Neutral Citation: [2014] IEHC 590

**THE HIGH COURT**

**[2009 No. 1918 P]**

**BETWEEN**

**GILL RUSSELL**

**(A MINOR SUING BY HIS MOTHER AND NEXT FRIEND, KAREN RUSSELL)**

**PLAINTIFF**

**AND**

**HEALTH SERVICE EXECUTIVE**

**DEFENDANT**

**JUDGMENT of Mr. Justice Cross delivered on the 18th day of December, 2014**

**1. Introduction**

1.1 The plaintiff was born on 12th July, 2006. Due to the now admitted negligence of the defendant, the plaintiff suffered catastrophic injuries at the time of his birth and has dyskinetic four limbed cerebral palsy. Gill is totally dependent for every need on a 24 hour basis, requiring full time care and assistance for his lifetime as well as the assistance of a number of aids and appliances to make his life as reasonably normal as possible.

1.2 The case initially came on for hearing in 2012 and a settlement was approved by order of the President of the High Court on 2nd October, 2012, whereby the plaintiff was awarded a sum of €1.4m by way of a periodic payment for two years. This sum was expressed to be a discount of 25% of the full value. It was a term of the settlement that the matter would be listed in October 2014 and if legislation establishing Periodic Payments Orders had been enacted in the meantime, the plaintiff's future needs would be dealt with by way of periodic payments but if legislation had not come into effect it was agreed that in the default of agreement between the parties as to the terms of any settlement that 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 notwithstanding the previous deduction of 25%.

1.3 The matter first came for hearing before this Court on 21st October, 2014, and counsel for the defendant submitted, *inter alia*, that notwithstanding the aforementioned agreement that the matter should proceed on the basis of a Periodic Payment Order rather than the assessment of liability in accordance with the provisions of the Civil Liability Act 1961.

1.4 I was invited by counsel for the defendant to find that the matter should proceed on the basis of Periodic Payment Orders on the basis that this was in the best interest of both the plaintiff and of justice and the defendant invoked the provisions of O. 36, r. 34:-

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

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

1.6 There are many good reasons for Periodic Payment Orders but the matter is by no means one sided. As counsel on behalf of the plaintiff stated, the plaintiff's family and the plaintiff himself, are significantly opposed to any obligation on the plaintiff to have to return to court in two or five or even ten years time to have his needs further assessed by several experts from both sides. In addition to the understandable reluctance on behalf of the plaintiff's family, the parties in this case have expressly agreed in settlement approved in October 2012, to have the entire balance of the claim dealt with in 2014, in the absence of any change of the law.

1.7 It was a further term of the settlement agreement between the parties in 2012 and approved by the High Court that the plaintiff's future life expectancy is to the age of 45 years. Life expectancy is always a difficult matter in such cases as this and the fact that the parties have reached agreement is, of course, to ease a significant burden on the court. Ultimately, however, if the parties had not agreed a life expectancy the court would have had to determine one on the basis of the evidence.

1.8 I note also that through the sensible offices of the parties and the representatives in the 20 days of this trial that a significant agreement has been reached in relation to a number of the items of the claim. There are, however, a number of significantly important issues that fall to be decided.

**2 Calculating the Rate of the Multiplier**

2.1 With apologies to the late Prof. John M. Kelly and the "Hidden Nature of the Tort Action", it is trite law that the purpose in awarding damages, subject to qualifications that they should not be too remote is to place the plaintiff in the same position as he or she had been before the commission of the tort.

2.2 In this case, the general damages awarded to the plaintiff for his personal injury as well as the cost of his care to date were fixed by the settlement in 2012. What remains to be determined is the quantum of damages that the plaintiff is entitled in respect of all the items of his future care and aids and appliances for the rest of his life.

2.3 There is no dispute between the parties that Gill is entitled to full compensatory damages in respect of these matters. Of all the victims of negligent tortfeasor in this Court, someone in the position of this plaintiff is most entitled to be paid in full.

2.4 The plaintiff's damages in this case consist of a number of capital items, of aids and appliances and equipment that have to be purchased, together with their replacement over the time, as well as weekly or monthly payments that will have to provide for the future care of the plaintiff throughout his agreed life span. If the plaintiff does not enjoy appropriate levels of care, he is as a matter of certainty, will suffer great diminution in his enjoyment of life and may well die prematurely due to the want of care. These future payments must be calculated today on a lump sum basis the lump sum is to be invested and hopefully produce a return. This sum must take into account anticipated inflation and is to be expended gradually throughout Gill's life. The lump sum must also take into account any return that is reasonable on the investment, if appropriate.

2.5 Accordingly, in relation to the sum to be awarded to the plaintiff in respect of future expenditure, it is necessary to calculate the multiplicand *i.e*. the annual cost of care and of aids and appliances which will have to be paid in the future. It is also necessary to calculate the multiplier which takes into account the real rate of return on any lump sum paid today over the period of the plaintiff's life.

2.6 The multiplicand will be dealt with in subsequent sections and is, of course, subject to the requirements of the law of damages, *inter alia*, of being fair and reasonable. This, of course, does not mean that one necessarily or at all, should approach the calculation of damages by hearing evidence from two sets of experts and taking an average between the two. Damages must be assessed like every other matter before a court in terms of the evidence that is adduced and on a fair and even handed balanced approach between the parties.

2.7 Although the multiplier is a figure that goes to the total of damages, I do not find that the assessment of an appropriate multiplier is, or should be subject to the same rules as referred to above in relation to the calculation of damages. The multiplier is a mathematical calculation determined after applying appropriate principles. The damages, the sums required to put the plaintiff in the same position as he would have been had the tort not been committed or contained in the multiplicand, the multiplier is the device to convert those damages which are periodic in nature into a lump sum.

2.8 Lord Lloyd of Berwick stated in *Wells v. Wells* [1999] 1 A.C. 345:-

> "It is of the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or too much. So far as the multiplier is concerned, the plaintiff may die the next day, or he may live beyond his normal expectation of life. So far as the multiplicand is concerned, the cost of future care may exceed everyone's best estimate. Or a new cure or less expensive form of treatment may be discovered. But these uncertainties do not affect the basic principle. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for a judicial scaling down. Current awards in the most serious cases may seem high. The present appeals may be taken as examples. But there is no more reason to reduce the awards, if properly calculated, because they seem high than there is to increase the awards because the injuries are very severe."

2.9 The multiplier is calculated on the basis of a "real rate of return". The greater the anticipated real rate of return, the lesser will be the multiplier. A real rate of return at a rate of 3% being the amount which a prudent investor could reasonably expect as a return on a mixed investment of equities, gilts and cash over an extensive period has generally been used by the courts as a fair basis in respect of all awards which involve a multiplier, and it is also the rate which the defendants have asked the court to fix in this case.

2.10 It is submitted on behalf of the plaintiff that the real rate of return of 3% is unfair and involves an investment in equities which is excessively risky and that the lump sum payable to the plaintiff should be assessed on the basis of a real rate of return of 0% or close to 0% being made up of a portfolio of Index Linked Government Securities (ILGS)

2.11 This aspect of the case was extensively and expertly argued by counsel on both sides over ten days of the twenty day hearing. I also had the benefit of learned submissions from both sides which I have read.

2.12 I heard evidence on behalf of the plaintiff from Prof. Kay, a distinguished academic and economist from London, Dr. Shane Whelan, a distinguished actuary, Declan Lynch, Accountant, Prof. Brendan Walsh, distinguished Irish economist. On behalf of the defendant, evidence was given by Prof. Alan Ahern, distinguished Irish economist, and former chief economist with Ulster Bank and Mr. Brian O'Loughlin, Stockbroker. I will not refer to the detail of the evidence of individual experts, all of whom gave, in my opinion, honest evidence. The extensive differences in the conclusions between the experts on behalf of the plaintiff and the defendants as to the best investment on a prudent basis of the plaintiff's fund, which in turn gave radically different views as to the real rate of return, indicate the fallibility of economists' forecasts of future events.

