation. It was submitted that that would not have been necessary if the courts already had that jurisdiction, either under the rules of court, or as part of its inherent jurisdiction.

56. The plaintiff noted that in the Quirke report they referred to the fact that a number of earlier bodies had previously pointed out the deficiencies of the single lump sum award system. The Law Reform Commission had also produced a report noting the shortcomings of lump sum awards. The plaintiff submitted that the only rational basis underlying these reports was the view of the relevant bodies that the courts did not possess the jurisdiction to make such awards. For this reason, legislation was needed to give the courts the necessary jurisdiction.

57. The plaintiff also referred to the ruling of Irvine J. in *Gaffney Hayes (A Minor) v. Health Service Executive* (Unreported, 7th November, 2013). In that case, the defendants had offered a periodic payment to the plaintiff. When this was not accepted by the plaintiff, Irvine J. did not rule the offer. The defendant then applied to amend its defence to plead that the plaintiff's next friend had been guilty of contributory negligence in not recommending the offer. It was submitted that the effect of the judge's ruling was that the only jurisdiction was to award damages in respect of a future risk. Irvine J. stated as follows in the course of her ruling:-

> *"Well I agree with all of that: if there was legislation which was there which would remove that risk. But until this date, for all of my period at the Bar and as a Judge, damages have been awarded, week in, week out where that risk is taken by every single plaintiff who claims any capital sum. There is always a risk. A capital sum is based on a guesstimate of future returns in respect of various investments. That is the way damages have been awarded and that is the only basis upon which I now have jurisdiction to award damages.*
>
> *As far as I am concerned, I look at this plea and if I were to allow this plea, what I am being invited to do is to hear the case, I am to calculate the loss, and then at the end of the day I am going to be asked to exercise some jurisdiction where I will consider the blameworthiness of a catastrophically injured plaintiff or perhaps his family or perhaps his lawyers, for failing to engage with a system of periodic payments which simply does not exist and, in respect of which I have simply no power. This is to hold some type of a sword over the heads of the infant plaintiff, his family and his legal team.*
>
> *I don't believe there is any jurisdiction for me to make this amendment, in circumstances where there is no periodic payment order legislation. All there has been to date is a system of making interim awards of damages. They are not periodic payments. Any settlement which has been put to this Court to date can, firstly, only be dealt with by way of an interim payment of damages, and can only be dealt with by the court by agreement between the parties, and where the action is adjourned.*
>
> *None of those circumstances arise in this case. The case is not being adjourned. Any offer which can be made can only be in respect of an interim payment rather than a periodic payment, because there is no such thing as a periodic payment order. So I will not allow an amendment to debate something that does not exist."*

58. Referring to the *Corroon* case, the plaintiff noted that in his judgment, Barton J. stated that the court had jurisdiction to make such an order in the case of a minor or a person under a disability. However, this was not contested by the plaintiff. In these circumstances, the plaintiff submitted that the comments of Barton J. were obiter, where it appeared that there had been no argument on the issue of jurisdiction. The plaintiff did not contest jurisdiction in that case. There had been a previous settlement which provided that on the review date, the plaintiff could elect to proceed by PPO or lump sum. Barton J. held that as the plaintiff was under a disability, he could not make the election, so the judge made the election for him. Furthermore, there was a contest in respect of life expectancy and the judge seemed to have held that that was significant. If there was such a contest, a PPO was attractive. The plaintiff pointed out that in this case, life expectancy was not in issue as this had been agreed at 70 years. Barton J. was balancing the plaintiff's parents concerns not to have to come back to court and was looking at the scenario where PPOs were expected to be coming into force in the near future. The plaintiff submitted that this clearly affected his decision. It was clear that the learned trial judge was influenced by the election point, as the plaintiff could not make an election, the judge did it for him. In all these circumstances, it was submitted that Corroon was not a binding authority on the court.

59. The plaintiff submitted that in the High Court judgment in the case of *Russell (A Minor) v. Health Service Executive* [2014] IEHC 590, Cross J. had expressly rejected the submission that O. 36, r. 34, effectively enabled the court to force a periodic payment order onto a plaintiff and his next friend, on the basis that this was in the best interests of both the plaintiff and of justice. Cross J. noted that the defendant had invoked this provision of the rules and stated as follows:-

> *"I reject that submission. The plaintiff through his next friend is entitled to proceed to have his case assessed in its*

finality in accordance with the law as it stands. Even in the absence of an express agreement and settlement that the plaintiff is so entitled to proceed, I believe that exceptional and almost unimaginable factors would have to ensue to prevent a plaintiff, who is well advised by solicitor and counsel, to have his case determined in accordance with law."

