Neutral Citation: [2015] IEHC 160

THE HIGH COURT

[2013 No. 543 P]

BETWEEN

GRACE O'NEILL (A MINOR) SUING BY HER MOTHER AND NEXT FRIEND PAULA O'NEILL

PLAINTIFF

AND

THE NATIONAL MATERNITY HOSPITAL HOSPITAL

DEFENDANT

JUDGMENT of Mr. Justice Bernard J. Barton delivered the 10th day of March, 2015

1. The plaintiff was born in the defendant's hospital on the 8th of July, 2007. Immediately before and during her birth the plaintiff suffered hypoxic-ischemic encephalopathy and cerebral palsy as a result of the negligence breach of duty and breach of contract on the part of the defendant and in respect of which these proceedings are brought. A defence was delivered on the 24th of July, 2014 admitting liability but otherwise putting the plaintiff on proof of her claim.

2. The plaintiff suffered catastrophic injuries which will affect her for the rest of her life. That that is so is not in issue between the parties who, subject to approval the court, have agreed a number of heads of claim which may be summarised as follows:

(a) General damages €450,000

(b) Care to date €100,000

(c) Assistive technology €200,000

(d) Neuro psychology €42,000

(e) Physiotherapy €110,000

(f) Speech and language therapy €107,000

(g) Special needs assistance €150,000

3. There remain a number of heads of claim upon which it has not been possible to reach agreement and these may be summarised as follows:

(a) The plaintiff's future care requirements,

(b) The plaintiff's future accommodation requirements,

(c) The plaintiff's future aids and appliances requirements,

(d) The plaintiff's future loss of earnings; and,

(e) Miscellaneous special damages to date claimed in the sum of €12,644 but in respect of which it has been indicated that it should be possible to reach agreement.

4. In July 2014 the plaintiff's solicitors wrote to the defendants solicitors notifying the defendant of the plaintiffs intention to have the damages to which she was entitled assessed by the court in accordance with the law as it presently stands that is to say damages to be assessed to date and into the future on a once and for all basis. Counsel for the plaintiff, confirming that decision in the course of the opening, stated that this decision was founded on the desire of the plaintiff's mother and next friend, and that of her father, to put an end to the disruption caused to the plaintiff, to her parents, and to her younger siblings arising as a result of the necessary preparations for the hearing of this case, including a significant number of assessments of the plaintiff. In addition, there was a concern that if the case were dealt with on a periodic payment basis this would cause not only further disruption for the plaintiff and her family but given that she is relatively well from a cognitive perspective she might also be caused to suffer immense psychological harm by repeated assessments ,especially during her teenage years.

5. At the close of the opening, counsel on behalf of the defendant made in open court what he described as a formal offer, namely 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. It was made abundantly clear by counsel on behalf of the plaintiff that her parents, and in particular, her mother and next friend, were unwilling to accept such a proposal and wished the case to proceed to final and conclusive judgment on the heads of damage remaining in issue . It follows that the court is now required to give a ruling on this matter before the case proceeds further.

6. In the course of the opening the court was advised as to the evidence which it was intended to call on behalf of the plaintiff, the disabilities consequent upon her injuries, her life expectancy, her requirements in respect of future care, future accommodation, aids and appliances, and her claim for loss of earnings in the future.

7. Expert reports having been exchanged between the parties, reference was made in the course of the opening to the differences of opinion between the plaintiff's and defendant's experts.

8. In relation to the question of life expectancy it was said that the difference was eight years.

9. In respect of her own future care requirements a number of propositions were advanced on behalf of the plaintiff. These were comprised in a number of schedules the annual cost of which varied between €115,573.20 and €182,342 annually. Additionally ,given that the plaintiff's cognition and physical status was such that on reaching adulthood it was said that she would most likely be able to form relationships and ultimately to settle down and have a family, a claim was also made in relation to night care to be provided in the event of the plaintiff having children. A claim was also advanced in relation to additional care in the event of deterioration in the plaintiff's ability to care for herself from middle age. The actuarial figures claimed in respect of these matters were calculated forward from age nineteen.

10. The plaintiff is now seven and a half. A claim for future care between the present time and age nineteen was advanced in the sum of €72,441.60 annually. As against this claim the court was advised that the defendant's carer placed the annual cost of care between the present time to the age of eighteen at approximately €21,500 and after that age at a figure which was just short of €26,000 per anum.