2.13 The plaintiff's contention was that the plaintiff must be required to invest in security as risk free as possible and that to invest in a "mixed fund" involving equities was an unacceptable risk. The defendant contended that the investment in a mixed fund could reasonably produce a return over a period of 3% and that this mixed fund is what the Courts Service through the Wards of Court Office actually do and that they have achieved such a return historically.

2.14 It should be noted that s. 24 of the Civil Liability and Courts Act 2004, permits the Minister by Regulations to prescribe the discount rate that should apply for the purposes of the assessment of damages in respect of future financial loss. There is a saving under s. 24(3), presumably for constitutional safety reasons, that the court may apply a different discount rate if it considers that the application of the prescribed rate would result in injustice being done. No rate has ever been fixed by the Minister under this section. From the conclusions I reached below, I do not see that a "one size fits all" rate could easily or fairly be fixed by the Minister, given the different needs and different levels of risk appropriate to different funds, as well as the different lengths funds are required to last.

2.15 A lump sum award may prove excessive if, for example, a plaintiff should die before his allotted span and his family would then be the beneficiaries of an "undeserved windfall". However, any plaintiff who receives an award may be fatally injured by the Luas tram when he leaves the Four Courts. Similarly, a lump sum may be exhausted because a plaintiff lives considerably longer than was anticipated. Neither of those eventualities represents anything other than life's contingencies not working in accordance with mathematical data. If, however, a lump sum is exhausted because in order to produce the required returns to meet the level of care stipulated by the court it had to be invested in a fund that was excessively risky and which did not in fact produce the required return, then it follows that the initial calculation of the multiplier were defective.

2.16 It is submitted on behalf of the plaintiff that the real rate of return calculated at 3% is unfair and an excessively risky burden on the plaintiff's fund. It is submitted on behalf of the defendant that this is a reasonable return and that the plaintiff through the Courts

Service will invest a sum in such mixed fund which historically have proved to be capable to producing a 3% rate of return in the long term.

2.17 Rather than investing a mixed fund of equities, gilts and cash, the plaintiff suggests that the sum should be invested in what is suggested to be a virtually risk free scheme of ILGS which are bonds not available from the Irish Government but are available in Germany, France, United Kingdom, United States, Australia and other European countries which guarantee that on maturity they will pay the price of the bond together with any intervening inflation.

2.18 It must be emphasised that it is not the function of the Court to dictate to those who will invest the plaintiff's money as to where they should invest it. It is the function of the court to assess the appropriate multiplicand and multiplier that will result in Gill's care needs being met and the investment being protected over his lifetime.

2.19 It should be noted that both sides in their calculations envisaged that at the end of Gill's agreed lifespan, the sum should be exhausted.

2.20 In *Wells v. Wells*, the House of Lords held that the court in awarding damages in the form of a lump sum had to calculate as best it could the sum that would be adequate by drawing down both capital income to provide the periodical sums equal to the plaintiff's estimated loss over the period and that an injured plaintiff was not in the same position as an ordinary prudent investor and was entitled to the greater security and certainty achieved investment in Index Linked Government Securities at the then discount rate of 3%. This figure of 3% was fixed because that was the then price of Index Linked Government Securities.

2.21 In *Dylan Simon v. Manual Paul Helmot* [2012] UK PC 5, the Privy Council in March 2012, followed the principles of *Wells v. Wells* and it was stated:-

> "The breakthrough came with the introduction of ILGS and the appreciation that there was at last a tool that could be used to provide protection against inflation. It is tailor-made for investors who want a safe investment for the long term. In practical terms it is risk free. As nearly as possible, it guarantees the availability of the money to meet costs as and when it is required. It may not be perfect, as buying and selling gilts in the short term may result in a gain or loss of capital. But it is the best tool that is available."

2.22 In the *Helmot* case, a different discount rate was applied for non-earnings and for earnings related loss.

2.23 The Irish Government does not issue ILGS, these are available in the United Kingdom and in France and Germany and elsewhere in Europe as well as in Japan, United States and Australia. The defendants have highlighted a risk in relation to foreign ILGS which is the risk of differential inflation.

2.24 This risk was referred to by Finnegan P. in *Boyne v. Bus Atha Cliath* [2003] 4 I.R 47:-

> "There is no equivalent investment available in this jurisdiction and, accordingly, to avail of that investment available in the United Kingdom would carry with it an exchange risk, as a result of which the security which such an investment offered would be undermined. Within the Eurozone similar investments are available in France, but again the security offered is undermined by the possibility of divergent rates of inflation between France and Ireland. For the foregoing reasons I do not consider the availability of index-linked government stock, whether in the United Kingdom or in France, as relevant to the approach this court should adopt in arriving at an appropriate lump sum award."

2.25 Today they are ILGS linked to Eurozone inflation. These are now available for the plaintiff's fund but were not apparently known of or discussed in *Boyne v. Bus Atha Cliath* [2003] 4 I.R. 47. These Eurozone linked ILGS are issued by the German and French Governments. There may be some divergence, the evidence suggests between inflation rates in different countries in the Eurozone, but that divergence is small and is not of significance in the long term. The practical difficulty in relation to such bonds is that while Germany and especially France are committed to future issues over the long medium and short term, at the moment, the number of such bonds is somewhat limited and these securities are not maturing at regular intervals. No ILGS, at present, are available in Germany or in France beyond 20 years. The plaintiff's experts have different solutions to this dilemma but essentially the plaintiff's position is that some of the fund be kept in cash and other in French or German bonds, and some put into other countries bonds to create a mixed portfolio on securities. This is a reasonable way of dealing with the practical difficulties of an Irish person investing in ILGS. The other risk cited by the defendants in relation to investment in ILGS is that of Sovereign Default by one of the countries concerned.

2.26 Should Germany or France default then there is a danger that the plaintiff's investments would be made null or depleted to such a degree as to result in his care needs not being met.

2.27 While the danger of a break up of the Eurozone may not be insignificant. I do not find that the combination of a break up of the Eurozone and a break up of the European Union itself and Sovereign Default by either Germany or France, all of which would have to occur before the security would be compromised as suggested by the defendant's experts is other than a fanciful risk.

2.28 I accept, however, that for an Irish investor, the ILGS is not as simple a proposition as it may be for an investor in the United Kingdom. I accept also that there are some risks associated with an investment in consisting mainly of ILGS.

2.29 The risks in relation to an investment in gilts have been well documented by the plaintiff's experts whose evidence I accept in this regard. Prof. Ahern on behalf of the defendant has stated at no period of 20 years over the last century or more has there been a negative rate of return on equities. The defendant's witnesses, however, agreed that there had been a number of periods to more than ten years in which there has been a negative return and there have been periods of over 20 years in which the rate of return has been substantially less than 3%. The defendants also agreed that in the mixed portfolio that they advocate of equities, gilts and cash that the real rate of return on the equity element had to be an annual 5% throughout Gill's lifetime.

2.30 The risks in relation to an investment in equity are very clear and can be encapsulated in the words "inflation and stagnation".

2.31 Prof. Walsh has illustrated two hypothetical portfolios each initially worth €1m over a 25 year period, both of them achieved a 3% real rate of return, (6% less 3% inflation) and portfolio A achieved this through a steady 6% return each and every year and portfolio B experienced volatility of negative return to the first four years and then rising to a 13% real rate of return in year nine, falling back again towards the average. The first example, the fund still had a healthy balance at the end of 25 years but the second portfolio, the fund was exhausted by year seventeen.

