Neutral Citation: [2014] IEHC 336

THE HIGH COURT

[2009 123 P.]

BETWEEN

ELAINE LENNON (A PERSON OF UNSOUND MIND NOT SO FOUND SUING BY HER FATHER AND NEXT FRIEND JOHN LENNON)
PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE – NORTH EASTERN AREA AND PATRICK O'MATHUNA

DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered on the 18th June, 2014

1. The plaintiff in these proceedings was born on 7th December, 1974, and is now 38 years of age. At the time of the events the subject matter of these proceedings, the plaintiff was working as a carer with the HSE and had just attained her Masters Degree in Psychology in Dublin City University.

2. Regrettably, in February 2007, the plaintiff developed an intracranial abscess which ruptured into her ventricular system and as a result sustained devastating injuries which will afflict her for the rest of her life. It is particularly tragic that these injuries were sustained at a time when herself and her partner, Mr. Marcus Connolly, were about to embark upon life as parents of their daughter Claudia who was born on 4th February, 2007.

3. Liability in respect of the plaintiff's claim has been admitted and when the case was first listed for hearing in February 2011, the parties were agreed that this would be an appropriate case for the making of a periodic payment order in respect of particular heads of claim if the court was permitted to award damages on this basis.

4. In anticipation of a change in legislation that would allow for the making of periodic payment orders an interim settlement was agreed between the parties on 23rd February, 2011. This provided that the defendants would pay a sum of €2,395,080 by way of damages in respect of the following heads of claim, namely:-

(i) General damages €450,000

(ii) Plaintiff's Housing Requirements €500,000

(iii) Future loss of earnings €650,000

(iv) Loss of earnings to date €90,000

(v) Retrospective care €225,000

(vi) Assistive technology €290,000

(vii) Orthotics €60,000

(viii) Psychologist fees €10,000

(ix) Special damages including travel €15,500

(x) Physiotherapy costs limited for the

two year period of agreement adjournment €4,580

(xi) Costs of aids and appliances for the

two year period of agreement adjournment €100,000

Total €2,395,080

5. The settlement, which included other terms it is not necessary to mention, provided that the proceedings would then be adjourned for a period of two years at which stage the remaining claims would be dealt with, namely the cost of future physiotherapy, aids and appliances and care.

6. The proceedings came back before the court for hearing on 16th April, 2013, at which stage it was agreed that the claim should be further adjourned for a period of one year to allow for the implementation of the long promised legislation in respect of periodic payments and to allow the plaintiff move into a new home which had been purchased on her behalf and which was then in the course of being fitted out to meet her needs.

7. The terms of that interim settlement provided, *inter alia*, that the defendants would pay to the plaintiff a further sum of €310,000 to cover the categories of claim set out at paragraph 2 of a written agreement signed by the parties.

8. The proceedings were again listed for hearing on the 30th April, 2014 when the parties once more agreed, because of the very uncertain evidence regarding the plaintiff's life expectancy, to postpone seeking a final award for a further period of three years in the hope that by then legislation will be in place that will allow the court finalise this claim by way of a periodic payment order.

9. The parties reached an accommodation in relation to a number of heads of claim which needed to be dealt with and as a result this decision is one which relates solely to the sum to be provided by the defendant in respect of the plaintiff's care requirements for the next three years.

Relevant Background Facts

10. In the years immediately following her injury, the plaintiff spent a significant number of months in Beaumont Hospital after which she was transferred for further rehabilitation to the National Rehabilitation Hospital in Dun Laoghaire. Following her first period of rehabilitation there the plaintiff moved for several years to Hamilton Park Nursing Home, where it is agreed she received excellent care. Her partner Marcus Connolly, who is an electrician at Dublin Airport, visited her on an almost daily basis and their daughter Claudia was brought to visit her twice a week. The plaintiff was very upset when residing in the nursing home and the clinicians in charge of her care were agreed that living in such an environment compromised her ability to engage appropriately with her partner and daughter and that every effort needed to be made to make her part of a normal family unit as soon as possible.

11. Early in 2013, the plaintiff and her partner purchased a three bedroom bungalow in Kilbarrack. Planning permission was obtained to adapt it so as to make it an appropriate family home for the plaintiff, her partner and daughter and such additional carers as might be required to assist her in her daily activities. It was hoped that the property would be ready for occupation by the end of 2013, but that aspiration proved optimistic. However, it is pretty certain that the family will move into this house in June of this year as it is almost completed.

12. At present the plaintiff is living in a rented apartment in Sutton, Co. Dublin. Her daughter stays over with her every Saturday night and on one other day during the week comes to visit her after school. The plaintiff loves her apartment, which overlooks the sea, and residing there has vastly improvement the quality of her day to day life. She is nonetheless eagerly awaiting the time when she will be in a position to live with her partner and daughter in a family environment.

13. There is little dispute between the parties as to the extent of the plaintiff's injuries. In this regard, I heard evidence from her partner Mr. Connolly; Dr. Niall Pender, Consultant Neuropsychologist; Ms. Maggie Sargent, a Nursing and Care Consultant; Ms. Gráinne McKeown, a physiotherapist who specialises in the rehabilitation of patients with chronic neurological conditions stemming from brain damage; Dr. Kristina Williams, Consultant Physician in Adult Neurological Disability Medicine; Mr. Will Winterbotham, Neuro-physiotherapist, and Ms. Mary Maguire, the plaintiff's case manager. On the defendant's behalf, the court heard evidence from Dr. Nicola Rhyl, Consultant in Rehabilitation Medicine; Ms. Christine Kydd, Nursing Care Consultant; Ms. Siobhan Doyle, Physiotherapist and Ms. Lockhead, Occupational Therapist. Other witnesses from the Irish Wheelchair Association ("IWA") were heard in respect of the nature and the costs of care provided to date and as to the nature and the cost of care which the plaintiff maintains she requires over the next three years.