11. In relation to loss of earnings, the court was advised that the plaintiff is currently functioning within the general average range in terms of her cognition but that the long term impact of the plaintiff's injury on cognitive functioning was not something about which conclusive evidence for her future life could be given at this time, however, the plaintiff is currently attending a mainstream school in a class appropriate for her age and it appears to be common case that the plaintiff would most likely have the ability to enter third level education of some type, however, it is claimed that her ability to gain and maintain employment thereafter would be seriously impacted as a result of her injuries and consequential disabilities.

12. The plaintiff's parents are both high achievers and, undoubtedly, the plaintiff will be brought up with that background and in an environment where such achievement is prized. Apparently, the evidence to be led will show that the defendant accepts that there will be limitations on the plaintiff's vocational opportunities, however, the main issue would appear to be the extent to which the plaintiff would, had she not been injured, have been able to follow career paths such as those of her parents or otherwise and from which significant income would have been derived.

13. In respect of the plaintiff's requirements for aids and appliances in the future, the court was advised that the capitalised value of her claim at a 3% real rate of return was €445,561 as against this claim it was said that the defendant's assessment of the plaintiff's requirements under this head was capitalised in the sum of €37,069.

14. With regard to the plaintiff's future accommodation requirements, a claim is being advanced on a number of scenarios the value of which range from just over €900,000 to just under €1.3 million. As with the other heads of damage in issue the difference between the plaintiff and the defendant on this head of claim is stark indeed with the defendant suggesting, apparently, the adaptation of the plaintiff's existing home at a cost of between €60,000 and €80,000 depending upon which option is adopted.

15. The foregoing is a brief summary of the matters remaining in issue and the disparity between the parties on these. They are recited here for the purposes only of illustrating the divergence on the potential value and outcome of the plaintiff's claims and to put the issue now before the court in context.

16. Counsel on behalf of the defendant submitted that two major issues in the case would relate to the loss of earnings and the cost of future care and that having regard to the evidence which was going to be led in relation to those two heads of claim the position in relation to them would be far clearer to a court coming to deal with those questions in ten years time. As of now it was submitted that, even on the plaintiffs own expert evidence, there was a great degree of uncertainty in relation to these two heads of claim in particular and that there was therefore a significant risk that the plaintiff might find herself being grossly undercompensated. Much more certainty in relation to all aspects of the plaintiffs case was to be derived from providing for an assessment of the plaintiff's damages over the next ten years , about which there could not be any real argument, and that thereafter a final assessment of the plaintiff's damages would be made in circumstances where the position in relation to her physical disabilities, future care requirements, educational achievements, job opportunities and accommodation requirements would be more apparent.

17. Counsel for the defendant also submitted that the important point of principle in the particular circumstances of this case was what the court was to do when a formal offer was made on behalf of the defendant and where the effect of the offer was to remove or at least minimise the serious risk to the plaintiff of being under compensated. It was submitted that the appropriate approach to be taken by the court in the best interests of the plaintiff was to assess damages now in relation to those heads of damage remaining in issue between the parties for the next decade or thereabouts and to adjourn the balance of the assessment of damages to take place at the end of that period when there would be greater certainty in relation to the plaintiff's requirements in respect of those heads of damage thereby rendering the issues in relation to those to be more easily and, importantly, more properly determined.

18. It was also submitted that a serious question which the court had to consider was whether or not, in the absence of some highly unusual or exceptional event which would warrant the intervention of the court intervening against the express wishes of a parent, such as where a life saving blood transfusion is refused on the grounds of religious belief, the court was bound by the wishes of the parents as in this case. If the court was not ordinarily bound by the wishes of the parents and considered that, in the best interests of the plaintiff, damages should be assessed now for the next decade with the balance of the claim to be assessed thereafter then, it was submitted, the court has a jurisdiction to make such an order pursuant to the provisions of O.36 r.34 of the Rules of the Superior Courts. It was submitted that the object behind decisions made by the court under O.36 r.34, as with all of the rules of the court, is to seek to do justice between the parties and to provide for how that is to be done.