2.32 I accept entirely that the defendant is entitled to presumption that the plaintiff will be a prudent investor. I also accept that in the past, the Courts Services have invested in mixed portfolios and have achieved a real rate of return of 3%. However, it is somewhat too early to be clear if this return will be maintained throughout the various mixed funds in the capable hands of the Wards of Court Office. As awards have been assessed to date using a 3% real rate of return, the only possible way the award could be sufficient to meet a plaintiff's assessed needs would be for that investment to be made into a mixed fund. In other words, the rate fixed by the court has in practice determined the method of investment.

2.33 The defendant's experts suggest that the plaintiff's funds should be invested in a fund with varying degrees of equities and gilts to produce a 3% real rate of return. It was accepted by the defendant that the greater percentage of the fund in equities, the greater the possible positive return and also the greater the risk. The defendant's experts did not seem to agree on a precise balance between equities and gilts that would produce the 3% real rate of return on a "prudent" basis, but they were in agreement that a "prudent" investor could have confidence in a mixed fund, however it was made up. I find that imprecision as to what mix of equities and gilts is required to produce the required, not desired, result is somewhat alarming.

2.34 The defendant's witnesses agreed that the equity proportion of any fund should be untouched for twenty years to allow the equities to grow, and that Gill's need in those twenty years would have to be met from cash or cash-type investments which would result in, at most, approximately 1% growth. It is clear, therefore, that a mixed fund can have no merits for any plaintiff incapacitated, as Gill is, whose fund is only required to last twenty years or less.

2.35 After the twenty years, it was proposed that the equity element should be gradually sold and converted into cash as it was agreed that only cash or cash-type investments were appropriate over the last ten years or so of the fund.

2.36 It was agreed that over a number of twenty year periods in the past, there have been real rates of return considerably less than 3% on equities. It is also agreed by the defendant's expert, and I accept, that for the total fund to which achieve an overall 3% real rate of return, the equity elements would have to achieve a 5% annual real rate of return. I do not find that a fund which requires an investment in equities that will produce a 5% real rate of return over its lifetime to be an acceptable risk for a person such as Gill Russell.

2.37 I accept and agree that the defendant's experts in the marketplace would not advise either an ordinary "prudent investor" or even an ordinary "prudent plaintiff investor" to invest in ILGS because they are too expensive and are not designed to produce any gains that an ordinary prudent investor would desire. As I have previously indicated, this plaintiff is not an ordinary prudent investor in the sense that normal rate the rules of real economic costs could apply.

2.38 I agree that there is no such thing as a risk free investment. There are risks in any investment. The risks in relation to a fund of ILGS are substantially less than the risks of a mixed equity fund of the type advocated by the defendant. There are, however, some practical difficulties investing the entirety of the fund in ILGS given the relatively few number of bonds available at present in France and Germany.

2.39 The Bank of England invests the pension funds of its staff in ILGS. It is because of the investment in ILGS by a number of pension funds, and some regulatory requirements to that effect, that the defendant's experts suggested that the price of ILGS was artificially too high and that the real rate of return was now too low. The price of ILGS is set by the market and if the Bank of England pension fund requires the security of ILGS to secure its fund, then Gill Russell's requirements for security are, I hold, far greater even than the Bank of England's pension fund. If the Bank of England were to have invested in a "prudent" mixed fund, and if that fund were devastated, it would doubtless be extremely serious, but the consequences for the Bank of England or its staff would be far less serious than the consequences for this plaintiff if his fund suffered a similar fate. The implicit question: if ILGS are prudent for the Bank of England Staff Pension Fund, why are they excessively cautious and therefore excessively expensive for Gill Russell? Was not satisfactorily addressed.

2.40 As was agreed by the defendant's expert witnesses, what is prudent for one investor is not necessarily the same as another investor. The reasonably prudent investor who was in receipt of a substantial State salary with a substantial State pension might, should he win the lotto decide that it was prudent to provide for his children by taking some more risks with his fund than a self employed busker, without other assets, who was similarly lucky. Whereas the House of Lord in *Wells v. Wells*, applied its "no risk" reasoning to all plaintiffs, not just plaintiffs such as Gill who are totally dependent on their fund surviving throughout the time to provide for their care, and where there is considerable logic to that approach, I am not dealing with all plaintiffs. I am dealing with Gill Russell, who is totally dependent upon his fund lasting him for his agreed life span.

2.41 A plaintiff who is compensated for future loss of earnings and who was earning €600 per week and now can only earn €500, might well consider that it was prudent to invest his fund in a mixed fund of equities and gilts to allow for growth of the fund over the period of his lifetime and say provide for his children after his death. If the worst came to the worst, that plaintiff would still have the earnings of €500 a week to provide for himself and his family. I am of the view that this plaintiff and similar plaintiffs to him are in a significantly different situation.

2.42 I do not see the case of *Boyne v. Bus Atha Cliath* as deciding the matter as against the plaintiff's propositions. First of all, the issue in *Boyne* was not that of ILGS versus a mixed fund. This judgment does not suggest that the possibility of ILGS was even argued in *Boyne*. Finnegan P. merely indicated that the ILGS was not appropriate in Ireland for the reasons previously outlined. The contest in *Boyne* was between the real rate of return on a portfolio of 70% equities and 30% gilts of 2.9% as contended by the plaintiff or 4% as contended by the defendant. In those circumstances, Finnegan P. accepted the plaintiff's calculations but allowing for the reinvestment of interest, he increased the rate to 3%.

2.43 Similarly, in *McEneany v. Monaghan County Council*, O'Sullivan J. fixed the multiplier at 2.5% based on the evidence before him. In that case also investment in ILGS was not considered but O'Sullivan J. quoted with approval the judgment of Lord Lloyd of Berwick in *Wells v. Wells* at p. 487 and continued:-

> "I find the foregoing reasoning compelling. On the evidence there is no equivalent in this country of the ILGS in the U.K. Accordingly I must approach the assessment of the sum required to produce the appropriate annuity for the plaintiff over the next 39 years on the basis that it will yield a reasonably secure and reliable stream of annual funding (comprising income and capital) and to that end that the investment of the award shall be as risk free as reasonably possible in the absence of an equivalent of the ILGS in the U.K."

2.44 Further, to distinguish *Boyne* from this case, the plaintiff in that case was clearly not someone who was catastrophically injured and his loss of earnings were the only matter subject to a multiplier.

2.45 As was the case in *Wells*, I do not believe I should take account of how the fund will probably be invested. The Courts Service at present invests funds of Wards of Court and infants on a mixed basis which have generally produced a real rate of return of 3%. It may well be that they so invest the funds because a mixed fund is the only possible vehicle to generate the required return as quantums are, in Personal Injury, assessed on that basis. I also note the evidence before me that in a similar case which is at present before the courts, sums invested under a PPO have not in fact been maintained and after deductions, for costs of administration *etc*., they have decreased over a short run.

2.46 It may be that whatever sum is awarded will actually be invested by the Office in a mixed fund. No more than in *Wells*, do I consider that to be of importance. What is important is that the plaintiff receives, full compensation; that the investment be as risk free as is possible; and that the sum should invested prudently. I have already indicated that it is not the function of the Courts to be prescriptive in relation to how the experts should invest the award and neither is it my function to be predictive to how they will do so.

