[2019] IEHC 788

THE HIGH COURT

[2015 No. 10520 P]

BETWEEN

JACK HEGARTY (A MINOR SUING BY HIS MOTHER AND NEXT FRIEND JACINTA COLLINS)

PLAINTIFF

AND

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

JUDGMENT of Ms. Justice Murphy delivered on the 14th day of November 2019

Introduction

1. The plaintiff is a minor and a ward of court. The plaintiff was born on the 10th December 2014. In the hours following his birth, by reason of the negligence and breach of duty of the defendant, he suffered catastrophic injuries. A personal injuries summons was issued on his behalf on the 16th December 2015. The matter was set down for trial on the 10th March 2016. On the 11th May 2016, the defendants admitted liability for the minor plaintiff's injuries. On the 13th July 2016, an interim payment of €100,000 was approved by Cross J. The case was listed for hearing on the 25th October 2016 and on that date the case was settled and ruled by Cross J. The settlement occurred against a backdrop of impending legislation to provide for periodic payment orders for life. The settlement terms reflected this and an interim order was made for payment of a sum of €1,600,000 to include €400,000 general damages and the previous interim payment of €100,000. The payment is expressed to satisfy all the plaintiffs' claims to the 22nd October 2019. The balance of the plaintiff's claim to include claims for the cost of future care was adjourned to the 22nd October 2019.

2. On the 7th December 2016, the minor plaintiff was taken into wardship and his parents Justin and Jacinta were made joint guardians of his fortune.

3. On the 30th November 2017, the Civil Liability (Amendment) Act 2017 was passed. The heading of the bill states inter alia: -

   "An Act to amend the Civil Liability Act 1961 to provide for the award of damages by way of a periodic payments order in certain circumstances where a plaintiff has suffered catastrophic injuries".

4. Part 2, s. 2 deals with periodic payment orders by the insertion of Part IV(B) into the Civil Liability Act 1961. The new Part IV (B) sets out the law in relation to periodic payments orders in eight lettered sections appended to s. 51 of the Civil Liability Act. The Act was commenced on the 1st day of October 2018 by a commencement order contained in Statutory Instrument S.I. no 377 of 2018. On the same date the Superior Court Rules Committee made Rules of Court to provide for the operation of the new periodic payments orders law. These are contained in S.I. 430 of 2018.

5. As we shall see in 2018 and early 2019 the minor plaintiff's solicitors were focusing their attention on the hearing of the balance of the minor plaintiff's claim, which was due to be

heard on the 22nd October 2019. In short, they suggested to the defendant that a further interim payment was more appropriate than a periodic payments order. The defendant's initial reaction was that as the legislation was now in place providing for a periodic payments order, their general policy was to seek such an order. Again, as we shall see, their position on this issue evolved over the period leading to this hearing.

6. The failure to agree the process for dealing with the outstanding elements of the plaintiff's claim led the plaintiff's solicitor to issue a motion for directions, returnable before the President on the 24th June 2019. The plaintiff sought an order directing the assessment of the plaintiff's damages to proceed on an interim basis for a further three years and for further and other relief as the court may deem fit.

7. On the 15th July 2019, based on the affidavits filed in support of the motion and an opinion of senior counsel which is not before this Court, on consent, the President directed trial before a judge of the High Court on the 22nd October 2019 of the following issues: -

    (i) Whether or not the legislation itself ousts the inherent jurisdiction of the court to assess damages for the ward's needs for three years from next October without imposing the PPO regime under the 2017 Act, whether by reference to the best interests of the ward or otherwise?

    (ii) If jurisdiction is not ousted, a determination as to what are the best interests of the plaintiff herein (interim three-year assessment or PPO)?

    (iii) Whether the court is precluded by the 2017 Act from fixing an increase other than the amount specified in the HICP?

    (iv) Whether and to what extent the court retains a jurisdiction to identify a means by which indexation of the recurring payment can be achieved that would avoid the risks of the recurring compensation falling behind having regard to wage and medical inflation?

