Neutral Citation No. [2013] NIQB 149 | *Ref:* **GIL9084**

Judgment: approved by the Court for handing down | *Delivered:* **20/12/2013**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN

KD (A MINOR) BY DK, HIS MOTHER AND NEXT FRIEND

Plaintiff

and

BELFAST SOCIAL HEALTH AND CARE TRUST

Defendant

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GILLEN J

Background

[1] In this case the minor plaintiff has suffered a tragic catastrophic injury and is a severely disabled child with:

- Spastic quadriplegic cerebral palsy
- Epilepsy
- Learning difficulties
- Developmental delay with right side being more severely affected than the left
- Inability to verbally communicate
- Dependency on others for every day functional needs

as a result of sustaining two episodes of coliform meningitis in the early neo-natal period.

[2] I have already given two judgments in this case dealing with various aspects of care and administration costs relevant to the cost of services carried out on behalf of the plaintiff.

[3] This third judgment arose out of yet further discrete areas of quantum which could not be agreed between counsel and which fell for determination by me on a broad principled basis with the parties thereafter translating these findings into a Periodical Payments Order (PPO) which would eventually come before me for approval. I am not in this judgment dealing with any arithmetical calculations but merely setting out guidance for the completion of the PPO by the parties for my perusal.

[4] I have adumbrated the legal principles governing compensation in this type of case at paragraph [4] et seq in my earlier primary judgment.

Matters for Determination by me

[5] In respect of a number of items which I shall set out in the paragraph below, should damages be capitalised and paid as a lump sum or paid as part of the yearly periodical payment? The items are:

(i) Carers' holiday expenses (£46,080).

(ii) Office of Care and Protection fees (£10,060).

(iii) Future administration fees to be paid to the plaintiff's solicitors (£42,575).

(iv) Cost of extra heating and lighting (£11,279)

(v) Swimming pool hire costs (£27,648).

(vi) Future accountancy fees (tax returns) (£13,827).

(vii) Future accountancy fees (£13,807).

The Plaintiff's Case

[6] Ms Higgins QC, who appeared on behalf of the plaintiff with Mr Dornan, advanced the following arguments:

- There is an inbuilt inflexibility in PPOs. The 2005 Damages (Variation of Periodical Payments) Order 2005 only allows the court to vary a PPO where as a result of negligence a plaintiff develops "some serious disease or suffers some serious deterioration".

- Accordingly, it is essential to ensure if possible that a suitably flexible provision is made for the plaintiff's reasonable future needs to be met.

- The risk of unknown contingencies arising in the future requires there to be a modest contingency fund.

- Examples of possible expenses which counsel suggest could be foreseen were:

    - The Office of Care and Protection (the OCP) might refuse to approve the rate of care charged because other providers charged the cheaper rate with the plaintiff to make up the difference.

    - A holiday or respite centre dedicated to the needs of severely disabled people opens on the continent and the plaintiff pays for a holiday there.

    - The plaintiff decides he would like a longer holiday than allowed by the care judgment.

    - If there are no adult respite or adult education places available the plaintiff would have to fund it himself.

    - If the plaintiff is ill and cannot attend the Adult Education Centre he will have to fund the care himself.

[7] Counsel invoked the authority of Thompstone v Tameside and the Glossop Acute Services NHS Trust [2008] 1 WLR 2207 as the basis for the need for the court to have a wide interpretation of what the plaintiff's needs may be. Since the plaintiff had not sought a contingency fund from the defendant as a head of claim this would appear to be the only way of creating the flexibility that the plaintiff will inevitably require in the next 40 years. In short the plaintiff requires some of his future losses to be allocated to a lump sum in order to ensure he is not under compensated and has to resort to his general damages to pay for his future needs.

The Defendant's Case

[8] Mr Elliott QC who appeared on behalf of the defendant with Mr McAlinden QC, made the following points:

- Capitalisation of this nature rather than payment on a recurring annual basis could result in an irrecoverable overpayment by the defendant.

- These items should be dealt with precisely on the same basis as other recurring items which are being paid on an annual basis.

- As a matter of practice the court has "always … directed the payment by the defendant in respect of such items on an annual basis".

- An element of undue enrichment at the expense of the defendant would occur if the plaintiff invested the capitalised monies.