2.47 I accept the law as stated by the House of Lords in *Wells* and indeed as reemphasised by the Privy Council in *Simon v. Helmot* [2012] UK PC 5. The law in *Wells* is already part of Irish law. It is clear that O'Sullivan J. accepted the principles in *McEneaney v. Monaghan County Council (*26th July, 2001). *Wells* was also accepted by Finnegan P. in *Boyne v. Bus Atha Cliath* [2003] 4 I.R. 48, with one exception which I do not consider important. Finnegan P. did accept the view of the Court of Appeal in *Wells* that "the court…is dealing with probabilities when fixing the multiplier, can and should pay regard to the high probability that the plaintiff will invest prudently, any other approach would be artificial". I do not consider that point to an important distinction, and I agree there can be no dispute that a prudent investment is required. I do not agree, however, that account should be taken of what will be done by the Courts Service with the fund, and in this regard I prefer the reasoning of the House of Lords. I do not think that it is my function either to be prescriptive as to how the Courts Service *should* invest any sums awarded nor do I consider it my function to take into account how the Courts Service *may* actually invest any such sums. The Court of Appeal in *Wells* also stated "we think that the defendant is entitled take advantage of the presumption that the [plaintiff] will adopt a prudent investment strategy". Again, I agree with this approach. As we have seen, actual investment in ILGS was not the issue in *Boyne* and Finnegan P. was not deciding between the plaintiff's advocacy of ILGS and the defendants suggesting a mixed fund. ILGS was not within the contemplation of the parties at the time presumably because European inflation linked bonds were not available or the availability was not brought to the attention of the Court. There is no problem whatsoever with the presumption that the plaintiff or his advisers will adopt a prudent investment strategy. The issue is what is prudent for Gill. Were I to be deciding on an appropriate multiplier for a plaintiff, such as in the *Boyne* case, who required investment of a sum for loss of earnings, and I am not so deciding, then it is very likely that a 3% real rate of return or the equivalent would be appropriate.

2.48 The issue for me to decide is what is in these circumstances prudent. It is agreed by both sides that the shorter the period of investment, the greater is the risk from equities and it follows that the more "risk averse" the fund should be, the proportion of a fund in equities should be less. If the investment was for a period of less than 20 years then none of the fund should be in equity. The defendant's expert advised that the equities be kept untouched for some 20 years and the first 20 years be provided from a cash or cash like investments. After the 20 years, the equities will be sold in order to provide for the balance of the plaintiff's requirements.

2.49 I find that a prudent investor on behalf of the plaintiff given the absolute necessity to ensure that his fund will not be dissipated would invest in a safest possible portfolio, whether of ILGS or in a mixed fund with substantially less equities to give greater security than an ordinary plaintiff who suffered a diminution in his earning capacity. Any plaintiff will also be more risk averse than an ordinary prudent investor in the marketplace. It is impossible to imagine any individual more risk adverse than this plaintiff.

2.50 As I stated, it is not my function to be prescriptive as to the nature of the investment that will be made on behalf of the plaintiff but rather it is my obligation is to ascertain a multiplier which will be as risk adverse as is reasonably possible and the result as prudent an investment as the plaintiff's needs require. Should the plaintiff have available to him through a mixture of German and French and possibly other securities then clearly the risks associated with ILGS would seem to offer the best way forward.

2.51 It may be that the experts who will have charge of the plaintiff's fund will not be able to find a totality of investments in ILGS and in those circumstances they may consider some mixture of investment. I do not consider the 70%/30% split or any other of the proportions as suggested by the defendants necessary in order to produce a 3% real rate of return would be sufficiently risk averse for the plaintiff. Should a down turn of the economy, as postulated in his example by Prof. Walsh and which actually occurred in the 1970s, when the market had not recovered until well into the 1980s was to occur, any fund with a majority of equities would be or would very likely to be severely compromised.

2.52 It is necessary for me to fix the real rate of return taking into account of the above and bearing in mind the agreement between the parties that it is open to me to fix any rate which I find to be fair and bearing in mind that my task is not to be prescriptive insofar the fund would be invested.

2.53 Before I proceed to fix the rate, there are two matters that fall to be considered. The first is the issue of differential of wage inflation and the second is the issue of the supposed extra medical inflation.

The Issue of Differential Wage Inflation

2.54 The significant majority of the plaintiff's costs are costs of care which are labour costs.

2.55 The Privy Council in *Helmot* determined, as we have seen a different discount rate for earnings related losses from other future costs and the plaintiff in this case also urges that a differential rate be applied. It is agreed by the defendants that to fix different rates for different categories of loss is more accurate but is less practical, I believe that to compartmentalise the different rates under different headings is to add uncertainty to litigation and I do not consider it to be good in practice. An alternative approach is to take into account any differential in wage inflation and incorporate that differential in the final figure of the multiplier. I believe that that is the preferable approach.

2.56 As the defendant's experts have indicated, it is difficult to establish the rate of wage inflation of carers because the Irish statistics are not precise enough for such calculation. The defendants also emphasise the fact that since the economic crisis of 2008, the best indications are that the cost of carers has actually fallen. This is because most carers are to be employed by the HSE and the HSE employees have suffered reductions in earnings.

2.57 I do not believe that this reduction is going to be other than temporary. I also note that Labour Court recommendations have recently indicated higher rates to be paid for "live in" carers and that these are being taken on board by the HSE. In the circumstances, I note that the Society of Actuaries indicate that the wages increase in general by 1.5% over inflation (if they did not

rise, there would be no question of any improvement of standards of living) and Prof. Walsh indicated that in Ireland the wage inflation range between 2% to 3% higher than inflation but certainly 1% at a minimum. Mr. McCardle on behalf of the defendant indicated that the difference of inflation was between 0.2% and 1.2%.

2.58 A substantial proportion of the plaintiff's damages will relate to the future cost of care. Taking account of the fact that wage inflation has yet to catch up with general inflation but will do, I believe, within the next five years and allowing a figure of 1% differential, I think that is appropriate to reduce the rate of return by 0.5% to allow for the extra wage inflation. I hope that this calculation is not too conservative to meet the plaintiff's needs but I do accept the point made by defendant that the plaintiff should be able to negotiate in order to get somewhat cheaper costs.

Medical Inflation

2.59 In *McEneaney v. Monaghan County Council*, evidence was given by learned economists on behalf of the plaintiff that there was a difference of 3% of medical inflation over other rates of inflation. This case was fully argued in front of O'Sullivan J. and as he stated an economic expert was in court on behalf of the defendant, no such expert was called, so it must be assumed that the economic experts were all of the view taking past events as a guide that there would be a differential of 3% of medical inflation.

2.60 What has happened to medical inflation since *McEneaney* is, I think, illustrative of the difficulty of economists or of courts forecasting economic trends from past events as rather than universally rising by 3% above inflation, medical expenses have in some cases been less than general inflation as the HSE has, for example, negotiated generic alternative for drugs and other medicines which have come off patent. What has increased substantially has been the cost of hospital care and of medical insurance. These items are not relevant to this plaintiff's case. Other items more relevant to the plaintiff have not increased as predicted by *McEneaney* above the general rate of inflation and, accordingly, I make no further discount for medical inflation.

Fixing the Rate

2.61 The multiplier is determined according to the real rate of return which I shall fix. The multiplier will vary from item to item of the damages depending on the frequency, those items must be repeated over the length of the fund.

An ILGS Fund

2.62 The market price of ILGS is now approximately 0%. Some bonds in the United Kingdom have to be purchased at a negative discount such is their popularity. I note the evidence which I accept that if the plaintiff were to purchase from an insurance company that guaranteed him an inflation beating return, the rate that would be quoted would be less than 0%. I also note that the popularity of these securities has increased due to various insurance funds such as the Bank of England and others investing in ILGS to guarantee that the funds will not be depleted. I do not see that that is an artificial level. The rate of approximately 0% or less is what the market prices at present taking into account the market's expectation of the future of such bonds. Accordingly, the present market rate represents a powerful argument for fixing the ILGS rates at no more than 0%. It is suggested by the plaintiff that the present price is what should dictate the multiplier.