Summary of the Plaintiff's Present Condition

14. The plaintiff suffers from spastic quadraparesis and is wheelchair bound most of the time. She also suffers from epilepsy which is well controlled with medication. She can bear weight on her legs and walk, albeit in an unsteady fashion, if supported by two carers and can do so for a distance of approximately 100 yards. In addition, with supervision, the plaintiff can stand for as long as one or two minutes unsupported. However, while in that position any movement of her head or upper body is likely to destabilise her. Both of her arms are uncoordinated and she has very little power in the left arm.

15. The plaintiff is able to walk a little using what is described as a gutter rollator, a walking device that can be used on smooth surfaces. She can manage five to ten laps of the interior of her apartment once she has assistance to help her steer and give her support. The plaintiff is particularly at risk of falling because of her ataxic gait, poor balance, lack of trunk control and left leg scissors action. If she were to become unbalanced when using the rollator, she would not be able to correct her balance. The plaintiff's experts maintain that if this were to happen when she was only supported by one carer there would be a real risk that they would both fall. The defendant accepts that the plaintiff needs two carers if she is to travel significant distances using her rollator such as when she does laps of the apartment for exercise but believes that she can travel very short distances with the assistance of one carer.

16. The plaintiff can pull herself up from a seated to standing position and has, in recent times, learned to transfer from bed to chair/wheelchair and from wheelchair to chair in her own apartment without physical assistance but subject to supervision. There is a dispute as the extent of the assistance she needs to make transfers from her wheelchair to any other type of seating when she is outside her home and in unfamiliar surroundings.

17. Within her apartment the plaintiff is toileted by one carer who wheels her as far as the bathroom in her wheelchair. She can then pull herself up onto what is called a Molift Raiser. This device is designed to facilitate a patient being moved from one piece of equipment to another. The plaintiff puts her feet onto the base of this device which is then wheeled into the correct position in front of whatever seat or toilet seat she is next to use. In the case of a transfer to the toilet, she will pull herself into a standing position from her wheelchair and then hold on to its upper rail while her lower garments are loosened. Then she can be safely lowered onto the seat. There is much dispute between the parties as to the extent to which the plaintiff can, when outside the confines of her own apartment, be transferred to various types of seating using a more transportable version of this device known as an ETAC turner, and I will return to this issue later.

18. The plaintiff requires help with most of her day to day activities. She can make an effort at dressing but cannot manage fine movements such as would be required for buttons or zips and cannot complete dressing on her own. The plaintiff can attend to her own oral hygiene and can brush her hair. However, she needs assistance with the preparation of her food even though she can feed herself and has no real difficulty maintaining a safe swallow.

19. The plaintiff's hearing is normal. She speaks slowly and can be clearly heard but her voice gets weaker as she tires. While the plaintiff reports that she sometimes experiences double vision she does not wear glasses and seems able to manage reasonably well without them.

20. The plaintiff is continent of bowel and urine. However, she does suffer from urinary frequency. Because of this she always wears a pad for protection and she empties her bladder before leaving the house or undertaking any physical activity. While botox injections were considered as a means of potentially improving the plaintiff's bladder control, this treatment has, for the moment, been passed over as it is something that would have to be repeated every six months. Likewise, the placement of a supra-pubic catheter has been rejected, a decision supported by the plaintiff's medical advisers, including Dr. Williams. She told the court that this approach might be considered to be a somewhat excessive response to the plaintiff's modest continence issues, particularly as she is quite continent during the day.

21. The plaintiff, at the time of her initial infection, developed inflammation which went deeply into her brain and as a result she suffers from severe global cognitive impairment and short term memory difficulties. She has problems with concentration, executive function and non-verbal intellectual ability. She is accordingly functioning at a significantly lower level than that which she enjoyed prior to her injury. While she has insight into her difficulties she is incapable of organising herself in a manner so as to overcome her cognitive problems.

22. The plaintiff had an intermittent history of depression prior to the events the subject matter of this claim and from time to time has felt somewhat low and down in recent times. However, Dr. Pender, who has been treating the plaintiff on an ongoing basis, told the court that in his opinion her mood has improved since she moved into her apartment and that it is likely to improve further when she is reunited with her daughter and partner.

23. The parties are agreed that the overall effect of the plaintiff's disabilities is that she is unable to maintain her own safe environment mainly because of her epilepsy for which she remains on anti-conversant medication and because of her impaired mobility and balance which leave her at significant risk of falling.

24. Since the matter was last before the court, the plaintiff has been diagnosed with diabetes mellitus. Thankfully this is well controlled and it is the opinion of Dr. Williams, that it is unlikely to impact significantly on her overall health given that her diet and medication are carefully monitored by her carers.

25. Since December last year, the plaintiff seems to have become much more optimistic regarding her future and she wants to get back to the type of life she expected she would have enjoyed but for her injuries. In particular, she is keen to assume her rightful role as Claudia's mother and to build the normal bond which ought to exist between parent and child. To this end, she wants to participate as fully as possible in her life and become fully involved in her schooling and extra curricular activities.

26. The plaintiff has told all of those who are close to her that she wants to be able to participate in the type of activities which are normal for a woman of her age. She wants to be able to go to the shops, to study, to have friends and to enjoy a good relationship with her partner and daughter. She hates being in a wheelchair and does not want to be an invalid. Her expectations immediately prior to her injury were that she would end up working in an area which would engage her qualifications in psychology, that she would enjoy family life and participate in a variety of leisure activities.

27. The plaintiff was a very capable and versatile young woman prior to sustaining her injuries. She was the first woman in Ireland to qualify to drive a 40ft truck. She trained as a soprano in the Leinster School of Music, sang with Opera Ireland and had been offered a role with the Riverdance Company, an invitation which she turned down because of her study commitments. Accordingly, I think it is highly likely that had she not been injured, the plaintiff would have engaged in quite a wide range of activities, subject to the type of natural curtailment which occurs by reason of parenthood and work commitments. Regrettably, she will now be permanently precluded from engaging in some such activities regardless of the extent of the care which can be provided for her into the future.