60. The plaintiff submitted that O. 36, r. 34, was a simple provision dealing with adjournment of a trial. It was not intended to be used in an inventive manner to give the court jurisdiction to make PPO's, when the Law Reform Commission and the Quirke report thought that the court did not have such jurisdiction, and legislation had not been introduced to give the court the necessary jurisdiction. In Russell, the defendant had been looking for a PPO and then an adjournment. Here the defendant sought a provisional award and an adjournment.

61. The plaintiff also referred to the case of *O'Mahony (A person of unsound mind not so found) v. Southern Health Board* (Unreported, Moriarty J., 7th November, 2014), where it had been argued on behalf of the defendant that O. 36, r. 34, could be used as a means of forcing the plaintiff to accept an interim award with further review in two or five years time. Mr. Sreenan, S.C., pointed out that in the course of argument, counsel for the defendant had conceded that there was no jurisdiction to force a periodic payment regime on the plaintiff. He referred, in particular, to the transcript of Day 2 of the hearing on 5th November, 2014, at p. 46 where counsel for the defendant stated:-

"Now, he says that the court doesn't have a jurisdiction and his reasoning is that there is no jurisdiction to enforce a periodic payment regime upon the plaintiff without the plaintiff's consent. He is absolutely correct about that. I am not asking the court to impose a periodic payment regime on the plaintiff at all….I am asking you to adjourn this case on terms by putting in place an interim payment pending the legislation and, when the legislation is in, that will take care of the situation from that time on."

62. In the course of his ruling in that case, Moriarty J. stated that it seemed to him that the plaintiff, in the absence of legislation, was entitled to nail his colours to the mast and seek final disposal of the matter. He appeared to reject the argument put forward by counsel for the defendant, that the court had jurisdiction to make the necessary order pursuant to O. 36, r. 34 in the following terms:-

"The argument that is made, and made eloquently by Mr. Mohan as to the potential use of the Rules of the Superior Courts, seemed to me not to be feasible in the context of this matter referring to substantive hearings as they do, they do not appear to contemplate year to year reviews and returns to court in the face of the wishes of a plaintiff, his or her family and their legal advisers, and it seems to me to be likely to involve an undesirable degree of paternalism in court treatment of what has transpired."

63. Finally, the plaintiff referred to the ruling of Cross J. in *Gillick (A Minor) v. Children's University Hospital* (Unreported, High Court, 12th April, 2016) where the judge reviewed the earlier decisions and held that it would only be in exceptional circumstances that the court would decline to proceed on the basis of a lump sum award. Cross J. stated as follows in the course of his ruling:-

"So I will put, for the moment that decision aside and look at the decision of Barton J. in the case of Grace O'Neill. He essentially, though he did not refer to the Russell decision, he came in essence to a very similar decision that I did, namely that it would be in exceptional circumstances for the court to decline to proceed on the basis of the law as it stands.

So I have to see whether there are truly exceptional circumstances. Giving any award, I must be fair to both sides. The jurisdiction, insofar as it exists, is my inherent jurisdiction and being fair to both sides certainly, but I think it arises principally because of the infant status of the plaintiff. I do not see any distinction to be made between this plaintiff – a distinction in principle to be made between this plaintiff and any other plaintiff. A judge has to decide complex issues. A judge may often get things wrong. But under the law as it stands, the judge must assess, in a case such as this damages on the basis of the view that he or she takes as to the life expectancy of the plaintiff; the view that he or she takes as to the reasonable cost of care; the view that he or she takes as to the amount of loss of earnings, if that is an issue; the view that he or she takes as to lots of other matters that are hotly contested in cases such as this.

I do not see why I should depart from the standard as set out by Barton J. in relation to the O'Neill case. I do not see how this is an exceptional case to take it out of the ordinary rules of the law, which provides for cases to be determined fully. I think that if I were to so decide in this case, such an application could be made in a very large number of cases. I don't see that that is what the law involves. If the law is to be changed, let the law be changed by those who have power to change it. The law at the moment is really clear. I am not going to accede to this application."