19. It was further submitted that every day the court rules on offers in cases where the plaintiff is in an infant or a person of unsound mind not so found. When the court exercises such a jurisdiction it is, in effect, overseeing the litigation to ensure that the plaintiff's best interests are protected and that on occasion this sometimes involves a court making a decision which is contrary to the express wish of the next friend and that in a case such as this the court is, in effect, exercising a jurisdiction in wardship.

20. Whilst the views of the parents are important and are factors which may be taken into consideration by the court when making a ruling on an offer such as that now before it, the defendant says that the prime and paramount consideration for the court has to be and is to determine the matter on the basis of what is in the best interests of the child. That is certainly so in the case of wardship and given that there can be little or no argument but that the plaintiff should be taken into wardship during the pendency of her minority, as in this case, any differentiation between circumstances that apply when a plaintiff is taken into wardship and those applicable to a minor or person of unsound mind not so found immediately beforehand, are artificial. Accordingly, it was submitted that the court is in effect exercising a jurisdiction in wardship and that if the court considers it to be in the best interests of the plaintiff, notwithstanding the expressed wishes of the parents, then the court should make orders for the assessment of damages in the

manner proposed by the defendant.

21. Counsel for the plaintiff submitted that the plaintiff is entitled to have her case dealt with on the basis of the law as it is and that the law as it is provides that damages should be awarded in accordance with the Civil Liability Act ,namely by way of a once and for all lump sum payment. The parents did not want to have to go through or more importantly they did not want their child, the plaintiff, to have to go through a series of difficult assessments and reassessments at a future date. As far as they are concerned the plaintiff and, indeed, the whole of the family, have been through enough already. It was fairly accepted that at seven and a half years of age that there were elements of the plaintiff's case which will be difficult to determine at this time but that that is something which occurs in every case to a greater or lesser extent where there is a future element to a head of claim. The court, it was submitted, was not being asked to speculate on the future but rather to arrive at a decision based on the evidence to be adduced as to the probable situation that faces the plaintiff in future years such as to the probability of the position regarding her physical condition as she ages. It was submitted that the court is required to do no more than to determine ,on the basis of the evidence, and on the balance of probability, the likely position in the future as to those matters remaining in issue between the parties. Deferring the assessment of damages for a ten year period would not significantly reduce the uncertainties which, it is acknowledged, presently exist, however, many if not all of the same problems which would now face the court on a once and for all assessment at this time would still be extant at the end of the ten year period. In either event the court will have to determine the future based on the evidence before it.

22. The plaintiff says that there is no law providing for the adjournment of a plaintiff's action on the basis of interim payments being made pending the implementation of some new law. The plaintiff has brought her case to court and was entitled, under the law as it stands, to have all aspects of her case determined now.

23. In this case the court was informed that the parents had considered and had been advised in relation to the proposition now before the court. Having taken all matters into consideration the plaintiff's her mother and next friend instructed her solicitors and counsel that she wished the plaintiff's case to proceed in accordance with the law. It was submitted that that view must carry heavy weight with the court in determining the defendant's proposal.

24. Whilst it was accepted that when the plaintiff reaches her majority she might well be in a position to make decisions on her own in relation to the action ,it was submitted that that was not to be taken as a reason for disregarding her parents wishes that the case should proceed now to a final and conclusive judgment. It was further submitted that what has been cast as an offer by the defendant is not an offer at all in the sense that that would confer on the court a jurisdiction to accept or reject it. It was contended that what the defendant is suggesting is nothing more than an invitation to the plaintiff to agree on what are essentially matters of procedure, namely, that there should be a separation of the assessment of damages in respect of the heads of claim presently in issue between the parties for a period of approximately ten years and that the balance of the claim would then fall to be determined at the end of that period. As far as the plaintiff is concerned that does not constitute a settlement or a compromise within the meaning of O.22 r.10 of the Rules of the Superior Courts, nor was it an offer in whole or partial satisfaction of the plaintiff's claim. Accordingly, it was submitted that the court cannot and does not have any jurisdiction to deal with the application under the provisions of that Order.

25. Whilst it was acknowledged that the court has an overriding duty to look after the interests of the child, counsel for the plaintiff submitted that the child's parents are also concerned only for what is in the best interests of their daughter, the plaintiff, and that that too is something to which the court must give particular weight.