8. The court further ordered that the issues set out in its order, be reproduced in the form of an issue paper, and that the plaintiff, by Wednesday the 17th September 2019, file witness statements and the defendants, by Friday 4th October 2019, file their witness statements.

    Finally, the court approved a further interim settlement of €350,000, pending the trial of the issues. The sum was expressed to be on account of the damages which may be ultimately awarded. That sum was approved and was subsequently lodged to the benefit of the infant plaintiff's account in the Wards of Court office. Liberty to apply was granted.

9. Subsequently, an issue paper reciting verbatim the terms of the order of the President was produced on the 26th July 2019.

Background and context in which the issues were framed

10. The background and context in which the motion for directions came before the President are well set out in the affidavits filed in the motion for directions. In her grounding affidavit, Marian Fogarty, solicitor for the plaintiff avers: -

> *"I say that the plaintiff's date of birth is the 10th December 2014 and he is four and a half years of age. Following the plaintiff's birth, he acquired a hypoxic brain injury due to the negligence and breach of duty of the defendants, its servants and/or agents in the care, management and control of the infant plaintiff while under their care at Cork University Maternity Hospital within two hours of his birth on the 10th December 2014. An MRI brain scan performed on Day 5 of the plaintiff's life showed an abnormal signal in the basal ganglia bilaterally which was in keeping with a hypoxic ischaemic injury.*
>
> *As a result of suffering the hypoxic brain injury, the infant plaintiff now has features of dyskenetic and spastic type cerebral palsy characterised predominantly by motor disability and coordination difficulties.*
>
> *I say that proceedings issued on behalf of the plaintiff on the 16th December 2015 against the defendant by way of personal injury summons".*
>
> *Liability was admitted by the defendant on the 11th May 2016 and the case proceeded after that time as an assessment of damages only.*
>
> *I say that on the 25th of October 2016 an agreement was entered into between the parties and proceedings were compromised. The terms of settlement dated the 25th October 2016 are attached to the order of the High Court dated 25th October 2016. An interim settlement was approved on behalf of the minor plaintiff for a three – year period. The plaintiff's loss of earnings and future accommodation costings were adjourned. It was envisaged that at the expiration of that initial three – year period that the further damages would be assessed on either a lump sum or further interim settlement or PPO. The plaintiff has made it clear for some time, his preference for a further interim settlement.*
>
> *I further say by order of the High Court dated the 7th December 2016 the minor plaintiff was made a ward of court.*
>
> *The infant plaintiff has resided full time with his parents, Justin Hegarty and Jacinta Collins along with his sister Lucy in California since in or around the 1st January 2017. The plaintiff has been engaging in a myriad of different intensive therapies including Anat Baniel therapy, physical therapy, speech and language therapy, etc. to assist with his various disabilities.*
>
> *The plaintiff has returned home during the months of May and June 2019 specifically to undergo various assessments to prepare for his own case listed for hearing later this year and also to undergo assessments at the request of the defendant.*

The case is especially fixed for hearing before this honourable Court on the 22nd October 2019".

Recent inter partes correspondence

By email dated the 9th April 2018, this firm informed the solicitors for the defendant that the heads of claim for further assessment in 2019 would include all those set out in the schedule of items attached to the interim agreement dated the 25th October 2016, to include care, therapies, accommodation costs, equipment etc. Therefore, the defendant has been aware for over a year as to the heads of claim to be advanced at the October 2019 hearing.

By letter dated the 30th August 2018, the solicitors for the defendant wrote to this firm requesting whether it is the intention of your client to proceed by way of an interim payment. By letter dated the 11th October 2018 your deponent responded and indicated it is the plaintiff's intention to proceed by way of an interim payment for a further three years i.e. from October 2019 to October 2022.

By letter dated the 4th December 2018, this firm wrote to the defendant's solicitors indicating that the plaintiff's parents wished to go for a two – year interim settlement as opposed to a three – year interim settlement at that time. No response was received from the defendants in respect of the foregoing letters.