28. In the last year, the plaintiff has enrolled in what may generally be described as an Open University degree in organisational psychology which can be completed online. She can study at her own pace and the typing of her project work is carried out by one of her carers from Associated Brain Injury Ireland ("ABI"). It is not as yet clear however, in light of her cognitive limitations, as to whether or not the plaintiff will be able to successfully complete these studies.

29. As for her daily life, the plaintiff gets up at about 9 a.m. It takes over an hour for her to get showered, dressed and have breakfast. Then she usually carries out an exercise programme which takes a further hour and a half after which she customarily has a rest. The plaintiff goes out from the apartment most days accompanied by two carers. She has ongoing medical appointments to keep. She likes to shop, get her hair done, visit the beauticians and attend the IWA gym. Thursdays have been designated as cultural days when she may visit a museum, gallery or perhaps go to the cinema. When out and about she likes to have lunch or a cup of coffee and when she does she likes wherever possible to sit in a normal chair. Claudia comes to visit her in her apartment one afternoon during the school week and also stays the weekend. Sundays are very much family days. The plaintiff has one carer on duty that day who takes a three hour break at some stage during the day. The family, including Mr. Connolly's parents, usually go out together for lunch. They often go for a drive or a walk or perhaps visit a garden centre. By the time this judgment is delivered in June 2014, the plaintiff, Mr. Connolly and Claudia hopefully will have moved into their new home to start a new life with the assistance of care provided by staff of the IWA and ABI.

The Plaintiff's Care Needs

30. Since the matter was last before the court, the plaintiff has had the benefit of one full time carer 24 hours a day, seven days a week. She has also had a second carer for eight hours, four days during the week. On the fifth day, that being the day Claudia comes to visit, she has a second carer for ten hours and on Saturdays she has a second carer for six hours. On Sunday, the plaintiff has only one carer and she takes a three hour break in the course of the day. Mr. Connolly and his family carry out all of the rest of the care that is needed on a Sunday.

31. Ms. Mary Maguire, the plaintiff's case manager, has retained the services of the IWA for the purposes of providing the greater part of her ongoing care needs. ABI provides the balance of the care package in circumstances where its carers have special training to assist in the rehabilitation of individuals who have sustained brain injury.

32. The hours and rates of pay for the care which is provided currently by the IWA are set out in an invoice bearing No. 54754 and dated 31st March, 2014. There are different rates for basic hours (8 a.m. to 8 p.m.), antisocial hours (8 p.m. to midnight), Sundays, public holidays, overnight (midnight to 8 a.m.) and in respect of the role of what is described as that of lead personal assistant. While the role of carer is the same as what is often described as a personal assistant, a lead personal assistant is a carer who is paid a higher hourly rate due to the fact that they carry out additional duties and take on additional responsibilities while also carrying out the regular duties expected of a carer/personal assistant. After much dispute between the parties it was ultimately agreed that a rate of €100 per night (midnight-8 a.m.) was one which was reasonable for me to apply in the present case.

33. Unfortunately, the rate charged out in the aforementioned invoice for the lead P.A. transpired to be incorrect and as a result an amended invoice bearing No. 54837 was provided in its place. The total correct monthly cost in respect of the plaintiff's care provided by the IWA for March 2014 was, according to the plaintiff's witnesses, a sum of €16,032.36.

34. There was much controversy regarding the charge included in the aforementioned invoices in respect of the 20 hours per week ascribed to the role of the lead personal assistant. Mr. Michael Doyle, who holds the position of National Director of Assisted Living Services with the IWA and Ms. Natasha Spremo, who is its Assisted Living Service Coordinator, told the court that all of the hours contained in the invoice dated 31st March, 2014, were provided by the IWA from March 2013 to the present time. According to these

witnesses, in September 2013, because of the need to ensure continuity of care for the plaintiff, the efficient management of care rotas, proper liaison with doctors, physiotherapists, occupational therapists, pharmacy etc. it was decided that it was necessary for a higher level of care to be delivered by the same person five days a week and this service commenced in September 2013. Since that time Ms. Barbara Barturwicz has been working as the plaintiff's main daytime carer five days a week and for four of her hours each day she is charged out at the higher rate applicable to the role of lead personal assistant ("lead P.A."). Due to an invoicing error this service was not charged out at the rate which applies for a lead P.A. but was charged out at the basic care rate. Because of the invoicing error, the IWA decided not to retrospectively claim for the lead P.A. care provided prior to March 2014. However, now that this anomaly has been identified the claim for ongoing care includes 20 hours per week charged out at the higher rate applicable to a lead P.A.

35. The defendant disputed the charge claimed by the IWA for the provision of a lead P.A. Ms. Kydd stated that she had never seen this type of charge imposed in any other case where two carers were present for several hours each day. That level of care provided sufficient flexability to allow one of them deal with any administratitive issues that needed to be attended to on any given day. Further, given that the defendant is also paying for the plaintiff to have the benefit of a case manager and all of her carers are being provided through agencies rather than through direct employment, it was her opinion that this additional charge was excessive. The difference in the rate is as between €21.11 for one hour of basic care as opposed to €25 for care provided by a lead P.A. The total sum invoiced by the IWA for the twelve months commencing 30th April, 2013 to 31st March, 2014 was €171,496.63. This includes a lower than average monthly invoice for April 2013, during which month the plaintiff was only living part time in her apartment. It also reflects the fact that the only month wherein a charge was made for the services of a lead PA for 80 hours was the month March 2014.

36. As is apparent from the aforementioned invoice, the IWA charge the plaintiff a 5% management fee which was, according to Ms. Maguire, negotiated down from an initial charge of 8%. In her evidence she stated that she felt it was possible that she might be able to get that fee reduced further through ongoing negotiations, a possibility which was also considered potentially viable by Mr. Doyle of the IWA.