2.63 I note that if the plaintiff in *Wells v. Wells*, bought ILGS at 3% which was the then rate, and now had to buy more bonds, she would have to purchase them at 0% or less than 0% and would suffer a loss. Similarly, if Gill was to purchase bonds at 0% and the bonds in ten years time were to rise to 1% or 2%, he would enjoy a benefit.

2.64 To fix a rate for ILGS greater than the present market does put some risk on the plaintiff. Considerable sobering expert evidence was given from both sides to the effect that the world economy may not improve substantially at least in the medium term and this somewhat pessimistic view is one of the reasons that the market in a "flight to safety" has reduced the current price of ILGS from the rate of 3% as it was at the time of *Wells* to 0% or less at present.

2.65 I accept that the current price of bonds is at a historic low. I accept as Prof. Walsh advised the court that as a matter of probability, bonds will rise into the future certainly by ten years time. Prof. Walsh did appear to concede that rather than fixing the present price as being the correct price of ILGS, a higher figure should be allowed. Prof. Kay did not agree. Whereas in his report, Prof. Kay suggested that ILGS should be valued at no greater than 1%. In his evidence, he indicated a figure of 0% or indeed less. I will find a fair figure for the present rate of ILGS not to be 0%, but 0.5%. To that figure, I would note the fact that Prof. Walsh agreed that a figure of 1% should be added to allow for the fact that over the lifetime of the investment, the bonds are reasonably anticipated to rise to 1% or 2%, and I consider that over Gill's lifetime, the price of ILGS will as a matter of probability increase and accordingly, I hold that a figure of 1.5% (i.e. 0.5% being the present price plus 1% to represent the future) is a fair figure for a multiplier on the basis of investment in ILGS. From the figure of 1.5%, I should take 0.5% being the extra cost of wage inflation referred to above, and accordingly, the real rate of return if the ILGS method is followed should be 1%.

Mixed Portfolio

2.66 It is conceded by counsel for the defendant that should I favour a mixed portfolio, that it is open to the court to arrive at a lesser rate than the 3% real rate of return should I come to the conclusion that a 3% real rate of return requires investment in an excessively risky fund.

2.67 Should the plaintiff not invest in ILGS but continue some mixed portfolio as I have indicated, I believe that the different methods suggested by the different experts on behalf of the defendant are not sufficiently risk adverse for the plaintiff. The plaintiff is not a prudent investor in the same sense as an ordinary man in the street or indeed as I have suggested in the same sense as a plaintiff who has suffered "merely" a loss of earnings.

2.68 Should Gill Russell not have the money available to pay for his carers then he is likely to suffer the most severe adverse consequences including an early death. It is as simple as that.

2.69 Accordingly, if for an ordinary prudent investor, the sum of 3% is the expected real rate of return on a mixed fund, someone in the plaintiff's position could very least be expected to take half of the risks of an ordinary prudent investor. This would result in investment of significantly less amount of equities than suggested to the ordinary prudent investor. Investing in a mixed fund, someone in the plaintiff's position who must be risk adverse to a significantly greater extent than an ordinary prudent investor must only contemplate investing in a very limited amount of equities which would reduce the risk to an acceptable level. Accordingly, a figure of 1.5% would be the appropriate figure for the real rate of return and from that figure would have to be deducted a further 0.5% to allow for the extra wage inflation element which would result in a rate of 1%. In this regard, and in fixing rate at 1%, I have

ignored the administrative cost in relation to the fund which in strictness ought to result in a further reduction of the rate, whether investment in ILGS or a "mixed portfolio" is preferred.

**Conclusion**
2.70 There is no doubt that by utilising a rate of 1% rather than 3% that the total of the award to this plaintiff will be considerably greater than otherwise.

2.71 The defendant accepted from the outset the principle of "full compensation", but argued in its submissions that I should have regard to the "position of the defendant". The duty to be "fair to all" cannot result in the plaintiff being under-compensated. The fact that the defendant in this case and in many such cases is, in effect, the State and the taxpayer, is no more a reason to diminish the award from some misguided sense of "public policy" than it would be to increase the award just because the State represents a "deep pocket". Arguments on "public policy" such as this are, in my view, more suited to the lounge bars of golf clubs than to courts of law.

2.72 When the defendant's experts argued in that ILGS are not a good investment, what they are saying in economist's language is that the "opportunity cost" of ILGS is too great. In other words, the cost of acquiring as much safety for the plaintiff as is reasonably possible is too expensive. This is, in effect, another way of arguing that the plaintiff should not be awarded full compensation and as I have stated, I reject that argument.

2.73 It follows from the above that the rate in Gill's case should be fixed at 1% whatever method of investment is used. Were there any significant divergence in the rates arrived at by either investment in ILGS or a "mixed fund", I would chose the rate suggested by ILGS as notwithstanding the difficulties from a practical level in relation to the number of bonds issued, the risks involved are considerably less. The learned judges in *Wells* favoured ILGS as being a method of providing certainty and no real risk and on the basis that it removed from courts an obligation to choose between the evidence of rival economic experts. Such a choice is, of course, what courts have to do from time to time. It is our duty to assess the evidence, not in any sense as a economic expert, but rather, which evidence is in accordance with the principles that have to be applied as I see them. In this regard, where there is a conflict between the experts, I favour the plaintiffs experts conclusions not because I have any capacity to be an economic forecaster but rather because they have demonstrated that investment in ILGS is more risk adverse than any mixed fund. You do not have to be in any sense an expert in economics to come to that conclusion.

2.74 Conclusion on the Real Rate of Return

(a) The plaintiff was entitled to full compensation.

(b) The multiplier is not in any sense a heading of damages; it is a mathematical vehicle to utilise with the multiplicand in order to come to a total. The multiplier, once assessed, is not to be subject to any further reduction.

(c) There is no such thing as a "risk free" investment. Future economic forecasting is a very perilous occupation.

(d) While not totally risk adverse, ILGS provides the safest method of investment though there are some practical difficulties.

(e) From whatever sum is fixed, a sum of 0.5% should be deducted to allow for the extra wage inflation element. There should be no extra allowance in this case for any extra medical inflation.

(f) The appropriate rate whether assessing it on the basis of ILGS or a suitably "risk averse mixed fund" is 1%.

**3 The Multiplicand**
3.1 The legal principle best summarising the nature of the damages to be awarded to the plaintiff was outlined by Irvine J. in *Lennon v. HSE* [2014] IEHC 336, when she stated:-

> "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… while the plaintiff should be given a sufficient award to maximise her capabilities… that award must be one which is fair to the defendant in the specific circumstances of this case."

3.2 The principles governing the quantum of damages for care needs and future aids and appliances for this plaintiff are no different from the overall approach to damages in the law in Ireland. The starting point is that of Blackburn L.J. in *Livingstone v. Rawyards Coal Company* [1880] 5 App. Cas 2539 to the effect that the measure of damages is "that sum of money which would put the party who has been injured or who has suffered in the same position as he would have been had he not sustained the wrong for which he now getting his compensation or reparation".

3.3 I have been referred to the helpful judgment of Gillen J. in *K.D. (A Minor) v. Belfast Social Health and Care Trust* [2013] NIQB 78, in which the learned judge stated in a case very similar to this case:-

> "What has to be first considered by the court is not whether other treatment is reasonable but whether, given the needs of the plaintiff, the treatment chosen and claimed for by the plaintiff is reasonable."

3.4 In this decision, the learned judge followed Stephenson L.J. in *Rialas v Mitchell* [1984] 128 SJ 704, and further quoted Pill L.J. in *Sowden v. Lodge* [2005] 1 WLR 2129 at 2144 (38):-

> "In this context paternalism does not replace the right of a claimant, or those with responsibility for the claimant, making a reasonable choice…… the objective approach was rejected in the *Rialas* case. "

3.5 I accept the above as a correct statement of the law. Indeed, the defendants in their submissions also accept the above principles when they say:-

> "…the court is entitled to, and, indeed, must consider whether the choices put forward by the plaintiff are reasonable. This is an elementary proposition and is, really, the only legal proposition which should guide the court herein. Is the plaintiff's claim reasonable?"