26. Furthermore, it is said on behalf of the plaintiff that the application which has been made by the defendant has simply grown out of what was categorised as an ad hoc process which had developed pending the introduction of legislation to provide for periodic payments, the government of the day having announced its intention to introduce such legislation, but which subsequently never materialised. This process necessarily involves the agreement between the parties and in this case that agreement was not forthcoming.

27. It was initially submitted that the court does not have an inherent jurisdiction or any jurisdiction to deal with a proposal which emerges in the course of or as a result of such an ad hoc procedure as there was no offer in the sense in which that term has been understood by the courts in order to compromise or settle an action. It is also said that the court does not have a jurisdiction to consider the proposal now being proffered by the defendant under its jurisdiction in wardship. Whilst the plaintiff may or may not be taken into wardship in due course as of now the plaintiff is neither a person of unsound mind not so found nor a ward of court, accordingly, that jurisdiction does not arise upon the present application.

The law.

28. It seems to me to follow from the submissions made on behalf of both parties on this application that the first point of departure which the court has to consider goes to jurisdiction, specifically, whether or not it is open to the court to accept or reject what the defendant says is a firm offer in respect of the plaintiff's claim but which the plaintiffs have categorised as nothing more than a proposal to engage in a different process for the assessment of the plaintiff's damages.

29. Order 22. Rule 10 of the Rules of the Superior Courts provides :

> *"In any cause or matter in which money or damages is or are claimed by or on behalf of an infant or a person of unsound mind suing either alone or in conjunction with other parties, no settlement or compromise or payment or acceptance of money paid into court, either before or at or after trial, shall, as regards the claims of any such infant or person of unsound mind, be valid without the approval of the court."*

30. A number of requirements must be satisfied in order to constitute a valid compromise or settlement and these may be summarised as follows:

(a) There is in existence a dispute between the parties to the litigation,

(b) That the parties to the litigation have reached an agreement to compromise the issues in dispute between them,

(c) That there is consideration for the compromise,

(d) That there is an intention to create legal relations; and

(e) That the agreement between the parties is certain and complete.

31. It is also open to the parties to reach a partial compromise or settlement of the issues between them and to allow the balance of the claim to proceed to trial.

32. Whether it be a complete or partial compromise of proceedings, no settlement or compromise of proceedings involving an infant or person of unsound mind is valid in law without the approval of the court. See *Carey v. W. H. Ryan Limited* [1982] I.R. 179.

33. Similarly, no payment or acceptance of money paid into court or offered or offers of payment in lieu of lodgement provided for by O.22 r.14, nor any assessment by the Injuries Board is valid without the court's approval.

34. Reference was made in the course of submissions to s.63 of the Civil Liability Act 1961. That section it is confined by its wording to cases where money has been paid into court. It is also clear from the provisions of O.22 r.14 that the provisions in relation to approval of a lodgement in that Order apply *mutatis mutandis* to tender offers.

35. Although the word "offer" is not mentioned in the Order, whether it is in the form of a tender, or a lodgement, or made by letter in writing or communicated orally in respect of the plaintiff's claim or any part of the plaintiff's claim, the purpose of an offer is to compromise or settle the claim in respect of which it is made. It is quite clear from O.22 r.10 (1) and its ancillary rules, that where there is a payment of money in proceedings involving an infant or a person of unsound mind, that any payment must be approved by the court. Payment in this context means payment of a sum of money whether by way of general and/or special damages in respect of any cause of action.

36. It follows that where the claim is to one for damages only, whether general or special or both, the settlement or compromise of any such action involving an infant or person of unsound mind not so found will invariably involve the payment of money and so comes within the Order. Similarly, where proceedings are for relief other than damages, any settlement or compromise of such proceedings involving a person of unsound mind or an infant also comes within the ambit of O.22 r.10. Accordingly , an offer within the meaning of Order 22 rule 10 means an offer the effect of which is to settle or compromise proceedings or a claim in proceedings

37. With regard to the exercise of the jurisdiction by the court on an application to approve the acceptance or rejection of a lodgement, tender, offer, or Injuries Board assessment in actions coming within the meaning of O.22 r.10 and s.63 of the Civil Liability Act 1961 as amended, that is to be exercised and the determination made solely by the judge entertaining the application. In exercising that jurisdiction whilst the wishes of the next friend and/or the recommendations of counsel are matters to be taken into account by the court it is not bound by them. See *Bourke v. CIE* (S.C.) [1967] I.R. 319.