37. Apart from the hours provided by the IWA, ABI provides the plaintiff with carers for 24 hours per week to assist in her rehabilitation. She is charged for 30 hours care, at a unit price of €702.82. The additional 6 hours charged for are said to be in respect of management and administration costs. The total fees invoiced by ABI from 1st May, 2013 to 1st April, 2014 were €36,363.62

38. Ms. Maguire told the court that her input as case manager over the last twelve months was somewhat exceptional. This was due to the complex nature of the care required by the plaintiff and complicated by the fact that she was living unsupported by family in her apartment in Sutton over that period. Her management fee for that period is claimed in the sum of €27,253.63. In evidence, Ms. Maguire stated that she would probably be providing the plaintiff with a reduced number of hours of assistance in the coming twelve months and that her input would likely reduce further in the following years. She anticipated a maximum fee of €20,000 for the next twelve months with a reduction to perhaps €14,000 the following year. The latter she said would bring her charges more in line with those charged to other clients where her annual fee was usually between €12,000 and €14,000 per annum.

39. Ms. Sargent expressed herself satisfied with the package of care which had been provided to the plaintiff over the last year and she felt this had significantly improved her quality of life. She stressed the benefit of having the plaintiff's care provided by a small group of carers with whom she had built up a very good rapport. Ms. Sargent told the court that the plaintiff had strong opinions and was resolute in her desire to lead as normal a life as possible. She described her as a very sociable young woman who wanted to be able to engage in the community as much as possible. Most importantly, it was obvious to her that the plaintiff wanted to be able to fully engage with her role as Claudia's mother and she felt she needed to be given enough care to allow her realise that potential.

40. Ms. Sargent said that it was her opinion that the plaintiff needed two carers to assist her when outside the home and that these were necessary for safe transfers to alternative seating and particularly for toileting. She did not think the use of a portable turner to allow one carer transfer the plaintiff from her wheelchair was viable, safe or practical. She told the court that to allow the plaintiff the freedom to engage in the community, to take her place as Claudia's mother and to meet her ongoing medical and therapeutic needs that she needs the assistance of a second carer for 10 hours every day including Sundays. However, because Mr Connolly and his family are currently providing that care on a Sunday she felt her costings could be somewhat reduced to reflect that fact. In response to a challenge by counsel for the defendant to the extent of the doubled up care which she recommended, Ms. Sargent stressed that the plaintiff's disabilities, family situation and enthusiasm would call for a greater level of care than at first sight might seem necessary.

41. Ms. Sargent's care package for the next three years is costed at a sum of €298,822.89 @. That figure includes an additional sum of €150 per week to cover extra food for the carers and any costs they might incur in joining the plaintiff in activities she may wish to participate in or when accompanying her to places such the cinema where there is an admission charge. She has also included additional home insurance costs of €1,000 per annum and an annual case management fee of €21,000.

42. Ms. Kristine Kydd assessed the plaintiff's care needs for the next three year period on the defendant's behalf. She assessed her care requirements by reference to the framework provided for in the Roper, Logan and Tierney model of living. She measured the amount of direct care she felt the plaintiff needed using the Rhys-Hearn Dependency Profile Score and then used her own professional experience and judgment in determining the indirect care which she believes is currently needed. Ms. Kydd agreed with Ms. Sargent that the plaintiff required two full time carers if the family decided to go away on holiday. However, she felt that the extent of the doubled up care proposed by Ms. Sargent for the rest of the year was excessive particularly in circumstances where, from June of this year, the only time when the plaintiff will need a second carer, when in her own home, will be when exercising using her gutter rollator.

43. Ms. Kydd, having been challenged by counsel for the plaintiff in relation to a number of her conclusions, ultimately conceded that in her view the plaintiff's care package should include the provision of a second carer for two hours each morning and two hours each afternoon, Monday to Friday and five hours a day in school holidays. In addition, she considered that the plaintiff required an additional hour of childcare each day to support the plaintiff in her role with Claudia. Ms. Kydd also felt that she needed one hour of home help everyday day to assist with domestic matters which were now beyond her capabilities by reason of her injuries. In respect of Saturdays and Sundays, Ms. Kydd was of the opinion that the plaintiff needed four hours of doubled up care with an additional two hours a day of childcare. This overall regime, she concluded, would give her good support in the morning during the window within which she would have to get up, washed, dressed, toileted and get Claudia out to school. It would also give her significant flexibility in the afternoons, if required, to engage in a wide range of activities outside of the home. However, Ms Kydd felt that most afternoons the plaintiff would be carrying out those functions normally performed by the mother of a seven year old child, such as the supervision of homework and playtime. She also stressed the importance of the plaintiff assuming her rightful position as Claudia's

mother and of ensuring that this role was not delegated to her carers.

44. Ms. Kydd's overall care package as proposed in her report was costed at €189,654 per annum but that did not take account of the additional care requirements which she conceded in the course of her evidence. To her credit it is worth noting that when costing additional childcare in her report she used carer rates rather than the lower rates which would normally apply to childcare. She did so in circumstances where she felt it likely that any additional childcare would be provided by a carer from one of the agencies presently providing the plaintiff's support. She considered this would be a reasonable approach so as to avoid introducing yet another individual into the present group of carers; something she felt was in the best interests of Claudia and her mother.

45. Prior to setting out my conclusions, I feel it is important to state that I believe that the plaintiff ought to have access to sufficient funds to enable her purchase the care required to live as normal a life as is reasonably possible over the next three years. She should be encouraged, particularly over the next twelve months, to integrate as best she can in the Kilbarrack community where her new home is located. She will need to find the most suitable places to shop, meet friends and do the other things that non working mothers do and I think it's likely that she will want to engage with some extramural or other leisure pursuits such as art classes or flower arranging, activities in which she has already shown interest. The plaintiff will of course also need to continue to attend a variety of medical appointments and engage with a lot of therapies to maintain and hopefully improve her present fitness levels.