3.6 Accordingly, when assessing whether a particular item of care or aids and appliances is reasonable, the decision is not the court's interpretation of what is reasonable or not but whether the model of care chosen by the plaintiff is reasonable and what are the reasonable costs of meeting the plaintiff's reasonable needs. In this regard, of course, costings and figures produced by the defendant may well be relevant in demonstrating that certain care matters or certain aids and appliances can be purchased at a lesser sum than suggested by the plaintiff's experts.

3.7 This is the same approach as adopted by Mackie Q.C. in the *Queens Bench Division in Wakeling v. McDonagh & Anor* [2007] EWHC 1201, in which the learned judge said:-

> "45. The legal approach is not in dispute having been restated by the House of Lords in *Wells v Wells* [1999] AC 345 carried through by the Court of Appeal in *Sowden v Lodge and Crookdale v Drury* [2005] 1 WLR 2129. The Court of Appeal in effect reiterated the principle that the court is first concerned not with whether other identified treatment is reasonable but whether that chosen by the Claimant is reasonable recognising that a Claimant or those looking after him are entitled to make a choice. This is an aspect of the basic principle that a Defendant is obliged to put the Claimant back so far as money can, into the position he would have been in but for the negligence."

3.8 The learned judge continued at para. 46:-

> "…The obligation upon the Defendant is to provide not simply what is necessary for Adam to survive but what he reasonably requires to have proper access to the very limited opportunities available to him. In order to provide Adam with what he reasonably requires it may well be that from time to time the provision of care available is not utilised to full capacity. But that potential waste of resource is something the Defendant should bear given the manifest unfairness to him of having to save money by imposing unnecessary restrictions on his enjoyment of a very limited life."

3.9 Accordingly, the issues before me in relation to all heads of claim is whether the plaintiff is in need of the care or equipment, whether he would benefit from it and whether what the plaintiff is proposing is reasonable.

**The Plaintiff's Life**

3.10 I have had the benefit of hearing the witnesses from both sides and also the submissions of counsel and I have had the benefit of seeing the video recording which showed aspects of Gill's daily life. What is clear from the video recording and the evidence is that Gill is and will always be totally dependent on care for 24 hours of the day, everyday, for all of his life. He needs a large array of aids and appliances to make his life as reasonable and as fulfilled as possible. He is subject to unpredictable epileptic seizures. Should these seizures last, he requires medication and occasionally hospitalisation. He is subject to twitching of his limbs. He is doubly incontinent. Given his age, I find it unlikely that, despite his mother's hopes, that he will ever be continent. He needs a range of aids and appliances to give him intellectual stimulation and enjoyment and he has shown remarkable progress in operating and mastering complex IT systems with eye movements. He requires, as was demonstrated by the video, two people to assist him in all of the moving and transferring tasks that he has over the day.

3.11 As long as the plaintiff is a minor and indeed probably throughout his life, his mother and her partner will want to be involved in Gill's care. When he is an adult, depending on his capacity, this involvement may be dependent upon Gill's consent. Gill's mother is clearly a loving and concerned parent who has to date been doing everything in her power to assist Gill and doubtless will want to do this into the future. This care will, of course, involve Gill's mother in "work" and responsibilities that will always be greater than most parents of growing children. I doubt if Gill's mother would have it otherwise. From the issue of the assessment of damages, however, Gill should be made as independent as possible from his mother being required as a matter of necessity to do more than any parent would do for their child.

3.12 As will appear hereunder, the legal representatives on behalf of the parties before and more particularly throughout the period of the hearing, came to substantive agreement on many aspects of what had previously been disputed.

3.13 The parties are to be congratulated on these sensible agreements and I note that in relation to an important aspect of care, it was conceded by the defendant that two people are required for Gill for all transfers. On a school day there may be up to eighteen transfers per day which require Gill to be moved with two persons. He requires transfers to get him into his stander for toileting, showering, dressing, undressing, for exercising, for administration of medication during a seizure and also in school.

3.14 I agree with the point made on behalf of the plaintiff that he is and will always be a vulnerable person and the presence of a second carer always reduces the risk of inappropriate abuses and it would be unsafe to leave Gill with only one carer for any appreciable length of time. Accordingly, I find that Gill will require the availability of two carers around the clock.

3.15 The difference between the parties in relation to care were outlined in the evidence given by Ms. Cathy Kirby on behalf of the plaintiff and Ms. Christine Kydd, on behalf of the defendant.

3.16 There is a dispute between the parties also as to whether the carers can be directly employed or employed from an agency. An agency employee is less expensive. The plaintiff's mother had an unhappy experience with one of the care agencies and has set her face against agency care.

3.17 There was also further disputes as to whether the night time carer or carers should be waking or sleeping and whether, if a second carer is required at night, that person could be engaged on a "live in" model, i.e. that the second day time carer who would not be required to work during the day on a full time basis would sleep in Gill's home as an au pair and be available to the night time carer from time to time should the need arise.

3.18 I find that given the plaintiff's mothers unhappy experience with agency care that it is not unreasonable that the carers of the plaintiff throughout the day should be employees rather than engaged on an agency basis. The advantage of such a choice is that there can be no question of substitutes being imposed and a strong relationship can be built up between the carer and Gill and his family. I do not believe that the requirement in this regard of the plaintiff is unreasonable.

3.19 I find that Gill also requires a full time night carer on a waking basis. It is not acceptable that a "sleeping carer" model be adopted as I am not of the view that Gill will always be able to make clear his distress to anyone who is asleep with a benefit of a monitoring device. I am of the view that this carer should also be an employee of the plaintiff's mother.

3.20 I find that there should be a further carer available throughout day time, who would also be an employee, for transfers and to assist the main carer. This carer can be a "live in" carer who will sleep at night and will provide a "back up" service at night who can

be woken by the night time carer to provide assistance from time to time. I note the submission on behalf of the plaintiff that this model might produce a breach of the working time directives but I do not believe that that submission is reasonable in the circumstances. To insist on a separate second carer at night in addition to a second day carer is, in my view, unreasonable and as stated the best model is that of a live in carer who will be available, in effect, throughout the day. In addition to this "live in" carer's fees, some sum will have to be allowed also for the cost of that carer's bed and board. The live in carer will be asleep at night to be woken in the event of emergencies.

3.21 The need for a case manager is agreed by both parties but as I have decided on the direct employment model, the duties of the case manager will be greater than those suggested by the defendant and accordingly, the rates payable would be that as suggested by the plaintiff.

3.22 The actuaries have given extensive costings and the plaintiff's model has been costed at €337,000 per annum until age 11, €375,500 per annum from 11 to 19 and €436,700 per annum from 19 for life. This, of course, represents the costs of not three but four full time carers.

3.23 None of the models suggested by the defendant's actuary encompass what I have in mind. There must be some reduction from the plaintiff's costs as in effect only three persons will be employed. I do note that the "live in" model is paid €1,175 per week at present but this figure is subject to Labour Court recommendations for increases and also that this figure does not take into account bed and board. This figure is also based on an agency and not in a direct employee model. The plaintiff's evidence suggests that the second day carer to be working for at least two hours a day on school days and six hours a day on non-school days up to age eleven and five and a half hours per day on school days and fourteen hours per day on non-school days from eleven to eighteen and being present full time from nineteen years. The hours during the day that this carer will be called upon will vary and be regular but this carer will have to be present and available for work for a far longer period during the day time than he or she will actually be working. I believe that having a total of three different carers, all employees, is reasonable. It is possible, however, that the plaintiff's needs at night may require that the sleeping carer be awoken too many times for safety purposes and that accordingly from time to time agency carers may be needed to supplement the care regime I have stipulated. Some allowance will be made for this in the figures but I do not believe that such a requirement would be in any sense regular.

