Neutral Citation: [2015] IEHC 752

THE HIGH COURT

[2004 No. 19518 P]

BETWEEN

EOIN O'MAHONY (A PERSON OF UNSOUND MIND NOT SO FOUND)

SUING BY HIS MOTHER AND NEXT FRIEND, KAREN O' MAHONY

PLAINTIFF

AND

HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Mr. Justice Moriarty approved on 25th day of November, 2015

1. This is the final part of this court's judgment in relation to what ultimately became an assessment of damages under various headings for what were, by any appraisal, truly catastrophic personal injuries occasioned to the plaintiff through demonstrably negligent surgical procedures performed on him at Cork University Hospital in November, 2001, causing irreversible brain damage.

2. It is unnecessary to reiterate the convoluted history of the proceedings since their institution in 2004, which are set forth in the earlier portion of my initial judgment of 27th March, 2015, primarily relating to the basis of compensation by way of special damages in catastrophic injury cases, and certain particular generic issues relating to the extent and nature of ongoing care required by the plaintiff for the remainder of his life, the projected duration of which was late in the course of the hearing agreed between the parties as a further 22.5 years. It will suffice at this juncture to state that, over the several years that elapsed, a figure for general damages was agreed and discharged, as were certain interim sums for past and future special damages, which culminated in the balance of the matters remaining in contention relating to special damages coming on for hearing before myself on 16th October, 2014. Following a nineteen day hearing, necessarily not sequential because of the difficulty in accommodating a wide spectrum of expert witnesses on both sides, detailed written submissions were furnished and supplemented by a day of oral argument, following which I delivered the said judgment of 27th March, 2015. This naturally set forth the court's findings on the disputed structural issues that arose in relation to the necessarily extensive requirements for the plaintiff's ongoing care and support, but significant differences remained between the parties regarding their costing and in some instances extent.

3. The legal advisors to the parties made creditable efforts to agree a significant proportion of the individual items and costings in controversy, but many remained intractable, and this was conveyed to the court in a number of brief hearings over late spring and early summer of this year, most pertinently at a hearing on 15th May, 2015, at which Counsel on both sides evinced broad agreement as to the remaining items and extent of provision, still in controversy, and the basis upon which the court ought to approach these. What was involved comprised a combination of ongoing differences as to (a) the actual extent of ongoing care required for the plaintiff, (b) the necessity in any event for particular items claimed, (c) the costing of certain items accepted as necessary by both sides, but where the defendant objected to the plaintiff's figures as being excessive, and (d) a limited number of what were referred to as "one-off" or non-recurring items. It was common case that, save for the few non-recurring items at (d), such amounts as were found to be within the plaintiff's entitlement under (a), (b) and (c) should be subject to the agreed actuarial multiplier applicable in consequence of the agreement late in the substantive hearing as to the plaintiff's remaining life expectancy, in the amount of 15.77.

4. Both Mr. Sreenan, S.C. for the plaintiff, and Mr. Mohan, S.C. for the defendant, agreed that the respectively computed aggregate residual amounts contended for came to €10,622,408.00 for the plaintiff and €8,202,290.00 for the defendant. They further were in accord that, while intensive discussions had to this extent narrowed the gap, no further progress was feasible. Mr. Mohan further agreed in principle with the basic *modus operandi* advanced by Mr. Sreenan to enable the court resolve the differences on quantum, whereby it should note the matters that were agreed, proceed to the dispute on the annual care package, although the differences in aggregate amounts were comparatively modest, and then proceed to the items that remained in contest, whether in part or in whole.

5. To this end, I have sought to consider the relevant evidence, documentation and argument advanced by each side in relation to those matters that remain partly or wholly contested. It is, I feel, unrealistic to set forth a lengthy reasoned assessment relating to every such item, and to this end, while I have re-read relevant data by way of documents, transcript extracts and submissions as best I can, I have restricted my findings to relatively synoptic expressions of what in each instance I consider a just outcome, somewhat on the lines adopted by Cross J. in his judgment in *Gill Russell v HSE* [2014] IEHC 590 delivered on 18th December, 2014. Further, to avoid any possible element of double counting, in a context of consensual payments out that were made available for the plaintiff's ongoing care, I have restricted the scope of this adjudication to the range encompassed by the respective aggregate sums of €10,622,408.00, contended for by the plaintiff, and €8,202,290.00 by the defendant.