46. In reaching my conclusion I am conscious of the fact that, by reason of the defendant's negligence, the plaintiff has been denied any real relationship with Claudia since she was born and that as a result Claudia has become, as might be expected, extremely attached to her father's parents with whom she has lived since birth. While that strong bond will hopefully continue, it seems to me, having regard to the evidence of Dr. Williams and Dr. Pender, that the next twelve months may dictate the extent to which the plaintiff, Claudia and Mr. Connolly will be successful in establishing some type of reasonably normal family unit and I must make sure that she is given enough funds to provide her with sufficient support so as not to jeopardise this enormously important project.

47. For these reasons it is important that the plaintiff will have enough support to make it relatively easy for her to attend Claudia's school events and to join her, where possible, in out of school activities of the nature commonly enjoyed by children of her age such as swimming, dancing, music etc. She will also want to participate fully with her on family outings and be able to support her in taking her to and collecting her from the homes of her close friends where inevitably she will want to spend time.

48. Notwithstanding what I have just said, there are very few people in society who have the luxury, on a day to day basis, to do precisely what they want when the want. Work and family commitments as well as economic restrictions oblige most young parents to organise and plan their activities to some degree. Complete spontaneity is simply not a reality. Even though Dr. Williams told the court that it was important that if one of the plaintiff's friends rang up inviting her out that she would be able to go at short notice, this is not what happens in everyday life. Universally, parents, whether or not they work outside the home, have to structure their days to some degree. Oftentimes, parents find themselves scheduling more then one activity on the same day or planning that they take place on separate days due to a range of constraints. Parents of children of seven years of age who want to go to the cinema, to a concert or out for a meal, have to plan these outings in advance because babysitting arrangements have to be made. Indeed, as earlier referred to, the plaintiff's days are already planned out for her to some extent because she needs to carry out an exercise regime and have a rest at some stage every day. Ms. McKeown, in giving her evidence agreed that the plaintiff's days do need to be somewhat structured as she suffers from fatigue and is not capable of being out all day.

49. Accordingly, in circumstances where the plaintiff will have the benefit of a case manager, the support of her partner and some additional hours help from a lead personal assistant, I think it is reasonable to expect that the plaintiff will be able, with some small amount of planning, to enjoy all of her desired activities within the regime of care provided for in this judgment.

50. So while the plaintiff should be given a sufficient award to maximise her capabilities as a parent, partner and member of society over the next three years, that award must be one which is fair to the defendant in the specific circumstances of this case. I also accept the submission of Ms. Egan, S.C., that in reaching my conclusions I ought to have regard to the reality of the plaintiff's life as it is likely to be over that period, providing as it must each day for an extensive period of supervised exercise, therapy and rest, all of which are essential to her continued wellbeing and in respect of which periods she only needs one carer.

Conclusions

51. In coming to my conclusion as to the sum that should be provided for the plaintiff's care for the next three years I have taken into account the following findings which I have made from the evidence adduced in the course of the present hearing.

52. I am satisfied that the plaintiff needs the assistance of two carers to allow her to go to the toilet safely when she is outside of her own home. While in many cases, it may be possible for her to safely use a disabled toilet with the assistance of one carer, as advised by Ms. Kydd, Ms. Lockhead and Ms. Doyle, I accept the evidence of Ms. McKeown and Mr. Winterbotham that on many other occasions the plaintiff will need a second carer to ensure her safe management throughout the toileting process. I am also satisfied that there are a large number of disabled toilets which, by reason of their size, configuration, or lack of suitably positioned of grab rails, make toileting the plaintiff with one carer unacceptably hazardous.

53. I reject the defendant's evidence to the effect that the plaintiff's toileting issues when out in the community can reasonably be met by her carers checking out, in advance of any given outing, the availability of a suitable disabled toilet. I do so in circumstances where I am satisfied that there will be a significant number of venues which she may want to visit where there will be no disabled toilet. Regrettably, there are still many commercial establishments where disabled toilets are not yet available. Further, no ordinary house has such a facility and I am not prepared to restrict the plaintiff for the next three years to attending and visiting only those establishments which have a properly configured disabled toilet. To do so would preclude her from visiting the homes of her own parents and friends apart from denying her access to the homes of Mr. Connolly and those of Claudia's friends.

54. I reject Ms. Lockhead's evidence and that of Ms. Kydd that a banana board could safely be used to transfer the plaintiff from her wheelchair to a toilet seat. This possibility was never canvassed by Ms. Kydd in her expert report and the truth of the matter is that in most private homes and in many commercial establishments, because of size restrictions, it will not be possible to bring the wheelchair alongside the toilet so as to allow this type of transfer take place. Further, even where there may be sufficient room for this to happen, the plaintiff's underclothes can only be removed safely if she can bridge her body using a series of rails. These need to be ideally positioned either side of her and I am certain that rails of this nature will be unavailable in anything other than the perfectly configured disabled toilets, to whose use I am unwilling to confine the plaintiff.

55. Notwithstanding the evidence of Ms. Lockhead and Ms. Kydd, having considered the evidence of Ms. Sargent, Mr. Winterbotham, Ms. McGowan and Ms. Barbara Barturwicz I am not satisfied that the plaintiff's current practice of being toileted outside the home by

two carers can be replaced by one carer using the ETAC portable turner. Having lifted it myself and having seen it in operation I do not consider it to be is a realistic method of dealing with her toileting needs. Firstly, at over 15 kilos, the turner is so heavy that I do not think it reasonable or safe for any carer to be expected to lift this piece of equipment in and out of a car or on and off the back of a wheelchair several times a day. It is no answer to my concerns regarding its portability to say that it can be broken down into three pieces to make it lighter to lift and that it can be left in the car and collected should the plaintiff need to go to the toilet. It is common case that the plaintiff suffers from urgency so the idea of a carer having to push her back to the car, wherever it is located, to collect and assemble the ETAC turner so that she can then be taken to the toilet, would be to expose her to the risk of the type of undignified event that would be likely to deter her from trying to establish some type of independence outside her home environment.