Conclusion

[9] In Thompstone's case Waller LJ observed at [107C]:

> "Many claimants are advised that, due to the uncertainties inherent in a long life in a disabled condition, they should seek a substantial capital sum for contingencies in addition to that required for their immediate and foreseeable needs; this will provide for a degree of flexibility in the future. … the decision as to what form the order should take will be a balancing exercise of the various factors likely to affect the claimant's future life."

[10] The test that I must apply is an objective one. In Thompstone's case Waller LJ said at paragraph 108:

> "The parties have agreed that the test which the judge must apply is an objective one. Of course, he must have regard to the wishes and preferences of the parties and to all the circumstances of the case but, in the end, it is for the judge to decide what order best meets the plaintiff's needs. The judge's mind should be focused not on what the claimant prefers but on what best meets the claimant's needs."

[11] In Gilliland (a person under a disability) v McManus and another [2013] NIQB 127 at [26] this court considered the disadvantages of PPOs. At paragraph [26] I adverted to the inability to vary to meet unforeseen changes of circumstances unless there is also provision for a capital fund. I added:

> "That capital fund can be provided for out of "past damages" and the "general damages award" for pain, suffering and loss of amenity. It may well be that any financial adviser will not recommend a PPO unless the plaintiff retains a reasonably significant contingency fund to cover future capital purchases and unexpected expenditure. That can leave things extremely tight if the claimant hopes to fund future care, case management, therapies and equipment by way of periodical payments

[12] It is that balancing exercise which I have had to carry out in this instance in determining what the form of the PPO Order should contain with reference to this aspect.

[13] I must therefore balance the advantage which would accrue to the plaintiff in having a capitalised fund in relation to these matters against the disadvantage of risking a capitalised sum being inadequate to meet the periodic requirements of payments out.

[14] I have come to the conclusion that it would best meet the plaintiff's needs in terms of holidays if a capitalised sum of his holiday expenses was to be provided. This would permit him to avail of a particularly expensive holiday one year and perhaps a much cheaper rated holiday the following year etc. It also would allow him to vary the length of holidays that he takes, taking a longer holiday one year than the next. The Office of Care and Protection will of course be keeping a wary eye on such developments to ensure that the money is not needlessly expended in the short term whilst affording him the flexibility to vary the nature of the holidays he takes.

[15] I do not consider that the same approach would apply to any of the other matters sought. It is imperative that the costs of the Care and Protection fees, the solicitor's fees, the extra heating and lighting, the swimming pool hire costs, and accountancy fees are firmly in position to be met each year. The danger of him running out of money by diminishing capitalised sums set aside for such expenditure is too great. Obviously, if he had to reduce a holiday one year because the capital had been expended to a greater degree than had been anticipated on another year that would be neither unusual nor damaging for him. There is no such room for manoeuvre with the other matters to which I have adverted. They must be paid at the appropriate level each year. I am satisfied that the plaintiff's needs will best be met by adopting an inflexible approach to ensure that these costs can always be met without any risk. Providing these capitalised funds as a substitute for a specific provision of a general contingency fund is rife with danger for him and in any event is contrary to the spirit of ensuring that the defendant does not have to incur the danger of making an overpayment. I therefore refuse to capitalise the figures sought in relation to matters (ii)-(vii).

Should the PPO provide that if the plaintiff is detained for over one month in hospital the defendant be afforded recoupment of the cost of providing two carers for the duration of that stay after the expiration of the first month?

[16] Each side called evidence on this matter.

The Plaintiff's Evidence

[17] Ms Kate Murphy was called on behalf of the plaintiff. She is an experienced care assistant and currently is the Social Care Co-ordinator with the agency providing care to the plaintiff. She is involved in recruitment for staff and is well versed in the multi-disciplinary needs of this plaintiff. She made the following points in the course of her evidence:

- The plaintiff currently has a team of eight which provides continuity for him given his difficulties in communication, behavioural problems and overall difficulties.

- If one member of the team drops out, it can take 7-9 weeks to train a new member.

- She has worked as a nursing auxiliary in a hospital attending a patient on a one-to-one basis who had suffered from mental health disabilities. She has a colleague who had similarly been employed by a hospital to deal with two cases similar to the plaintiff where that person had provided consistency of care and assistance on a one-to-one basis throughout their stay in hospital.