Agreed items

6. Of the original list of items of recurring special damages in contention, negotiations, primarily conducted by the two junior counsel, Mr. E. Clifford, for the plaintiff, and Mr. D. McGuinness, for the defendant, resulted in a significant proportion of these, some forty-one, becoming agreed as to their annualised costings. Given that development, it is unnecessary to set these forth seriatim, and it will suffice to state that they comprised a wide range of medical, equipment, hygiene, clothing, motoring, insurance, recreational, vacation and other items deemed necessary for the plaintiff's multi-faceted needs. The aggregate agreed annualised cost of the recurring items involved came to €69,100, allowing for a further agreement made in the annual amount of €6,000 in respect of speech and language therapy. Applying the agreed annual multiplier of 15.7723, this gave rise to a capitalised sum of €1,089,866 in the plaintiff's estimation, and €1,089,707 in the defendant's estimation. Those figures are in such extreme proximity that I will deem €1,089,785 to represent the operative capitalised sum. A further one-off cost of €125.00 was also agreed between the parties as a one-off cost of a movable ramp for the plaintiff. A memorandum of the individual items and costings is contained as a Schedule at the rear of this judgment.

General observations
7. Before addressing these remaining items in the different categories of expenditure that remain in controversy between the parties, some brief remarks appear apposite in the context of a generic appraisal of the proceedings. Firstly, what was intimated at the conclusion of last year's substantive judgment, to the effect that the ultimate figure assessed for all outstanding special damages was likely to be appreciably closer to what as contended for on behalf of the plaintiff that the defendant, appears well warranted. This was an arguably unique case in the scale and duration to date of the plaintiff's disability. A tried and tested regime for his care at the behest of his parents was in being and well established before the defendant became involved in its support. The authorities on quantification of special damages in catastrophic injury cases within these islands have already been referred to in last year's initial judgment. The observations of Gillen J. in this regard in the Northern Ireland High Court in K*.D., a Minor, by D.K., his Mother and Next Friend v Belfast Social Health and Care Trust* [2013] NI QB 78 are specifically approved and adopted by this court. An award appropriate to the gravity of the case for these matters that remain in controversy must surely be warranted. While complex factors arise on both sides, including appropriate observance of the duty to mitigate, the final figure should, as observed on a number of occasions by the Supreme Court, be one appropriate to the scale and gravity of the claim.

8. While the case was in general conducted on both sides with high professionalism and dedication, a degree of rancour on occasion permeated the hearings. This was undoubtedly contributed to by the degree of unhappy breakdown in agreed interim nursing care provided by the defendant in the weeks preceding the commencement of the substantive hearing last year, necessitating emergency arrangements to be devised and taken part in by the plaintiff's parents at a time when their anxiety levels were in any event high. The pressure borne by both sides may have contributed to a measure of somewhat extravagant contentions having been advanced by both sides: for the plaintiff, this might seem to be borne out by the range and incidence of assistive technology claims from a number of sources, and by a proposed annual resident carer charge in a sum of €7,540 for which details of substantiation were modest; for the defendant, when challenged on behalf of the plaintiff as to the extensive lapse of years before liability was admitted, Mr. Mohan, S.C. agreed that the scale of the claim and the initial involvement of two separate defendants and insurers necessarily delayed conceding liability. Yet it transpired that Mr. Jellinek, the English consultant retained to advise the defendant at an early stage, had promptly denounced the level of professional care accorded to the plaintiff in the most swingeing terms, and he was also the consultant latterly retained to testify for the defendant on the (subsequently compromised) issue of life expectancy, and an impressive witness he proved to be. I mention these matters, not in criticism of either party, but as instances of arguably needless assertions or communications between the parties that served mainly to extend and complicate the length of the proceedings, not least in the context of the plaintiff's utterly devoted but no longer young parents. That I am not myself without some culpability in this regard is a matter I will revert to at the conclusion of this judgment.

Categories of special damages remaining in contention
9. I turn to the four categories of special damages that remain in contention between the parties. These comprise:

(i) cost of care for the plaintiff;

(ii) individual items not agreed in report of Ms. Linda Horgan;

(iii) individual items not agreed in report of Mr. Declan Lynch;

(iv) a limited number of "once-off" or non-recurring items.