56. Secondly, this device does not have wheels, only a swivel plate. Hence it can only be used if the wheelchair and turner can be brought alongside the toilet. Accordingly, I am quite satisfied that this device can only be used in a large disabled toilet and as already stated it would be unjust to confine the plaintiff's activities for the next three years to be undertaken in an environment where she could gain access to a disabled toilet.

57. Ms. Kydd told the court that in her opinion many of the non disabled toilets are too small for the plaintiff to be safely toileted by two carers and that for this reason she will in any event be restricted in terms of the toilets she will be able to use. However, having regard to the evidence of those that care for the plaintiff on a day to day basis I am quite satisfied that the plaintiff can be toileted relatively easily in most non disabled toilets. Apparently the wheelchair is left outside the door. The plaintiff is helped in and when safely seated on the toilet the door is closed behind her. Her undergarments can then be removed by one carer standing to her side while the plaintiff holds on to the shoulders of the carer straight ahead of her. Further, even if I was satisfied that there might be some curtailment in the plaintiff's capacity to be toileted outside the home with two carers because of the size of the odd toilet, that is no reason to confine her to visiting locations where there is a perfectly configured disabled toilet for the next three years.

58. It follows that I am satisfied that the plaintiff requires two carers to be with her at all times when she is outside her own home. She cannot be placed in a situation where she is some distance from home and needs to access a bathroom and cannot do so because she only has one carer with her. This would be to place her in a position of great indignity and distress. Even if the plaintiff always uses the bathroom before she goes out, it is perfectly reasonable to expect that she might need to go to the toilet particularly if she has visited a coffee shop or taken some beverage whilst she is out. Many of her outings will take her away from her own environment for a couple of hours. When she goes to the hairdressers or to her many medical appointments she may not be able to manage the duration of these trips without feeling the need to go to the toilet.

59. The parties are agreed in principle that wherever and whenever it is practical, the plaintiff should be transferred out of her wheelchair so she can sit in a normal seat, once it has arms to support her. She hates being in her wheelchair and wants to look normal as much of the time as is possible. In particular the plaintiff likes to sit in an ordinary chair in restaurants, hotels, cafés, cinemas and theatres, assuming that a suitable chair can be located and there are no other insurmountable difficulties. She does not want to sit in a row of wheelchairs at the back of a concert hall or some like venue where she cannot be beside her partner and daughter. Further, it is accepted that wheelchairs do not pull neatly under a table and make it difficult for the user to eat with any degree of comfort.

60. I readily accept Ms. Kydd's evidence that there may be some restaurants and venues where the plaintiff may not be able to obtain a seat with arms on it and that she therefore may have to remain in her wheelchair. However, to my mind this is not sufficient reason to deny her the right to access proper seating where it is available to her. The plaintiff should be enabled to use normal seating whenever possible such as attending the hairdressers, certain restaurants and cafés, the cinema, theatre or when visiting the homes of her friends and those of Claudia. Accordingly she should be provided with whatever assistance she requires to enable her to make those everyday transfers with minimum fuss and maximum dignity.

61. Having concluded that the plaintiff will always need two people with her when outside her own home because of her potential toileting requirements, it may be irrelevant to report that I am also satisfied that she needs like assistance when transferring from her wheelchair to other seating when out in the community. While she can make these transfers on her own within the apartment, she has only achieved this skill where the surface height of the two surfaces is more or less the same, where the two items can be placed in the optimum position and where there are no space restrictions. The plaintiff needs to sit in a chair which has arms on it and this causes particular difficulties when she needs to transfer to such a chair from her wheelchair. A banana board is useless for such a transfer as the arm on the receiving chair will preclude her from sliding across onto the receiving chair from the wheelchair.

62. I reject the defendant's evidence that transfers of this nature can be safely made with the assistance of one carer once some other adult who is present is willing to hold the chair into which she intends to transfer. Firstly, there may not be such a person available. Secondly, even if there is, the management of the venue in which the transfer is to take place may not permit their staff to engage in this activity. Thirdly, it may not be possible, because of seating arrangements to bring the wheelchair to the position that will allow the plaintiff try to make this transfer with the assistance of one carer. I am also not satisfied that the plaintiff might not, in unfamiliar circumstances destabilise herself when attempting to move into an unfamiliar seat while under public scrutiny. I have been told that the plaintiff is impetuous and needs constant prompting and supervision even in ideal circumstances and I can easily see her faltering in such a manoeuvre in the absence of two carers.

63. While the plaintiff may have lost a little weight in the past year, she is nonetheless still quite heavy and has extremely poor balance. I have seen at first hand the effort it took for two carers to move her up and over the arm of the chair in which she sat in during the present hearing. I find it hard to believe that this manoeuvre could be safely managed by one carer as advised by Ms. Kydd or Ms. Doyle. I also reject Ms. Lockheads evidence that the plaintiff can, with supervision, safely pivot onto a chair with arms when out in a public place. I accept the evidence tendered on the plaintiff's behalf that transfers carried out by her in her own home in a familiar environment with no distractions are a completely different proposition from those that might be attempted by her with different furniture and in unfamiliar surroundings. It does not follow that just because the plaintiff can transfer from her wheelchair or bed onto the wide sofa arm of her lazy chair in her own home that she can manage to transfer without the assistance of two carers when trying to cope with regular commercial seating in a public place.

64. For the reasons already referred to when dealing with the plaintiff's toileting requirements I reject the defendant's contention that it is reasonable, safe or practical to transfer the plaintiff to any other from of seating outside her home, using the ETAC portable turner. I am also satisfied that this piece of equipment is not commonly used by disabled persons outside of their own home or relevant care establishment. I think, as advised by Ms. Lockhead, that it is mostly used to assist disabled people when getting into or out of their cars. It is not truly portable in the real sense of that word.