- She instanced some examples where there would be problems with the plaintiff if he did not have such familiar care e.g. recognising if he is unwell and may have a seizure, dealing with his challenging self-harm behaviour, recognising that he has a bed with high sides so he does not roll out. His bed at home at the moment has a Perspex glass and is approximately 6 feet in height.

- She indicated that the team looking after him at the moment from the agency is on a zero hour contract and that if they were not required for a prolonged period, they would go elsewhere and the team would therefore be lost.

- She felt there was a need for a carer to sit with the plaintiff in hospital for 24 hours every day. In a hospital environment he might not be well and simple matters such as constipation could bring on seizures which would not be recognised by hospital staff unless he was being monitored on a one to one basis for 24 hours per day.

[18] Mr A, the grandfather of the plaintiff, gave evidence that he had been with him during day treatment in the School of Dentistry for a period of 6 hours in a hospital bed. He was only given a normal bed and Mr A was told that he would have to stay with the plaintiff by his dental nurse because there was no one else to do so.

The Defendant's Evidence

[19] On this matter the defendant called Ms Brenda Creaney who is currently the Director of Nursing in the Belfast Trust. She has been responsible for managing the Children's Hospital in Belfast between 2002 and 2007 and Co-Director of Children's Health Services 2007-2009. In the course of her evidence she made the following points:

- She had lengthy experience of looking after children with complex health needs.

- The Belfast area over which she has control includes major hospitals such as the RVH/Mater/Children's Hospital/City Hospital etc.

- As far as beds were concerned, she indicated that the hospital had a contract with a specialist bed company that could provide specialist beds where it needed to meet the needs of a particular patient.

- The hospital nursing staff would assess the needs of the plaintiff if he were in hospital and the Trust would provide all care in respect of the child in partnership with his family and plan the care based on the individual care needs.

- If necessary the Trust would admit carers to the hospital. Any care they would be permitted to provide would be negotiated with the nursing team and only permitted if the team could assure themselves of their level of skill in this regard. They would be closely supervised by hospital staff.

- If the patient required particular consideration for example because of epilepsy, self-harming etc, this would be identified at admission. The nurses would factor that into his care and if necessary prescribe one-to-one supervision provided by the dedicated nurse or nursing auxiliary who would be brought in.

- There is a prescribed level of nurse to bed ratio which, if the hospital is unable to fill it, would result in nurses being brought in. There is a temporary workforce from which the Trust recruits nurses on zero hour contracts and who work on a temporary basis. If they are not available, the hospital has a number of agencies with whom they hold a contract.

- She recognised the importance of having a thorough assessment in liaison with people with know him best.

- The ratio of staff in an adult hospital would be one/four or five whereas in a children's ward it would be one/three.

- She would have expected such an assessment to have been made in the School of Dentistry although a distinction has to be drawn between dental nurses who are there to assist the dentist and nurses in conventional hospital wards.

- The Trust does employ people whose role it is to anticipate needs eg school teachers, play therapists for stimulation and distraction, for young people in an adult hospital.

- The Trust looks after patients with learning disabilities right across the adult wards.

- If the plaintiff were assessed as requiring a "specialising" need this would be done. Whilst carers who are with him all the time might know him better, staff in hospital are very experienced in dealing with adults and children with complex needs. A one-to-one service can be provided if it is needed. Whilst there may be a disadvantage at the start, the implementation of negotiation and discussion during the entire time in hospital will be adequate to meet all his needs.

- The six foot Perspex screened bed which the plaintiff now has would present difficulties in preventing access in an emergency situation and the nursing staff would have to weigh up safety issues with need issues. A proper assessment would be carried out to see what kind of bed he needs.

Conclusion

[20] I have to consider whether, given the needs of the plaintiff, the treatment chosen and claimed for and chosen by the plaintiff in this instance i.e. that provision should be made for one carer throughout his period in hospital, is reasonable. The plaintiff, or those with a responsibility for him, has a right to make a reasonable choice. Reasonableness in this context must be seen from the plaintiff's point of view.

[21] I have come to the conclusion that this requirement by the plaintiff is not such a reasonable choice of care.

[22] My reasons are as follows. First, in a hospital setting, the plaintiff cannot mandate the nature of the care that is to be given. Whilst the Trust according to Ms Creaney will work in close collaboration with patients and carers in order to agree the parameters for the care of the patient. The assessment of how to deal with a patient in a hospital setting has to rest in the last analysis with those who are in charge in the hospital.