10. Although in any event being substantially the largest component of the headings of special damages in issue, it is to the credit of the parties that they had narrowed their differences in the respective annualised care packages providing for the plaintiff to a margin of approximately 1.333%, with the annual aggregate of €520,044 for the plaintiff being met by €502,200 for the defendant. Such narrowing of initially wider divergence was no doubt contributed to by the rulings in the initial judgment of 27th March, 2015, on the components of night and day care for the plaintiff, and the generally exemplary role assumed by the Irish Wheelchair Association, and in particular Ms. Patricia Cooney.

11. In the short indicative judgment given on 17th July, 2015, I indicated that, having appraised the evidence, documentation and submissions, I was disposed to assess the aggregate of this portion of the special damages in the amount of €513,000 annually. By way of breakdown in this regard, I took as the primary component what was the agreed annual figure of €439,367, being the Irish Wheelchair Association care package—scenario 2. I then evaluated competing figures for two hours morning nursing of €28,864 (plaintiff) and €24,064 (defendant), for two hours morning carers of €17,290 (plaintiff) and €17,716 (defendant), for replacement of HSE carer provision of €7,135 (plaintiff) and €6,750 (defendant) and for replacement of HSE home help of €27,388 (plaintiff) and €14,303 (defendant).

12. In reaching the ruling already expressed, I have given careful consideration to all material documentation vouching the respective figures contended for, the relevant evidence adduced at hearing, and the respective written submissions delivered. Balancing all these as best I can, I have concluded that an appropriate sum to assess for two hours morning nursing for the plaintiff was €26,700, for two hours morning carers €17,140, for replacement of the HSE care provision €6,800 and for replacement of the HSE home help, €23,000. The aggregate of the four sums is €71,840, to which must be added the agreed annual Irish Wheelchair Association sum of €439,367, giving an aggregate total of €513,007. Given the extreme proximity of that sum to €513,000, and the fact that some very slight errors appear to have arisen in the computation of the defendant's figures, I have in the circumstances rounded the sum down to €513,000, the sum expressed as the aggregate found at the sitting of 17th July, 2015. A very brief synopsis of the position is set forth hereunder. In any event, the small disparity in calculation may well be due to the defendant deploying 15.77 as a multiplier, whereas the operative actuarial report specified 15.7723 (Mssrs. Seegrave, Daly & Lynch Ltd.).

Care Breakdown	Plaintiff	Defendant	Decision
IWA Care Package-Scenario	2439367	439367	439367
2 Hours Morning Nursing	28864	24064	26700
2 Hours Morning Carers	17290	17716	17140
Replace HSE Carer Provision	7135	6750	6800
Replace HSE Home Help	27388	14303	23000
	520044	502200	513007

Items not agreed in lists of Ms. Linda Horgan and Mr. Declan Lynch
13. Recurring items of special damages that remain either wholly or partly in controversy between the parties have been conveniently divided into two sub-categories: firstly those items in relation to which no agreement was reached as set forth in a report of Ms. Linda Horgan, an occupational therapist retained by the plaintiff who testified on day 10 of the trial, and secondly, a similar list of contentious items comprised in a list of Mr. Declan Lynch who testified on the following day on behalf of the plaintiff. In each

instance, I have taken for consideration each of the items that remain in issue, as set forth in the respective reports, and have reviewed the respective items, the evidence heard, documentation furnished, and the submissions made both orally and in writing. While it is particularly applicable in a tragic and substantial claim such as this that a plaintiff cannot recoup what he does not claim, it has to be said that a not insignificant proportion of both the items sought and their costings import elements of both the speculative and the inflated. I shall consider first the report of Ms. Horgan, in which the non-consecutive numbering reflects the majority of other items initially referred to in her report in relation to which agreement was reached as part of the overall agreed category already referred to.