65. Even if the turner could be brought to a restaurant, café or hairdressers, to take but a few examples, I don't think I should

countenance a scenario whereby in order for the plaintiff to use an ordinary seat she would then have to haul herself onto this device so that she could be turned and lowered into that seat in full public view. This would be to deny her the type of dignity to which I believe she is reasonably entitled, particularly having regard to the fact that she has complete insight into her own condition and in circumstances where she can be transferred relatively discreetly by two carers within seconds. Quite frankly, I have no doubt that if the plaintiff had to be transferred using something like the ETAC turner, she would never go out. I also think that if she was to be transferred in this way in public areas that Claudia might find her mother an embarrassment and this might jeopardise her chances of becoming cherished and accepted by Claudia in a full mothering role.

66. As to the extent of the care required by the plaintiff to carry out her day to day activities within the apartment or her future home, I am satisfied with the exception of using the gutter rollator, she can manage all other activities with the assistance or supervision of one carer. Obviously, the plaintiff should continue to use the rollator to preserve and further build up her strength and muscle function but in my view, this can be done without adding in any way to the period of time each day when she will require a second carer. I accept Dr. Rhyl's evidence that the plaintiff only uses this device for only a short number of minutes each day. This being so, this particular exercise can be carried out at any time of the day when there are two carers present and does not have to be performed in the course of the exercise programme which she commonly undertakes mid morning.

67. I think it is highly likely that for the next three years the plaintiff will continue with the morning routine as it presently stands. In this regard it is relevant to note that after she gets up and dressed she routinely carries out her exercise programme which takes about an hour and a half and then usually takes a rest at that point or less frequently sometime later in the day. Having regard to the fact that Claudia will be finished school at 2.30 p.m. each day, I think it probable that the plaintiff, whenever possible, will try to have that rest immediately after her exercise regime so as to have it over before going to collect her from school. Consequently I believe that there will be a block of time most weekdays between 10 a.m. and 2 p.m. when one carer should be sufficient to meet all of her needs. From time to time she may want to alter her routine to go out in the morning or at lunch time. She may need to do so to attend a medical appointment or to deal with other personal matters. However, with the type of care and support she will have from her agency carers, her case manager and partner, I believe it will be possible to get this additional care at relatively short notice and I am satisfied that she will have sufficient funds available to her to meet her needs in this regard.

68. In reaching my conclusions as to the extent of the doubled up care required by the plaintiff, I have considered her situation, so to speak, in the round. While I have costed one particular plan of care, I do not expect that she will engage precisely the amount of care provided for each week. I expect that the plaintiff may arrange to have more care some weeks than other weeks, depending upon her plans and commitments. Further, she may find that she needs more or less care at different times of the year. However, I am satisfied that the overall total sum allocated in respect of her care should permit her, with some small amount of planning, enjoy a very good quality of life having regard to her disabilities over the next three years. In particular, I think it unlikely that she will end up using all of the funds provided for her care on Sundays given the well established pattern of her weekends over the past year and this should leave her with an additional cushion to meet any additional needs.

Care Conclusions

69. I am satisfied that the plaintiff needs the assistance of one carer for 24 hours a day everyday. I accept that for two hours each day from Monday to Friday one of her carers will have to carry out work which attracts additional responsibility such as arranging of staff rosters, making medical appointments or ensuring continuity of the plaintiff's physiotherapy and occupational therapy. Accordingly, for those two hours, that carer should be paid the rate applicable to a lead P.A. On Saturday, I believe that both carers should be paid the basic care rate for the entire day as I feel it is unlikely that either of them, on that day, is likely to be involved in the type of activities which attract a premium payment on other days during the week.

70. Insofar as doubled up care is concerned, I am satisfied that I should make an allowance for a second carer to be provided for the plaintiff for seven hours a day from Monday to Friday inclusive. Having regard to the fact that her routine will be different on a Saturday in that she will not be bringing Claudia to or from school and it is likely that Mr. Connolly will want to be involved with her for a substantial part of that day, I believe that to provide for a second carer for six hours will be sufficient to reasonably meet her needs.

71. Insofar as Sunday is concerned, the bought in care as currently provided, on the face of it, seems satisfactory. The plaintiff has full day and night time cover provided by one carer with the exception of three hours during the day when that carer gets a break. However, this is only satisfactory as Mr Connolly and his family are filling the role which would in other circumstances need to be met by a second carer. The system works because the extended family go out togther every Sunday. Sometimes they go for lunch in Malahide and visit a garden centre. On other occasions they engage in some like outing.

72. I do not like the idea of the plaintiff's ability to get out and about on Sundays for the next three years to be dependant upon the support and availability of Mr. Connolly and his parents. Mr. Connolly has a very symptomatic back and is currently unable to participate in heavy lifting or activities likely to aggravate his condition. Accordingly, the plaintiff is currently somewhat dependant on Mr. Connolly's father if she wants to engage in any activities outside of the home on a Sunday, particularly as her principal carer needs to have a three hour break during the day.

73. While Mr. Connolly senior is well and willing to participate in such outings, I feel that when the plaintiff, Mr. Connolly and Claudia start living together as a family they may wish to make arrangements on a Sunday which do not include their extended family. Further, as Claudia gets older, she may not want to go to lunch in the Malahide Hotel or to the local garden centre and her parents may wish instead to take her to any number of other venues either alone or with one of her friends. Alternatively, the plaintiff may wish to take Claudia to participate in some activity not involving Mr. Connolly, as often happens in everyday family life on Sundays. I believe that it is only fair that she should be able to plan her Sunday activities without being dependant on Mr. Connolly and/or his parents.

74. In relation to Sundays, I also see no reason why the plaintiff should not, as occurrs on every other day, be provided with 24 hour care from her principal carer. At present her Sunday carer takes a break of three hours during the day and I think that gap ought to be filled with bought in care. This could easily be done by the person who is to provide the doubled up care coming in earlier or staying later so as to ensure that the plaintiff is never is never left without the support of one carer.