64. The plaintiff submitted that even if it was held that the court did have jurisdiction to make a provisional award and adjourn the balance of the matter for consideration at a later date, there were no exceptional circumstances in this case to justify the imposition, against the will of the plaintiff and his parents of such a provisional award. Counsel referred to the dictum of Cross J. in Russell that there would have to be "exceptional and almost unimaginable circumstances, to justify making such an order". Counsel submitted that every day the courts had to award damages in respect of events that were not certain. As had been pointed out in the Gillick case, the courts regularly had to make awards of damages in respect of uncertain events. There was no reason why the court should not do so in this case.

65. Finally, it was submitted that many bodies and judges had proceeded on the basis that there was no jurisdiction at common law to make interim awards, provisional awards or PPOs. It was submitted that it was unrealistic to suggest that they were all blind to the fact that this jurisdiction was part of the inherent jurisdiction of the court, as maintained by the defendant. In this case, the plaintiff believed that he could establish on the balance of probabilities that he will have behavioural problems in the future, necessitating him having two carers. The burden on proof rested on the plaintiff and it was up to him to establish his future care needs to the satisfaction of the court. There was no reason why the court should not deal with this matter in the usual way by the making of a lump sum award. It was submitted that it had been accepted by the *State Claims Agency in O'Mahony v. SHB* that the court could not force a plaintiff to accept a PPO. Similarly, they could not force the plaintiff to accept a provisional award with a review at some date in the future.

Conclusions

66. The defendant's application is for an adjournment on terms. It is submitted that those terms should cater for the plaintiff's therapy and care costs until the adjourned date. The defendant submits that the court has jurisdiction under O. 36, r. 34 or under its inherent jurisdiction, to adjourn a case if such is in the interests of justice.

67. I am satisfied that O. 36, r. 34 is sufficiently wide in its terms to give the court jurisdiction to adjourn a case in the circumstances which arise here. Even if I am wrong in that, I am satisfied on the basis of the decisions in O'Neill v. National Maternity Hospital and Gillick v. Children's University Hospital, that the court has an inherent jurisdiction to grant an adjournment of portion of a hearing if that is necessary in order to do justice in the case.

68. The defendant argues that the plaintiff's need for two carers is based on his anticipated behaviour problems in adulthood. It is submitted that when the plaintiff undergoes behaviour management therapy, this may bring about a marked improvement in his behaviour, such that he may not require two carers. I am satisfied, from the content of the plaintiff's medical reports and the defendant's reports, that where the plaintiff has had therapy over a consistent period in the past, there has been improvement in his behaviour.

69. Furthermore, it seems to be accepted by the medical and care experts, that the plaintiff will have to be reviewed again in the future to finally assess his cognitive and behavioural progress and his consequent care needs.

70. It is reasonable to assume that improvement may be achieved in the future, when he has behaviour management therapy on a regular basis. In those circumstances, it seems to me that there would be a real risk of doing a grave injustice to the defendant to force the action on and to award a lump sum in damages for future care costs at this time, without giving the treatment which has been advised for the plaintiff, a chance to work. Where there is such a large discrepancy in the cost of future care, depending on whether there are two carers or one, it is necessary in the interests of justice that an adjournment should be granted to see if the behaviour management therapy will result in substantial improvement in the plaintiff's behaviour.

71. I am satisfied that where therapy has been recommended for the plaintiff, which will be undertaken in the near future, and which may have a profound effect on the level of care needed by the plaintiff and where the success or failure of this treatment will be known in a relatively short period and where the difference in the amount of future care costs is of the order of €9,000,000, these are exceptional circumstances which justify the court in granting an adjournment on terms to enable this issue to be clarified.

72. I am further satisfied that it will only be when the behaviour management therapy has been undertaken for a reasonable period, that the plaintiff's future care needs will be finally crystallised. It is in the interests of justice to adjourn further consideration of that issue until the treatment has been undertaken for a reasonable period.

73. Accordingly, I give the following directions in relation to the hearing of this action:-

> (i) I will adjourn the question of the plaintiff's future care costs for a period to allow the behaviour management therapy to take place. I will hear the parties on the appropriate length of the adjournment.
>
> (ii) I will proceed to assess the plaintiff's therapy and care costs for the period of the adjournment.
>
> (iii) I will proceed to assess the other heads of claim that can be dealt with at this time.