Report of Ms. Linda Horgan

14. Turning to the disputed items referred to in Ms. Horgan's list, the first two seek annual payments in the sums of €300 and €350 for dental and optician care respectively (Nos. 66 and 67). The defendant responds that such care for the plaintiff would be in any event required, regardless of his appalling injuries. I am not entirely persuaded that this argument should entirely prevail for someone who is utterly unable to lift a finger for any purpose, and for whom the brushing of teeth or other hygienic procedures depend entirely upon nurses and carers. However, the sums require to be discounted, and I assess the sums of €260 and €300 respectively. Whilst an earlier version of Ms. Horgan's list referred to a substantial claim for home help, this has been superceded and costed as part of the overall care provision. I am more receptive to the defendant's argument in relation to chiropody being recoverable as a recurring item at €280 per annum. Much has been made during the evidence of the desirability of carers being upskilled and there was also mention of lengthy daytime hours when very little was happening in the plaintiff's unit. This seems an apt opportunity for carers to become conversant with attending to this fairly infrequent requirement of the plaintiff. I believe the justice of the matter will be fairly met if I decline to approve any annual chiropody payment, but direct that there be a one-off payment of €420 to provide for a time-frame of unexacting training to enable carers take over this fairly modest role.

15. Next is the OT and AT role of Mr. Kevin Farnan and Ms. Emer Lotty. The provable degree of actual advances made by the plaintiff in these spheres cannot be pronounced upon with any certainty, but there was certainly potential encouragement in Mr. Farnan's testimony, and in what was observed of the plaintiff's responses, and the great pride taken by his father in any potential or actual progress. This seems to me to remain an important part of the case, and while I cannot speculate on its development, I would be averse to its being inordinately downgraded. As was argued in the defendant's submissions, nothing was heard from Ms. Lotty, and Mr. Farnan was a little uncertain on costing matters. The €12,000 sought annually seems somewhat excessive, but I will approve what I feel is a fair reduced sum of €8,000.

16. Regarding the lift in the plaintiff's unit, sums of €2,000 for its replacement, and €1,702 for its servicing were maintained, and objected to with some force on behalf of the defendant. I am not in doubt that a satisfactorily functioning lift is an essential part of the plaintiff's regime within his specific unit in the home, given his extreme degree of disability. But the figures contended for appear to exceed what is reasonable and necessary, and as stated in the course of the argument, the defendant cannot be expected to finance something akin to a Mayo clinic in miniature. I believe an aggregate annual sum of €1,960 will satisfactorily provide both for the item and its servicing.

17. The next item was an annual claim for €762 for what were described as household expenses. The defendant argued that any such details as had been furnished appeared to relate to nothing more rarefied than daily household domestic items of no particular quality or distinctiveness, and proposed that €273 annually would sufficiently meet requirements. I believe that the reality of matters will fairly and readily be met by an annual payment of €410.

18. For general refuse charges, in respect of which the plaintiff sought €283 annually, and the defendant responded with €100, I accept that the plaintiff's condition, disablement and hygiene requirements and range of activities inevitably generate more refuse than a healthy person, with all the procedures required to be followed both by day and night, but I feel a payment of €220 will adequately cover all likely requirements.

19. In regard to motor transport, it has at all times very properly been accepted by the defendant that the plaintiff must have the use of an adequate and safe vehicle, and among the annual items agreed is €4,800, in this regard, taking into account a reasonable trade-in value for the previous car. What here more specifically arises is provision for service and tyres, an aspect that will undoubtedly entail ongoing expenditure. On behalf of the plaintiff, €913 annually is sought, with the defendant contending that €513 will suffice for likely requirements. Bearing in mind the location of the family home of the plaintiff, and the range of both recreational and other travel that the evidence indicated he undoubtedly benefits from, I believe an annual sum of €700 represents fair provision in this regard.

20. Diesel fuel was also a heading of claim, the plaintiff seeking €2,718 per annum, and the defendant proposing €1,133. Given again the location of the plaintiff's home, and the extensive evidence heard at the trial of his range of activities and travel, I believe a sum of €2,000 is warranted. I note that Ms. Barry for the defendant contended that the plaintiff receives an annual disability allowance of 600 gallons of diesel.

21. Electricity and heat are self-evidently crucial requirements for a person so physically disabled, especially in winter months. In this regard, bearing in mind the defendant's acceptance of the extra needs of the plaintiff, I am of the view that an annual sum of €3,300 is warranted, and that while the plaintiff's request for €4,542 is too large, a fair figure is closer to that than the €1,200 proffered by the defendant.

22. As to the maintenance of the care unit, a list was produced grounding a contention for €4,325 annually. It was acknowledged that costings all reflected items of the highest standard, and it in general seemed that little regard had been had to any duty to mitigate. No more than an annual sum of €2,250 could realistically be warranted.