3.24 I accept that the actuarial figures are a guide and because of my adjustments, that a reduction in the plaintiff's figures is necessary. Accordingly, allowing for the 1% rate, I will accept the capital value of the plaintiff's care up to the age of eleven as being €700,000 (not €884,000), the cost from eleven to nineteen is €2,300,000 (not €2,774,000) and the cost from age nineteen for life is €7,000,000 and accordingly, the total cost of care for Gill on the 1% basis is €10,000,000.

Agreed Items

3.25 I shall next deal with the extensive amount of items that the parties have agreed and assess that agreement on the basis of 1% rate. I will utilise the spreadsheet agreed between the parties which sets out all items of special damage agreed and non agreed as a basis for my calculations:-

Physiotherapy and Hydrotherapy €78,828 (to 18)

€20,800 thereafter

Therapy Costings: Second Physiotherapy €480

Twelve sessions to implement home hydrotherapy programme €5,760

Further twelve sessions €5,760

Further twelve sessions €5,760

Fifty additional physio treatments over life time €4,000

Adolescent thera-wedge guesser €737

Gait Trainer €3,623

Leckey horizon stander €20,667

Leckey stander service €4,551

Wide electric neurology plinth €4,958

Haussam posture mirror €1,048

Theraband exercise mat €806

Therapy balls €962

Power pump for therapy balls €106

Dynair ball cushion €1,611

Movin sit junior €29

Lisclare oasis H/A bed €4,986

Installation €150

Height adjustable bed (from age 18) €2,370

Cocoon bumpers €3,813

Crash mat €417

Wendy Lett sheets €20,023

Pressure mattress €7,596

Ceiling mounted hoist €36,781

Ceiling hoist hydrotherapy €13,382

Slings €5,308

Maintenance and parts €19,295

Maxi twin floor hoist €8,854

Service €5,764

Sling €3,450

Folding holiday hoist €675

Kinkraft easy bath €8,875

Delivery €508

Body and head cushion €1,997

End cushion €722

Side cushion €635

Cushion from Great Britain €241

Paediatric shower chair €8,686

Adult shower chair €18,038

Folding holiday SH. seat €1,257

Showering trolley €14,175

Service €5,339

Wall mounted fan heaters €276

Chemicals/Hydrotherapy €3,792

Maintenance €3,034

Running costs €27,683

Medium nappies €68,877

Disposal of nappies €2,912

Disposal gloves €5,537

Wet wipes €4,733

Feeding spoons €1,289

Food processor €4,035

Bibs €9,174

Kitchen towels €11,295

Extra nutritional costs €32,103

Clothes allowance €15,168

Lycra body suit €28,365

Bedding €10,679

Orthotics €36,405

Monitor €4,551

Moulded seat manual WC €36,951

Seat for every four years after 18 – life €22,436

Wheelchair frame €26,539

Service and parts €3,185

Assisted power €42,410

Service €3,034

Battery replacement full powered wheelchair €3,286

Annual service €13,652

Moulded seat power chair €56,481

Wheelchair cosy €1,285

Swing €1,196

Lounge chair €21,581

Service €5,710

Portable ramp €443

Van raam velo bike €22,482

Service €2,427

Delivery €350

Assisted power €9,828

Service €4,551

Washing machine €2,146

Tumble dryer €1,005

Washing liquid €5,143

Heating oil €36,405

Electricity €23,489

Gardening €26,183

Maintenance and decoration €25,975

Insurances €20,629

Occupational therapy/ACC €6,166

Speech and language (lesser figure for six years) €60,588

From 14 – 18 years €18,974

From 18 – 25 years €15,359

From 25 – 45 years €18,549

Additional speech and language therapy for communication sys €4,000

First AT system €155,573

Mounting system for wheelchair €11,499

Handheld AT system tablet €12,739

Eye Gaze Tracker add on United States €23,674

Height adjustable table €6,185

Printer, scanner and copier €3,204

Insurance for AT system €9,691

External door openers €17,466

Door intercom €5,015

Gate openers €968

Addition to current house, new build and site €485,000

Stamp duties €145,619

Total €2,042,802

3.26 It will be seen the extensive nature of the agreement that has been reached between the parties and the sums which I have set out in the preceding paragraph are not just the initial capital sums but are the capital sums together with annual regular replacement sums that will be required. The total of these matters which have been agreed by the defendants and whose capital costs and replacement costs have been agreed (though of course the rate to be applied for the multiplier was not agreed) amount to on the 1% rate, the sum of €2,042,802.

Items in Dispute

3.27 I will again use the spreadsheet for the basis for these calculations. I will indicate with an emphasis those figures that I am allowing under each headings with capital values. The first two items that are not agreed are the need for neuropsychological assessment and psychology services which the plaintiff has costed on a once off basis of €1,000 and €1,500 respectively. Evidence was not given on the need for this expenditure and I do not see these sums as being reasonable and I will not allow same.

3.28 The next item that is not agreed is an annual sum for sterile water needed for the plaintiff's PEG machine. I believe that this is entirely reasonable and the sum of €106,181 is the total capital sum for this item.

3.29 The next item is the price for a powered wheelchair which the plaintiff claims at €11,195 which will have to be replaced every three years to the age of fourteen and an adult wheelchair at €12,000 which will have to be replaced every three years from age fourteen. The defendants agree that a powered wheelchair is required but the price is disputed.

3.30 I believe that the plaintiff is, for the reasons previously outlined, as a matter of principle, entitled to the claimed items unless these can be shown to be unreasonable. I do not think that the plaintiff's wheelchair costings are unreasonable but some deduction in the sums claimed might be possible because the fact that the plaintiff will be a valued customer of the wheelchair company and will be replacing the wheelchairs approximately every three years and accordingly, rather than €22,000 being the capital cost on a 1% basis of the wheelchair up to the age of fourteen, I will allow €20,000 and rather than €105,000 being the capital cost thereafter, I will allow €100,000 totalling together a sum of €120,000.

3.31 The next item that is in dispute is the Scotson Therapy. The plaintiff's mother was made aware of the Scotson Therapy which she has availed of in the United Kingdom by travelling there with Gill and she believes that as a result of his availing of this therapy, Gill has already benefited and that he does not suffer from "reflux" in the manner as before and that generally this has had a result in significant improvement in the plaintiff's life. The defendant's doctors disputed the need for this or were unaware of the benefits of it. Given the fact that it has been to date of proven benefit, I will allow the sums claimed under this heading being €3,961 for travel, €36,645 being the future cost of Scotson. The total of these sums come to €40,606.

3.32 The next item that was in dispute is the claim for summer and winter holiday costs. The plaintiff is claiming a total of €3,376.54, for yearly summer holiday costs and €2,695.22 being the winter costs.

3.33 I appreciate that two holidays a year are what Gill and his mother and her partner and carers have enjoyed in recent years and I doubtless these two holidays prove very necessary especially given the amount of labour, Gill's mother has had to expend on behalf of Gill over the period. However, I believe that one holiday alone will be reasonable for Gill in the future given his extra level of care and I will allow the prices claimed by the plaintiff for the summer holiday which capitalises at €102,435.

3.34 The next item in dispute is the cost of the specially adapted vehicle which will be required. The defendants have agreed a cost of €33,000 for the adapted vehicle from which the plaintiffs agree to allow a trade in of €5,000 every four years which capitalises at €226,476.

