

THE HIGH COURT**RECORD NO. 1998 NO. 7707P****BETWEEN**

**PATRICK PIERCE (A MINOR) SUING BY
HIS FATHER AND NEXT FRIEND, PATRICK PIERCE**

PLAINTIFF**AND****KEN KELLEHER****DEFENDANT****Judgment of Finnegan P. delivered on the 4th day of May 2005**

The Plaintiff in this matter was born on the 9th January 1983 and is now 22 years of age. He was involved in an accident on the 2nd August 1996 and sustained serious injury and in consequence thereof the present proceedings were instituted. On the 12th July 2004 an offer in settlement in the amount of €3,200,000 together with costs was approved by the High Court. By its order the High Court directed that the sum of €3,200,000 was to be placed on a joint deposit interest bearing account in the names of the Plaintiff's parents and Matheson Ormsby Prentice Solicitors pending an application to have the Plaintiff made a ward of court.

By Notice of Motion issued on the 23rd February 2005 the Plaintiff seeks the following reliefs –

1. An Order approving the setting up of a private trust to administer the Plaintiff's affairs and otherwise approving the terms and conditions of the proposed trust referred to as "The Patrick Pierce Discretionary Settlement" and directing payment into the said trust of the settlement monies in the sum of €3,200,000 approved by this Honourable Court on the 12th day of July 2004 or such amount or portion thereof as is deemed just and appropriate.
2. An Order approving the appointment of the proposed trustees referred to in the proposed Deed of Trust and such further or other Order approving the terms and conditions of the said Deed of Trust as is deemed just and appropriate.

As to the Plaintiff's condition I have before me the medical reports obtained for the purposes of prosecuting this action. The Plaintiff sustained a profound head injury and as a result is significantly impaired with intellectual, communication and motor difficulties. In the years immediately following his accident he made progress in terms of mobilisation and personal care. As of the 22nd November 1997 psychologically he fell in the mid mild range of mental handicap with particular problems in the area of social judgment and abstract thought. His psychological assessments from May 1997 to March 1998 disclosed a slow but sure graph of progress in several areas of functioning. As at 23rd July 1999 on the WIS for Children his fund of general information and capacity for abstract thought fell in the low average range of ability. His short term verbal and visual memory, attention to detail and spatial and constructional abilities were significantly below average and in the moderate range of learning disability in the bottom 1% of the population. His memory was poor. On the Rey Auditory Verbal Learning Test the Plaintiff scored in the bottom 2% for his age. Academically he functioned at the level of an 11 year old. By the 22nd September 1999 in the opinion of his consultant neurosurgeon his intellectual difficulties were unlikely to improve further with time. A CT Scan of the Plaintiff's brain disclosed in the words of his consultant neurologist "the worst degree of cerebral atrophy that I have seen and quite remarkable atrophy of the brain caused by a head injury. The changes described will be permanent."

The Plaintiff was assessed by Anne O'Connell Senior Psychologist on the 26th January 2001. On the WIS for Children his scores fell in the mild range of learning disability but he was making some progress. His performance on the Rey Auditory Verbal Learning Test showed no improvement and academically his skills lay at the 12 year old level. Intellectually his ability falls in the bottom 4% of the population.

On the 2nd July 2004 Michael Hutchinson, Consultant Neurologist wrote as follows –

“I am of the opinion that Patrick Pierce is not capable of handling his own affairs. As I have indicated in my previous medico legal report of 3rd November 1999 Patrick has evidence of severe cognitive impairment.”

A draft discretionary trust is exhibited on the application. It envisages a settlement by the next friend. I do not understand the law as enabling a next friend to divest a person of full age of his property. The Plaintiff himself, assuming that he has capacity to do so, could of course enter into such a trust. On this application I am not in a position to determine that the Plaintiff has indeed such capacity; that is a function to be addressed in my wardship jurisdiction. I use divest advisedly: the terms of the trust are as follows –

“The trustees shall stand possessed of the trust fund and the income thereof upon such trusts for the benefit of the beneficiary and subject to such terms, limitations and provisions as the trustees shall from time to time by deed revocable or irrevocable executed before the vesting day but without infringing the rule against perpetuities appoint.”

It is of course the intention that the trust fund and the income thereof should be applied for the benefit of the beneficiary but it is in the nature of a discretionary trust that the trustees are not bound to follow that intention. The investment provisions extend beyond those authorised by law, that is under the Trustee (Authorised Investments) Act 1958 section 1. It provides that no trustee shall be liable for any loss or damage occurring as a result of his concurring or refusing or failing to concur in an exercise of his discretion or powers. Further it provides that no trustee shall be liable for any loss to the trust fund by reason of any improper investment made in good faith nor for any negligence or fraud of any agent employed by him or by any other trustee. The settlement is irrevocable. There is power in the trustees to transfer the whole or part of the trust fund to the trustees or trustee for the time being of any other irrevocable settlement the beneficiary of which is the beneficiary and whether such settlement is within the state or without. I have concerns as to the appropriateness of the deed having regard to the age, life expectancy and capacity of the Plaintiff.

For the foregoing reasons I am not content to make the Orders sought on this application.

Upon the basis of the psychological report of Anne O’Connell dated the 26th June 2001 and the letter of Michael Hutchinson, Consultant Neurologist dated the 2nd July 2004 I propose proceeding on foot of the twelfth Section of the Lunacy Regulation (Ireland) Act 1871. On the proceedings for a Declaration Order I will be in a position to consider whether it is appropriate that a Declaration Order should be made. On that occasion I can be addressed on the several reasons opened to me in the Affidavits filed on this application as to why wardship is inappropriate for the Plaintiff. It is only at that stage that I will be in a position to determine whether it is open to me to make a Declaration Order, if so whether it is appropriate that I should do so and to then embark upon consideration should that be appropriate as to the best means to provide for the maintenance, benefit and comfort of the ward having regard to his estate and to the circumstance that he has normal life expectancy.

On this application I refuse the relief sought.