23. Item No. 99 seeks an annual clothing payment for the plaintiff of €1,920. The defendant contends that other than €100 for special socks, nothing more should in law be recoverable. But it would be hard not to be moved by the photographic albums produced in evidence showing the plaintiff beaming with pleasure in smart and stylish clothing at family and entertainment functions. However, it would be unjust to the defendant to measure an annual sum of more than the €450 I now assess.

24. With regard to item No. 100, €895 annually is sought in respect of sharps. This refers to needles, syringes, lancets and other devices used at home to treat a wide range of diseases and infirmities, and which should be promptly disposed of after use. Any appraisal of the evidence heard makes clear the range of procedures required on a daily basis by the plaintiff, and the defendant's proposal of €100 is palpably inadequate. However the €895 sought for the plaintiff appears inordinate, and an amount of €450 annually will be assessed.

25. The final outstanding item in Ms. Horgan's report relates to pharmacy expenditures, and it is contended on behalf of the plaintiff

that an annual sum of €1,615 equates with an appraisal of chemists' bills over a recent period. This nonetheless seems unwarrantedly high, and it must be borne in mind that, independent of all contentious terms of settlement under consideration, the defendant has separately committed itself to an annual supply of a very substantial range of pharmaceutical products of no small value to the plaintiff. Available information is not such as to permit of a precise appraisal, but in a context of all that has been heard in relation to the extent of the plaintiff's incapacity, and dependence utterly upon a wide range of daily procedures and preparations, I propose to assess an annual sum of €950 as a reasonable estimate. The aggregate of what has been sought in respect of the contentious items in Ms. Horgan's list comes to €21,670, and a brief synopsis appears hereunder.

Item	Ruling € (Annual)
Dental care	260
Optician	300
Chiropody	420 (one-off)
OT and AT	8,000
Lift & servicing	1,960
Household expenses	410
Refuse charges	220
Vehicle service & tyres	700
Diesel	2,000
Electricity & heat	3,300
Unit maintenance	2,250
Clothing	450
Sharps	450
Pharmacy expenditures	950
Total	21,670

Report of Mr. Declan Lynch

26. I turn now to the items comprised in the report of Mr. Declan Lynch, the accountant retained on behalf of the plaintiff, in respect of which agreement was not forthcoming, and have again appraised the relevant evidence, documentation and submissions.

27. The first item in contention is music therapy, in respect of which an annual sum of €6,500 is sought on behalf of the plaintiff, this being based on one session per week at an hourly rate of €150 for 46 weeks, presumably excluding vacations away from home. From the evidence of Mr. O'Mahony Snr., and other testimony, even taking account of the photographic albums featuring the plaintiff, it would be difficult to gainsay that the plaintiff derives immense pleasure from music, and his interaction with Snoop Dog, the celebrated U.S. rapper, was one of the more poignant memories of the case. Yet there are clear uncertainties over an untried regime, and while I do not wish to curb realistic possibilities, I will limit the annual provision to €3,000.

28. The next and most substantial item arising from the report of Mr. Lynch was the proposed retention of a case manager, costed at €13,000 annually, in addition to retaining Ms. Patricia Cooney as service co-ordinator. This is no small outlay, and I have carefully considered the relevant evidence and submissions, including the testimony of Ms. Christine Kydd on behalf of the defendant. Whilst acknowledging her expertise, I have to say that the care scheme and proposals advocated by Ms. Kydd appeared less persuasive than the model advanced on behalf of the plaintiff, and indeed in her later testimony Ms. Kydd appeared to draw back quite appreciably in her views. As set forth in the plaintiff's submissions, what is in being in the O'Mahony unit is no small operation, involving thirty-one personnel, and working a shift system round the clock to provide for an enormously compromised patient in multiple respects. Having appraised all the relevant factors and arguments, I am persuaded that the exceptional requirements of the case warrant the retention of the case manager at the annual rate contended for.

29. What then follows is a claim for hire of medical equipment in the amount of €1,957 annually, expressed in submissions as required on the occasions that the plaintiff goes on holiday with family members. Evidence has shown a pattern of the plaintiff taking accompanied holidays throughout Ireland and abroad, of course that should not be dissuaded, and it would be unrealistic to suggest that necessary bulky equipment should be uprooted from his unit at home for this purpose. Nevertheless, quantification of this for the limited periods involved at €1,957 annually seems somewhat costly, and I am disposed to limit the sum to €1,400 annually.