38. The proposal before the court is not in my view an offer to settle or compromise the matters remaining in issue by way of money payment in the same way that the plaintiff and the defendant have, subject to the approval of the court, agreed to settle other heads of claim in this case. As the remedy in law which is being sought by the plaintiff in respect of those matters is one of damages, the defendant's proposal does not satisfy the requirements to constitute a valid settlement or compromise of the plaintiffs claim, accordingly, it does not come within the meaning of O.22 r.10.

39. The defendant does not contend, however, that it is upon that order that the court should proceed to determine whether or not to accede to the defendants application but rather that it should do so on the basis that for all practical purposes it is in effect exercising its jurisdiction in wardship. Whilst quite properly it is accepted by the defendant that the advices of counsel and the wishes of the parents and, in particular, the next friend, are matters properly to be taken into account the court is, nevertheless, bound to resolve the matter on the basis of what is in the best interests of the plaintiff.

40. The jurisdiction in wardship under the Lunacy Regulation (Ireland) Act 1871 was ultimately transferred to the President of the High Court by s.9 (1) of the Courts of Justice Act 1936.

41. Reference was made in the course of submissions to the ruling of the court delivered by me in the case of *Corroon (a minor) and Pillay's General Hospital Limited and others* delivered on the 29th October, 2014. In that case there were a number of interim settlements which had been approved by the court and on foot of which the plaintiff had been made a ward. When the case came before me the plaintiff had attained his majority and I directed that a ruling be sought from the President as to the effect that this had had, if any, on the plaintiff's status as a ward. The President decided that having regard to the fact that the plaintiff had been brought into wardship only by virtue of his minority , that the wardship had been discharged when he attained his majority ,and so the matter came back before me. As with the plaintiff in these proceedings, the plaintiff in that case had sustained catastrophic injuries. He and his next friend wished to have damages assessed once and for all on a lump sum basis. The defendant made an application at the close of the opening and sought to have the assessment of damages proceed on a periodic payment basis. Upon enquiry as to the capacity of the plaintiff to give instructions, an application was made to amend the title of the proceedings to enable the plaintiff to proceed by his next friend as a person of unsound mind not so found. In the event and having heard evidence from the plaintiff's mother and next friend and having taken into consideration the submissions of counsel and the views of the next friend in evidence, the court decided that it was in the best interests of the plaintiff for the matter to proceed by way of an interim assessment of damages and periodic payments.

42. Although counsel for the defendant in this case submitted that the jurisdiction being exercised in that case was, in essence, one in wardship, I did not consider myself to be doing so, such jurisdiction being vested in the President, but rather to be exercising an inherent jurisdiction which required the court to approach the determination of the matter on the basis of what was in the plaintiffs best interest. In that case there was no issue between the parties as to the nature of the jurisdiction being exercised.

43. If, by virtue of the fact that the plaintiff in that case was proceeding as a person of unsound mind not so found and in circumstances where it had been indicated to the court that an application was to be made to bring the plaintiff into wardship, the court was exercising a wardship jurisdiction, as is submitted by counsel for the defendant, that is plainly not the case here. The plaintiff is not a person of unsound mind not so found but, rather, is an infant at law and proceeds accordingly. Artificial though the distinction may be, as counsel for the defendant submitted, the plaintiff is not a ward. She is a minor. This is an action between the infant plaintiff and the defendant. Absent the defendant's application coming within the meaning of O.22 rule 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.

44. 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, adjourning the balance of the action for determination to that time.

45. Order 36 rule 34 provides

> *"The judge may, if he thinks it expedient for the interests of justice, postpone or adjourn a trial for such a time, and*

upon such terms, if any, as he shall think fit."

46. A not dissimilar application was made on foot of the Order and which fell to be considered by the high court in the case of *Russell v. Health Service Executive* [2014] IEHC 590. In that case there had been a previous periodic payment settlement which had been approved by the President of the High Court on the 2nd of October 2012. It was a term of the settlement that the matter would be listed in October 2014 and that if legalisation establishing periodic payment orders had been enacted in the meantime the plaintiffs future needs would be dealt with by way of periodic payments. However, it was also agreed that if legislation had not come into effect when the case came on for hearing then, in default of agreement between the parties as to the terms of any settlement, the plaintiff would be entitled to proceed with the balance of his claim not already provided for by the payment of the initial lump sum on an agreed basis of 100% of the claim.