75. For the aforementioned reasons and having regard to the evidence of Ms. Kydd and Ms. Sargent, I will allow for five hours doubled up care each Sunday throughout the year. Some weeks the plaintiff may plan not to have a second carer at all on a Sunday because the extended family has decided to do some activity together. The monies saved on care on such occasions can then be used to provide funding for those other days when the plaintiff may need assistance over and above that routinely provided for in the regime advised in this judgment. This provision will also give the plaintiff a little protection against any deterioration in her relationship with Mr. Connolly, although I think this is unlikely in the short term. I am satisfied that Mr. Connolly and his family are devoted to both the

plaintiff and Claudia and because of this are likely to remain relatively involved in Sunday activities, at least for the next three years.

76. In the aforementioned circumstances, I intend to cost 50 weeks care per year on the aforementioned basis. For the remaining two weeks, I intend to allow the plaintiff the cost of having two carers, 24 hours a day, to facilitate a holiday. Only one of these two carers will be on duty at night-time and I have taken this into account in making my calculations. I have also included all of the day-time hours for the two week period to be calculated on the basic rate of €21.11 per hour. I think it would be excessive for the IWA to expect Sunday rates or anti-social rates to apply in circumstances where care workers were supporting the plaintiff abroad on holiday. I do, however, also intend to allow an additional sum of €2,000 to cover the extra costs generated in having to take those carers on holiday.

77. I will also allow a sum of €75 per week in respect of food and admission charges that may be incurred by the plaintiff due to the fact that she will have two carers out with her when engaging in many activities. In coming to this conclusion, I have looked at the diaries presented to the court and from these I believe that this sum will, as an average figure, meet these costs. I am not satisfied that the plaintiff has made out a case for additional funds to cover any additional insurance costs.

78. Ms. Egan, on the defendant's behalf submitted that in reaching my conclusions I should take into account the fact that the loss of earnings aspect of the plaintiff's claim was settled in a sum of €740,000. This being so, she urged the court to conclude that on the balance of probabilities the plaintiff would have incurred significant childcare costs had she been working full time over the next three years and that some deduction should be made to the figures awarded to reflect this fact.

79. I think it is fair to say that the court heard no evidence from which it could conclude as a probability that the plaintiff would have incurred childcare costs over the next three years had she not been injured. Claudia's schooling ends at 2:30 p.m. each day and will do so for the next three years. Mr. Connolly starts work early in the morning and is at home by about 4 p.m. It may well be the case that the plaintiff's parents or those of Mr. Connolly would have been available to mind Claudia until her father was free to collect her. Having regard to the hours of Mr. Connolly's employment, I think it is reasonable to assume that any childcare costs that might have arisen over the next three years had the plaintiff not been injured would have been relatively modest. Further, any such costs I believe should be treated as a cost to the couple jointly rather than a cost attaching solely to the plaintiff's income. Taking all of these factors into account I don't believe I should at this interim stage of the claim make any deduction from the sums which I intend to award in respect of the plaintiff's care over the next three years.

80. In calculating the value of the aforementioned care package, I propose to use the rates provided by the IWA throughout regardless of the fact that ABI presently provide 24 hours care per week charged out at a cost of 30 hours. I believe this will make the calculation easier and will avoid me having to grapple with whether or not the extra hours charged for by ABI to cover administration/rostering is reasonable, having regard to Ms. Kydd's evidence to the effect that normally an "all in" rate is quoted.

81. Regardless of Ms. Kydd's evidence in relation to the schedule of costings which she received from the IWA when pricing a care package in a different case, which included management fees within the hourly rates quoted, I believe I should still allow for some management charge, particularly in light of the fact that ABI also levy extra charges over and above hourly rates to cover administration and management costs. However, I am satisfied I should not allow the current rate of 5% in light of the evidence and I believe that this percentage fee should be capable of being negotiated downwards, perhaps to something close to 2.5 % and accordingly I will allow for a management fee at this rate.

82. I also intend to allow Ms. Maguire a management fee for the next year in the sum of €17,000 and provide that this will reduce to €12,000 for year two and year three.

Calculations Year 1

50 Weeks Care

Carer 1 **Mon – Fri** Midnight– 8am €100 x 5 days = €500	**8 a.m. – 8 p.m. (Basic)** 10hrs x €21.11x 5 days = €1,055.50 2hrs x €25.00(P.A) x 5 days = €250 **8 a.m. – 8 p.m.**	**8 p.m. – 12 a.m. (Anti-Social)** 4hrs x €24.78 x 5 days = €495.60 **8 p.m. – 12 a.m.**	Weekly Total €2,301.10
Saturday €100	12hrs x €21.1= €253.32	4hrs x €24.78 = €99.12	€452.44
Sunday €100	16 hrs x €28.71 (Sun) = €459.36		€559.36
Carer 2 Mon – Fri	7hrs x €21.11= €147.77 x 5 days = €738.85		€738.85
Saturday	6hrs x €21.11= €126.66		€126.66
Sunday	5hrs x €28.71 = €143.55		€143.55
	Weekly		€4,321.96
	X 50 Weeks		**€216,098.00**

Midnight – 8 am **Carer 1** €100 x 14 = €1,400	8 a.m – 12 p.m 16 hrs x €21.11 x 14 days - €4,728.64	€6,128.64
Carer 2	16 hrs x €21.11 x 14 days = €4,728.64	€4.728.64
	Two weeks Total	**€10,857.28**

Total Care costs 52 weeks €226,955.28

Management fee @ 2 ½% € 5,673.88

Food and Admission Charges €75 per week € 3,900

Case Management Year One € 17,000

Ancillary Holiday Costs € 2,000

Total Year 1. **€255,529.16**

83. The sum to be allowed in respect of Year 2 and Year 3 will be the sum of € 250,529.16 having regard to the reduction in Ms. Maguire's management fee for those years.