30. Next, a voluntary health insurance claim in the annual sum of €1,484, per annum is made. Much was made in submissions for the plaintiff on alleged defence delays before and during the hearing in confirming continuation of the plaintiff's medical card, which would seem the most practical means of rendering this claim moot. It seems defence counsel found instructions in this regard hard to obtain, although it transpired that the commitment to furnishing wide-ranging medical supplies was given. Unless and until this important aspect is properly clarified, I would be disposed to approve an annual insurance premium of €1,000.

31. There follows a claim for "other capital items" in the sum of €200 annually, which is wholly unvouched and unverified. No order will accordingly be made.

32. Water charges in an annual amount of €527 are then sought. Clearly, any relief in this regard can only relate to the plaintiff's unit, and not to the entire and substantial O'Mahony dwelling. Even allowing for greater use of water in the unit being necessarily required than for rooms within the main house, it is difficult to envisage annual consumption exceeding €270, and I limit the claim accordingly.

33. Bank charges are sought in the sum of €200 per annum. While I do not preclude some proportion of this being allowed, I am not aware of there being an account in the plaintiff's name, and would have thought it likely that Mr. O'Mahony Snr. may now be exempt from all or most such charges. I do not wish to delay matters over so limited contention, and rather than deferring it, I allow €100.

34. Next come four separately listed recurring charges relating to equipment considered necessary for the plaintiff's unit in the O'Mahony dwelling: a harness, a fire extinguisher and its supply, and an evacuchair. The aggregate of what is sought on a recurring basis comes to €466. I propose to allow an aggregate of €340.

35. Having carefully reviewed all the relevant evidence, both of professional experts retained for the plaintiff, and in the moving testimony of his father, Mr. Eddie O'Mahony, I am persuaded that, however uncertain the degree of ongoing progression for the plaintiff may be, real and ascertainable progress in the spheres of comprehension and indication of choices has emerged, much of it due, apart from his devoted family, to his productive interaction with these experts, in particular Mr. Kevin Farnan and Ms. Ciara Fitzsimons. I do acknowledge the defendant's arguments that the role of Mr. Damien Coyle was more limited, and was acknowledged by him as substantially reflecting interaction with the plaintiff that was alternative to what was conducted by Mr. Farnan. However, I am persuaded that some allowance should be made for both the Eye Gaze replacement in an annual amount of €800, and in respect of Brain Computer Interface, I allow an annual sum of €3,750 in lieu of the €4,500 sought.

36. Substantially less impressive is the next heading of recurring claim, which is a sum of €7,540 annually under the rubric of "Resident Carer". In both written and oral submissions on behalf of the plaintiff, it would appear that this represents allowance for the plaintiff's team members for boiling of kettles, preparing tea and coffee and the like. Of course, the various team members require breaks and refreshment, but it would be oppressive to visit upon the defendant a sum of what (applying the multiplier) would be marginally under €119,000, or a sum close to it. An annual sum of €2,800 seems to me adequate and appropriate, and the relevant provision is limited to that amount.

37. The last contentious item in the list of Mr. Lynch is "Administration and Management Charges" in the sum of €7,500 annually. Very little substantiation was provided. I feel it incumbent on the plaintiff's advisors to bargain realistically in relation to what seem exceptionally high charges for dealings in respect of so severely compromised an individual. At this juncture, I am not disposed to approve a sum in excess of €3,150.

ITEM	TOAL (ANNUAL) €
Music therapy	3,000
Case manager	13,000
Medical equipment hire	1,400
VHI	1,000
Water charges	270
Bank charges	100
Unit equipment	340
Eye-Gaze	800
BCI	3,750
Resident carer	2,800
Admin and management charges	3,150
TOTAL	29,610

Non-recurring items
38. The last of the categories of special damages in issue, and the least vexed as to both nature and amount, relates to a small number of non-recurring or "once-off" items.