47. When the matter came before the court the defendant submitted that, notwithstanding the terms of the previous settlement, the matter should proceed on the basis of a periodic payment order rather than on the basis of an assessment according to the provisions of the Civil Liability Act 1961 as this was in the best interests of both the plaintiff and of justice.

48. That submission was rejected. Cross J. held that :

> *"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 the law."*

49. This decision is cited as authority to support the case made by the plaintiff in response to the within application.

50. The Plaintiff also relies on the decision of the Supreme Court in *North Western Health Board v. W.* (H) [2001] IESC 9 delivered on the 8th November, 2001. It was submitted that although that case concerned matters which were very different from those under consideration here, it is of some assistance to the court in the context of an exercise by the court of its inherent jurisdiction rather than upon any specific jurisdiction conferred by statute or under the rules of court, including wardship. It was submitted that particular regard has to be paid to the fact that under the Constitution the State recognises the family as the natural primary and fundamental unit in society possessing rights superior to positive law; that a child has constitutional rights both as part of the unit of the family and as an individual, that there is a presumption that the welfare of a child is to be found within the family, that parents have the primary responsibility for a child's welfare and that the Constitution relegated, in those circumstances, the State to a subordinate and subsidiary role. The involvement of the State in a way which had the effect of supplanting constitutional rights of the child and the parent as a family unit could only arise in the most exceptional circumstances.

51. In that case the child was not a party to the proceedings but rather those proceedings involved the plaintiff seeking a declaration and order of the court that a medical test should be carried out on a child whose parents, the defendants, had refused their consent to that procedure.

52. The factual matrix of that case is altogether different to that which the court is required to consider here. In this case the plaintiff is a litigant who brings these proceedings by his mother and next friend.

53. It is apparent from the judgments in that case that the position which was being considered in terms of the exercise by the court of its inherent jurisdiction was that which related to the power and duty of the State in a role which was clearly subsidiary to that of the parents.

54. In this case the role of the court, when its inherent jurisdiction is involved in the making of a decision on the matter before it, cannot be compared to the role of the State in circumstances where, as in that case, the plaintiff was seeking to intervene in what was in effect the exercise of constitutional rights clearly conferred on the family; the judgement of the court has to be seen and understood in that context.

55. It is clear from the judgments in that case, however, that the Supreme Court expressed a particularly strong view as to the rights of parents in what was described as the constitutional family carrying with it a presumption as Hardiman J. put it

> *"…that where (it) exists and is discharging its functions as such and the parents have not for physical or moral reasons failed in their duty towards their children, their decision should not be overridden by the State or in particular by the courts in the absence of a jurisdiction conferred by statute."*

56. It was fairly accepted by counsel for the plaintiff that the facts of that case were not at all similar to the facts in this case, however, it was submitted that in this case there could be no doubt but that the parents were thoughtful, caring and intelligent people devoted to their children and that given the constitutional position of the family weight had to be given by the court to the wishes of the parents such that those wishes could only be displaced in circumstances which were both clear and exceptional but none of which, it was submitted, were present here. In fact there was nothing to suggest otherwise that the plaintiff's parents were acting and motivated only by what was in the best interests of their child.

57. It was submitted that even if the court were of the view that a different decision might be better for the plaintiff than that which her parents take, it is not the function of the court nor is it permissible for the court to substitute its own decision for that of the parents in the absence of compelling and exceptional circumstances.

58. It was said on behalf of the plaintiff that whilst O.36 r.34 enables the court to adjourn or postpone the trial, it was not contemplated at the time when that rule was promulgated that the court would adjourn a trial to make provision for periodic payments nor for periods which would possibly be involved including as in this case a period of up to ten or eleven years. The process of the court in assessing damages on a periodic payment and structured settlement basis, whilst the subject matter of academic debate, had not then been and still remains to be legislated for. The most recently expressed intention of the government to do so whilst welcome cannot be taken into account by the court in determining the matter now before it. Moreover, it was submitted that the court cannot be given and has not acquired a jurisdiction arising out of what has been described as an ad hoc process to make the kind of orders now sought by the defendant.

59. Insofar as there is an inherent jurisdiction in the court enabling it to entertain an application such as the present, it was submitted on behalf of the plaintiff that that is to be exercised sparingly and only in the most exceptional circumstances.