3.35 The defendants counter that in any event a family would be expected to purchase a family saloon and trade it in, if not every four years then at a greater period. This is indeed correct and the price and frequency of trade in, in the normal course of events is unclear, I will allow a total figure of €150,000 being the capital cost of the extra vehicles.

3.36 The next item in dispute is the sum for occupational therapy. The plaintiff is claiming a sum of €4,940 per year being 26 sessions at €190 per session and the defendant is suggesting the sum of €1,000 per annum being eight sessions at €125 per session.

3.37 I note the evidence given by the plaintiff's occupational therapy expert, Ms. Barry, when she suggested some compromise between the figures. The defendants submits that in relation to the plaintiff's figures that the plaintiff will have a wide range of support from other sources such as carers in speech and language therapists and assisted technology training and accordingly, I believe that there is indeed some over payment in the plaintiff's figure and will allow approximately half of the plaintiff's total of €2,500 per annum which is approximately €75,000 in total.

3.38 The next item that has not been agreed is the claim that the plaintiff requires a second gaze tracking AT system. This is, in effect, an eye gaze system over and above three systems that are recommended and agreed by the defendant and involves the need for a separate desk top mounting system. I accept in this regard, the evidence of the defendant's expert, Ms. Fitzsimmons, that it is reasonable that the plaintiff should have a large tablet computer at home and another one in school which would both use the PC-Eye-Go. I also accept that the extra system as suggested on behalf of the plaintiff will involve some "overcrowding" for Gill and would not be reasonable. Accordingly, I do not accept as reasonable the costs of the extra system at €140,918. However, as the plaintiff develops, I do think some extra assisted technology will be required in addition to what the defendants have allowed and I will allow a figure of €50,000 under this heading.

3.39 I will also disallow the sum of €3,382, in respect of a mounting system for desktop use and the sum of €6,764 for IR and RF remote control capabilities, as well as the sum of €23,738 being the cost claimed for additional IT items.

3.40 However, I will allow the sum claimed for a digital camera of €702.78 to be replaced every three years which amounts to €7,461 and the sum of €3,028.36 for the text capture system to be replaced every three years which amounts to €32,148 but not allow the hand position sensor access device as I believe that this may involve too much cluttering technology for Gill.

3.41 I will allow the sum of €575.01 to be replaced every three years for electrical devices including toys adapted for AT control which amounts to €6,104, the sum of €8,305.64 for special needs software to be replaced every three years which amounts to €88,171. I will also allow the sum of €1,597.24 for screen reader software replaceable every three years which capitalises at €16,956 but not allow the sum of €766.67 for mainstream software for use by assistant and client. I think mainstream software would probably be a matter that would have been purchased in any event.

3.42 The plaintiff is claiming a sum of €5,750.06 for visits for installation and assessment in training in relation to software. The facts of visits for installation assessment and training is agreed but the price is not agreed. The price as claimed by the plaintiff capitalises on a 1% basis at €61,041 but I will only allow the sum of €30,000 under this heading as I believe that less visits and less assessment than called for in the plaintiff's figures will be required. A sum of €460 is claimed for broadband internet connection and though there are some extra costs because of the nature of the connections required, I will not allow the sum claimed under this heading.

3.43 It is agreed that a sum should be deducted from the total to represent IT that would have been purchased had there been no disability, the defendants suggest that more should be deducted than the €638.90 allowed for by the plaintiff but I will accept the plaintiff's figures given the fact that I have already had some discount in a number of my figures, and accordingly a total of €4,199 should be reduced from the total.

3.44 The next item to be considered is the issue of door openers for the dwelling house. The defendants have agreed exterior door openers which have been previously calculated and have been set out in the "agreed items" list, but do not agree the amount claimed by the plaintiff, namely that door openers be required at €6,190 to be replaced every seven years which amounts to €29,964. I find that a sum should be allowed under this heading and I give some reduction off the amount claimed and allow the sum of €25,000 under this heading.

3.45 I will also allow the sum claimed of €13,748 being the capitalised sum for electrically operated curtain openers.

3.46 The next item claimed is for system design and installation. The plaintiff expert, Mark Beale, gave an estimation of €1,910 every ten years and Mr. Rob Gill costed at €5,500 which is a once off expenditure. I will allow the once off expenditure of €5,500 and not the figures of Mr. Beale.

3.47 In relation to Assisted Technology, the plaintiff has benefited greatly from the use of this technology up to date and there is no disagreement of the need for extensive Assisted Technology. The plaintiff is claiming further additional sums for the AT system control and items of the Optimusic eight, wireless lighting circuit, Smart TV, boundary microphones, wireless audio players, wireless audio amplifiers, weather resistant speakers, wireless camera, bedside call button, beside mount for PC, Imperium home control units, Imperium software storage rack, site visits and training days, all of which are disputed by Ms. Fitzsimmons on behalf of the defendant and in this regard, I accept Ms. Fitzsimmons' evidence and will not allow the sums under these headings which would capitalise it over €325,000.

3.48 The next item in dispute is a cost of moving the assisted technology to the new house which I will accept the sum of €3,000.

3.49 The further items in dispute are sums claimed for legal costs, travel and GPs and drugs as well as hospital charges. The defendants submit that there is no evidence that the plaintiff will loose his medical card but I do not accept that proposition as it was stated in answer to my queries to counsel on behalf of the plaintiff that this would occur and it was not significantly disputed by the defendants.

3.50 In the circumstances, I will accept as reasonable, the sum of €3,000 for yearly travel, as €550 for GP's fees, €840 for Consultant's fees, €1,728 for drugs and €5,000 for hospital charges. These items come to €91,012, €16,686, €25,483, €52,423, and €151,686 totalling together at €337,290.

3.51 The legal fees are claimed at the sum of €5,000 for the first year, €2,965 for the second year, and €1,000 thereafter which would total €28,851 for the subsequent years totalling together at €36,816.

Summary of Disputed Items which are allowed at the 1% Rate

Sterile water for PEG machine €106,181

Cost of two wheelchairs €120,000

Cost of Scotson therapy items €40,606

Cost of extra holidays €102,435

Cost of vehicle €150,000

Occupational therapy €75,000

Additional assisted technology €50,000

Digital camera €7,461

Text capture system €32,148

Replacement of electrical devices €6,104

Special needs software €88,171

Green reader software €16,956

Visits for installation and assessment in training of software €30,000

Less deductions for IT purchased in any event -€4,199

Internal doors €25,000

Electrically operated curtain openers €13,748

System design and installation €5,500

Cost of moving assisted technology €3,000

Travelling expenses, legal costs, GPs,

drugs and hospital charges €337,290

Legal fees €36,816

Total €1,242,217

3.52 Those sums with one addition represents the non-agreed items in Gill's damages. The non-agreed items that I have allowed amount to €1,242,217 on a 1% basis. This sum will fall to be added to the sum of €2,042,802 for agreed items and therefore totals €3,285,019. I will round that sum down to €3,275,000 to which I will add the sum of €10,000,000 for care which total together the sum of €13,275,000.

3.53 The only additional item to be added to the sum of €13,275,000 is the cost of financial advice which is claimed on the basis at 0.12% of the award. I did not allow any deduction in the multiplier for the costs of administering the sum which are not inconsiderable and accordingly, the sum comes to be awarded under the heading of damages. Evidence was given by the plaintiff's actuary that financial advice to comes to a sum of €13,000 per million on the basis of 3% increasing to €22,000, per million, on a 0% and is €19,000, per million, on a 1% basis. Accordingly, the sum of €247,000 (€19,000 multiplied by thirteen) should be added to the award which comes to the figure of €13,522,000

3.54 In the circumstances, I believe that the sum of €13,522,000 is a reasonable sum, fair to both the plaintiff and the defendants and accordingly I award this sum to the plaintiff.