39. The first and second items refer to amounts that accrued over the months of July, August and September, shortly prior to the commencement of the substantive hearing when, seemingly due to a combination of health, availability and other factors, the established care arrangements to care for the plaintiff broke down to a substantial degree, and necessitated contingency arrangements being urgently put in being on the part of both the O'Mahony family and the Irish Wheelchair Association. These circumstances were graphically referred to at the hearing and in an affidavit sworn by Mr. Michael O'Connell, solicitor to the plaintiff on 22nd October, 2014. It was not suggested that this contingency was either typical or *mala fide*, but it was most unfortunate that it arose, particularly at a time when the O'Mahony family and their advisors were facing into a long and draining hearing. The respective sums of €2,023 (Irish Wheelchair Association) and €1,419 (O'Mahony family) appear satisfactorily vouched and must unhesitatingly be allowed.

40. Thirdly, the modest outlay of €125 in respect of a ramp was referred to in the course of documents relating to agreed items, and will be approved.

41. Fourth is a sum of €3,550 in respect of a detailed report from Ms. Ciara Fitzsimons, followed by €25,520 for provision of a Brain Computer Interface system, and €4,650 for replacement of the Eye Gaze system. Undoubtedly, there cannot be an indeterminate series of options that might enhance the plaintiff's severely compromised cognition and communication capacities and skills, but having appraised the relevant evidence as a whole, and given the non-recurring nature, I am persuaded to approve these items as sought.

42. Lastly, there is the non-recurring sum of €420, which I provided for, when addressing Ms. Horgan's report, as a payment in respect of chiropody during the interim period when the plaintiff's carers were being instructed as to its performance.

43. It remains then to set forth the aggregate total amount from the various component categories that should be found due to the plaintiff in respect of his special damages claims. Before that, two short matters should be noted. Firstly, on the aspect of costs, Ms. Egan, S.C., on behalf of the defendant very properly conceded on the last day of the hearing, 17th July last, that costs must follow the event in favour of the plaintiff, thereby alleviating the need for a further listing to argue costs. This must, in respect of hearing days, apply up to and including the said 17th July last, with provision for taxation in default of agreement. Further, as touched upon earlier, whilst my course of then communicating only a judgment of an indicative nature was in the then context well-intentioned, I have to now acknowledge in retrospect that its deployment was inappropriate, and express my regret to the parties, but particularly to the O'Mahony parents, for the further passage of time that has ensued.

44. Accordingly, as already notified in writing to the parties last week, on Monday, 16th November, 2015, when the matter was listed for mention, the judgment of the court on the remaining issues in controversy by way of special damages is an award against the defendant in favour of the plaintiff in the sum of €10,027,596 plus costs, taxable in default of agreement. This, as set forth in the memorandum then furnished to the parties is comprised of:-

(i) agreed items: €69,100 (*see* schedule at end of judgment);

(ii) care per judgment: €513,000;

(iii) items not agreed in report of Ms. Linda Horgan: €21,670; and

(iv) items not agreed in report of Mr. Declan Lynch: €29, 610.

The total of these items, assessed on an annual basis is €633,380. This is then multiplied by the agreed actuarial multiplier of 15.7723, which realises an amount of €9,989,859.

Finally, the aggregate of certain "one-off" amounts sought by the plaintiff, including an additional sum of €420, referable to chiropody, in a total amount of €37,737, is added, giving rise to the judgment amount of €10,027,596.

45. Having communicated those findings at the said listing of the matter last week, I ruled that judgment in that sum, together with

costs, taxable in default of agreement, should take immediate effect.

46. Some remaining matters were briefly then argued. Firstly, Mr. Sreenan, S.C., urged for an award of interest on the judgment amount. He was opposed in this by Ms. Egan, S.C., for the defendant. I have considered the arguments advanced in this regard, ranging over the different modes of computation of damages which held sway over the period of the contested hearing, and the amounts of payments to the plaintiff that were made without demur by the defendant, in December, 2014, €200,000, in June, 2015, €300,000, and in August, 2015, a further €800,000, bearing also in mind the considerable sums paid by way of interim part settlements for both general and special damages, in October, 2010, and then in October, 2012. I readily understand the anxieties that the daunting predicament of the plaintiff and his family have occasioned, and the natural wishes to extend or increase the entirely of financial compensation, but having considered all arguments, all payments made on account, and the relevant chronology of payments, I have to conclude that, both in law and in the reasonable exercise of my discretion, an interest award would represent an excessive intrusion of my natural sympathy for the O'Mahony family, and would be unfair to the defendant, whose representatives have been amenable to reasonable requests for payments out, when made. In all the circumstances, including having specified that the judgment is operative as and from Monday week last, I refuse the claim for interest at this juncture.