[23] Secondly, I am satisfied from the evidence of Ms Creaney that the Belfast Trust is more than adequate to provide all necessary care in respect of this child or when he becomes an adult in partnership with discussions with his family and the care agency. I was satisfied that in order to fulfil his needs as assessed by the Trust, it will either draw staff from its own establishment or, if there is not sufficient available, it shall then revert to the nursing agencies with whom it has a contractual agreement. Thus, for example Miss Murphy herself has been an auxiliary nurse employed by the staff of hospitals in appropriate cases. I do not see why that will not happen in this instance. If one-to-one supervision is required I am entirely confident that the Belfast Trust will take steps to provide this. I do not see why the Trust would not be able to take into account the need for familiarity and continuity

and take such appropriate steps to familiarise their staff with the plaintiff's needs through the medium of close co-ordination with the care agency who are dealing with him and of course his family.

[24] The Trust has agreed, on an historical basis, to pay for two carers for 4 weeks after admission to hospital in recognition that employers do need some facility for re-organising and redeploying staff. It seems to me that that concession of one month should allow an opportunity for at least the commencement of the retraining of new staff if necessary to commence on the part of the care agency to cater for the very rare cases where he is likely to be in hospital for longer than one month. I find it difficult to believe that the *entire* team would disappear over the period he is in hospital, particularly since they will be retained for the first four weeks. I do not believe it would be a reasonable choice of care to insist that the Trust expend public money continuing to be responsible for payment for care on a 24 hour basis ad infinitum on the speculative basis that members of the team might disappear over the period of the plaintiff's hospitalisation. The fact of the matter is that there will always be a risk of new members of the team requiring to be replaced for a myriad of reasons and the vicissitudes of retraining new members of staff is an ever present danger no matter what the circumstances. Inevitably from time to time substitutes will have to be retrained on the job. I consider therefore that the PPO should provide that if the plaintiff is detained for over one month in hospital the defendant be afforded recoupment of the cost of providing two carers for the duration of that stay after the expiration of the first month. To order otherwise is not a requirement to best meet the plaintiff's needs.

Should the PPO make provision for the cost of care during the day if day care is not provided free of charge by the Trust at an adult education centre?

[25] In the course of my care judgment, at paragraph [38] I said:

> "I am also of the opinion that the overwhelming likelihood is that after he leaves school KD will regularly attend day care centres. … hence the necessity for two carers during the day will not be necessary during the periods when he will attending the day care centres during his adult life."

[26] At paragraph [46] I said:

> "On non-school/day centre days there should be two carers for all daytime care with the exception of a period of 3 hours when there should only be one carer."

[27] I make it abundantly clear that my reference to "non-school/day centre days" includes those days when for good reason e.g. the illness of the plaintiff or the school/AEC Centre being closed due to inclement weather the plaintiff is unable to attend. On such days the Trust would be responsible for costs of two carers etc when he would be at home. To that extent, and within those limitations, the PPO should make provision for such costs. The parties therefore might wish to consider including in the PPO a clause along the following lines:

> "Where the plaintiff for good and verifiable cause such as illness or inclement weather is unable to attend school or AEC or other facilities (whether operated by the defendant or some other similar organisation) where he would be in receipt of such free care as would normally be available to him at an AEC or school the defendant shall pay for the cost of normal care provided such costs are incurred."

[28] I therefore do not accept that it is reasonable for the plaintiff to propose that the PPO should pay the cost of care without making any deductions for attendance at AEC centres shifting the onus on to D to recoup that cost if free day care was provided at an AEC. I am satisfied on the evidence before me that AECs (or similar centres) are likely to be available for him to attend in the future and that the PPO must be predicated on that finding of fact by me.

Should the PPO contain:

(a) An arbitration clause?

(b) A recoupment clause to allow the defendant to recoup from the plaintiff any payments made to him in a periodical payment in respect of therapies which are unused?

(c) A clause to allow the plaintiff "carry over" unused care or therapy costs in any given year for a fixed period of years which would be held in a rolling contingency fund and spent within that fixed period.