Conclusion.
60. 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.

61. The plaintiff says that the factors and circumstances outlined in this case fall far short of what would be required to warrant the court intervening and making the orders now sought by the defendant against the express wishes of the plaintiffs parents.

62. The defendant's proposal is not without its attractions. Acknowledging, as I do, that the court has not heard any evidence as such other than the views of the mother and next friend in relation to the matter now before the court, it is apparent from the opening and from counsel's submissions that such uncertainties as are recognised in relation to the plaintiff's cognitive status would, it appears, become more clearly ascertainable by the time she attains her majority. Similarly, her academic achievements, vocational opportunities, future care, accommodation, aids and appliances requirements are likely to be more easily assessed and as counsel for the defendant submitted, more properly determined for the remainder of her life at a point in time at or shortly after the plaintiff attains her majority.

63. The plaintiff's mother and next friend gave evidence in relation to the plaintiff's disability and the basis upon which she had made the decision to proceed to have the damages assessed by the court on a once and for all basis.

64. She very fairly accepted, I thought, that at eighteen years of age or thereabouts the plaintiff, notwithstanding that there was some uncertainty in relation to her future cognitive capacity ,might be able to make decisions for herself and that she may very well be able enough to go on to third level education. In the course of cross examination she made it clear that she was motivated not by the disruption which future assessments would cause herself and other members of the family but the effect that that was likely to have on the plaintiff. She fully appreciated that if it transpired that the plaintiff was able to make decisions for herself ,including how she should proceed with the litigation in the event that the court were to make the order now sought by the defendant ,that the effect of her decision would be to deprive the plaintiff of that opportunity. As a mother she would hate to think that by her decision she would have deprived her daughter in some way but then she also had to deal with the situation that at eighteen or nineteen her daughter might still need advice and even protection of the court if it transpired that she failed to retain the same level of cognition as she now appears to possess. She accepted that there was uncertainty about that aspect of matters.

65. Additionally, evidence was given that she had carefully considered the advice which she had received from all of the experts legal and otherwise as had been retained. She wanted her daughter to be able to get on with her life and to enjoy it as best she could. However, as far as she was concerned she did not think, for example, how significant problems which may well arise in middle life are going to change anymore in ten years time than at present. Whether or not damages are assessed at this time or in ten years time the plaintiff's future in middle age and later would essentially, she had been advised, be no different.

66. I had the opportunity to observe the demeanour of the next friend as she gave her evidence and it was quite clear to me that she was very conscious of the potential risks in having the plaintiff's claim proceed at this time, including the risk that her daughter, the plaintiff, might in the result be under compensated, perhaps to a significant degree. In that regard she was quite clear that even if it transpired in due course that the plaintiff was under compensated the fact would remain that if the action proceeds to full and final judgment now it would be decided on the basis of the best evidence that it is possible to bring before the court.

67. Although another parent might make a different decision on the basis of the information presently available such as would, by way of example, minimise the risk of under compensation and/or afford the plaintiff an opportunity to make decisions for herself on attaining her majority, the decision which has been taken by the next friend is, in my view, and on what I know of the case as it has been opened to the court, one which has been made rationally and upon considered legal advise.

68. Moreover, I have not the slightest doubt nor do I hesitate for one moment in saying that in my view the plaintiff's mother and next friend is acting in what she believes is absolutely in the best interests of her child.

69. Nothing in the evidence of the next friend nor about the circumstances as they have been outlined could properly found a conclusion by the court other than that the Plaintiff is motivated solely by doing what she believes to be right in the best interests of her child when deciding as to how she wishes this case to proceed and in particular there are not in my view any exceptional circumstances or factors present as would make it permissible for the court on foot of its inherent jurisdiction to intervene against the express wishes of the plaintiff's mother and next friend made in the exercise of the constitutional right which she enjoys as part of the family unit guaranteed and recognised under the Constitution.

70. 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 away 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.

71. This case and others like it illustrate, if illustration is required, the urgent necessity of bringing forward long promised legislation to amend the law in this area by providing for structured settlements and the making of periodic payment orders in such cases.

72. 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 here 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 will refuse the application. I will discuss with counsel the final form of the orders to be made having due regard to the judgment of the court on this matter