47. The second matter argued between Counsel last week related to Mr. Sreenan's contention that the scale and complexity of the case was such as to warrant the court certifying or approving two senior counsel on behalf of the plaintiff, noting that the defendant had in any event engaged representation on that basis. Ms. Egan, S.C. acknowledged that was the position on her side, but contended that in any event a fair taxation process was likely to yield higher dividends on the plaintiff's side; she submitted that both the composition of the plaintiff's team and the rate of remuneration were preferably left to taxation. Mr. Sreenan cited some extracts and references from *Flynn & Halpin on Taxation of Costs* (Blackhall, 1999), in particular a footnote at pg. 594:-

> "But where there are three or more Counsel, the Court dealing with the matter should endorse the number of Counsel, and this relieves the Taxing Master of the responsibility of exercising his discretion, and obviates any mistake or error of principle which may occur because of the Taxing Master's unfamiliarity with the actual proceedings. *Fluflon Ltd v William Frost & Sons Limited* (1965) 109 S.J. 417 (C.A.)."

48. Even though liability was agreed between the parties as far back as 2010, the case remained a particularly intricate, demanding and draining one, with a wide spectrum of expert testimony on both sides and differing modes of computation of damages being canvassed at various stages. It was in some respects comparable with the case of *Gill Russell (a Minor suing by his mother and next friend Karen Russell) v HSE* [2014] IEHC 590, initial portions of which were heard by me, prior to Cross J. hearing the preponderance. I am persuaded that the present case is of so considerable a nature that it is proper that the retention of two senior counsel for the plaintiff should be approved. However, I enter one modest caveat, and in doing so in no way suggest other than that the case was contested on both sides with particular dedication, expertise and commitment. In a long and difficult case, it can be in the nature of things that a particular counsel may with the assent of solicitor and client have to absent himself or herself from certain portions of the hearing. If it transpired, as on occasion in the present case it did on both sides, that a counsel had to be absent, not briefly but for the duration of a day, it could fairly be viewed that visiting the opposing side with referable costs might seem unwarranted. Accordingly, I feel a proper exercise of the taxation process should enable allowance to be made in that regard.

49. Lastly, and on a note of consensus between the legal teams, Mr. Sreenan, S.C. drew attention to the fact that, while the present proceedings had undoubtedly been conducted on a basis of consensual contest between the respective polar figures of €10,622,408 on the plaintiff's side, and €8,202,290 on the defendant's side, it nonetheless remained a contingency that a degree of reassessment might prove necessary. This resulted from the very recent Court of Appeal decision in the case of *Gill Russell v HSE* [2015] IECA 236 aforesaid, particularly its pronouncements on respective rates of return for certain categories of damages and the possible prospect of a further substantive appeal to the Supreme Court. Given the present degree of uncertainty on the matter, it was agreed that both sides would have liberty to apply.

Agreed items schedule

Item	Total (Annualised) €
Tissues	572
Motomed viva 2	245
Motomed service	115
Height adjustable physio bench	147
Service adjustable bench	68
Percussion vest	832
Percussion vest service	334
Tilt table extended warranty	3,629
Physio previously provided by HSE	9,750
Physio (private)	17,030
Shower trolley	248
Shower trolley parts	176
Shower mattress	110
Toileting/shower chair	108
Power chair	1,200
Power chair parts	1,000
Moulded seating	1,367
Floor hoist	102
Floor hoist spare parts	519
Ceiling hoist	572
Ceiling hoist service	155
Ceiling hoist spare parts	208
Slings	103
Sports bed	2,375
Sports bed service	529
Bed linen	300
Washing machine replace	130
Drier replace	170
Service wash and drier appliances	120
Generator replace	100
Generator service	140

Mobile phone	240
Car replacement	4,800
Holidays & family functions	7,500
Car insurance	854
House insurance	1,542
Recreational/leisure	3,491
Drugs payment scheme	1,728
Fan	10
Television	281
CD	200
Speech & language therapy	6,000
TOTAL	69,100