[29] So far as the arbitration clause is concerned, Ms Higgins suggested that the arbitration clause would be couched in the following terms:

> "The action against the defendant be stayed except in the event of:
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> - A dispute between the parties arising out of the application, implementation, interpretation, variation or enforcement of the terms of this Order or its schedule in which case the party

shall have liberty to apply or to refer the matter for determination to an arbitrator where both parties consent to this course except in the event set out at (i) or (ii) below when either party may refer the amount of the periodical payment to be paid to an arbitrator to be appointed jointly by the then Chairman of the Bar Council of Northern Ireland and the then President of the Law Society of Northern Ireland to consider in accordance with his duties under the Arbitration Act 1996, whether there should be a variation of the terms of this Periodical Payments Order having regard to the relevant legal principles and, in relation to the matter as set out at (i) and (ii) below, to the reasonableness of the plaintiff's choice of residential accommodation and care in accordance with the principle is set out in Snowden v Lodge [2005] 1 All ER 581 or in the event that this case has been overruled or distinguished at the material time, to the relevant leading authority. In the absence of agreement, the costs of any arbitration shall be determined by the arbitrator.

(i) In the event of the plaintiff's care arrangements changing from a privately funded care arrangement to a publicly funded care arrangement in whole or in part.

(ii) In the event that the plaintiff is placed in a home that is not that of his family or its equivalent.

(iii) In the event that the parties cannot agree a figure for the reasonable travel allowance of a local case manager or other disputes arising from the operation of the PPO."

[30] Counsel indicated that the purpose of including this clause was to resolve disputes that may arise as to the operation of the PPO on the basis that the court has no jurisdiction to revisit the terms of its Order except in very limited circumstances under the Damages (Variation of Periodical Payments) Order 2005 and the Damages Act 1996. On that basis it is not open to the defendant to argue that it is for it to determine and where necessary construe the meaning and effect of an Order made by it.

Conclusion

[31] This novel suggestion does not appear to have any authoritative support and certainly no precedent for it was raised before me. The fact of the matter is that Parliament has laid down the very limited circumstances in which variations of these orders may be made and I do not consider that the wishes of Parliament can be sidestepped by invoking the use of an arbitrator. Moreover, I know of no circumstances in which the court has permitted an arbitrator to determine the meaning of its own decision or to construe its own provisions. It is for the court to make such determinations if necessary under a construction summons. In the absence of authority, I am not prepared to lend the courts imprimatur to such a step. I emphasise that it is well-nigh impossible to make provision for every conceivable eventuality and cost implications would inevitably follow if the services of the court were to be invoked in cases where common sense had failed to prevail.

[32] So far as the recoupment provisions were concerned counsel advocated the insertion of clauses allowing the plaintiff to "carry over" unused care or therapy costs in any given year for a fixed period of years which would be held on a rolling contingency fund and spent within that fixed period. The corollary of this was that the defendant should not be allowed a recoupment clause to allow it to recoup from the plaintiff any payments made to him in a periodical payment in respect of therapies which were unused.

[33] It seems to me that provided the PPO has set out clearly the number of therapies required in any given year, should a mishap occur e.g. the plaintiff is unwell or the treatment giver is indisposed causing the plaintiff to lose a particular therapy and the treatment giver is prepared to state unequivocally that the "lost" therapies are medically "required" to be made up, then there should be no recoupment. On the other hand if progress is such that the treatment giver does not feel it necessary to give the required treatments in any one year, the defendant should be permitted to recoup the figure. It seems axiomatic that if a given number of treatments are required then that number should be implemented even if there is a spill over from one year to the next. A classic example of this would arise when for example a treatment that has to be given in mid-December has to be adjourned until mid-January because of illness. Common sense would dictate that the defendant should not be allowed to prevent the plaintiff gaining the benefit of the short adjournment if the treatment was still required but equally so the plaintiff should not be allowed to maintain a carry over if the treatment giver felt that the lost treatment was now redundant.

[34] I consider it therefore unnecessary to set in stone in the PPO a fixed carry over concept provided the parties recognise that the operative word is therapies that are "required" in any given year.

[35] I have in an earlier judgment expressed my deep concern as to the length of time that has been expended on this case which is now approaching its second anniversary since it was opened before me. I strongly exhort the legal representatives in this matter to take all steps to prioritise any outstanding issues and bring this matter to a speedy conclusion.