By letter dated the 7th January 2019, the plaintiff advised the defendants once more of the heads of claim to be advanced at the October 2019 hearing on foot of the defendant's query by letter dated the 20th December 2018. The plaintiff's letter of the 7th January also advised the defendants that the plaintiff's other claims including loss of earnings would not be advanced at the October 2019 hearing as the plaintiff would be too young at that stage for such losses to be quantified.

By letter dated the 9th April 2019, your deponent write to the solicitors for the defendant once more, stating the plaintiff's parents had requested that the forthcoming interim settlement period be extended from two years to three years.

By letter dated the 11th April 2019, the solicitors for the defendant stated 'We will take instructions as to whether we can agree to such an approach. We should signal that in light of the commencement of the PPO legislation, the general position of our client now is that there is no necessity for interim arrangements. Instead a PPO arrangement for life may be more suitable and in the best interest of the plaintiff'.

By letter dated the 16th April 2016, this firm wrote to the solicitors for the defendant highlighting that the defendant cannot unilaterally cast aside the interim agreement arrangement in place to date together with the agreement for that to continue when this matter appears before this honourable court later this year. The solicitors for the defendant were also advised that as both the defendant and the plaintiff were in the process of preparing for assessments taking place in May and June

while the plaintiff was in Ireland, it was incumbent upon the defendant to clarify its position without delay. I was also conscious that unless the matter was clarified there was a serious risk of the case being adjourned with the result that the plaintiff may not be able to continue with the treatment he has been receiving in the US.

By letter dated the 2nd May 2019, the solicitors for the defendant wrote to the deponent stating inter alia that interim agreements were only facilitated in the past because the PPO legislation was not in being. The letter states: 'The defendant no longer intends to deal with catastrophic injury cases by way of interim payments'. The defendant then proceeded to indicate that it would only be following receipt of the reports of the defendants' experts following the assessments in May that the defendant would be in a position to inform the court of its preference i.e. PPO, lump sum or interim settlement.

By letter dated the 23rd day of May 2019, the defendant was advised that the plaintiff's preference was to go for a three – year interim settlement. The solicitors for the defendants were advised that this firm has prepared and are continuing to prepare the case on the basis of an interim settlement. The defendant was advised if the defendant is suggesting that they will not consent to that then it will be necessary to apply to the High Court for directions.

By letter dated the 29th May 2019, the solicitors for the defendant wrote to this firm indicating that their preference is to proceed by way of a PPO but that they are not in a position to confirm their preference until they receive their expert reports following the assessments taking place this month. This is a contradiction as the defendant has indicated a preference not to proceed by way of interim payment.

I had understood that there was agreement between the parties that the most appropriate course of action was for the assessment of the plaintiff's damages on the basis of a further interim settlement. There was no signal or sign of disagreement in respect of this until the letter of the 11th April 2019 from the defendant's solicitors. It appears that as the PPO legislation (Section 2 of the Civil Liability (Amendment) Act 2017) was commenced on the 1st October 2018 via S.I. 377/2018 that the defendants have taken a different view and seemed to suggest that the PPO might be 'more suitable and in the best interests of the plaintiff'. It is hard to understand how the defendants came to this view without having the benefit of any current updated reports on the plaintiff. It seemed frankly that a policy decision had been taken that such cases were to proceed by way of a PPO.

I say matters are complicated somewhat by the fact that the plaintiff is currently residing in California to avail of therapies and therefore is only in Ireland until the 17th June 2019. He then will not be returning to Ireland until late September 2019 in advance of his case.

Practical difficulties with the application of PPO or lump sum

I further say that in relation to the defendant's preference for a PPO, some of the plaintiff's experts have already indicated to your deponent that they could not assess the plaintiff's requirements for the remainder of his life given his young age. Dr. Mark Beale, assistive technology expert, cannot forecast the plaintiff's AT requirements beyond three years. The plaintiff's dental expert, Dr. Jennifer McCafferty, cannot foresee his future dental requirements into adulthood as he does not have adult teeth. The plaintiff's neurorehabilitation assessor, Dr. Ganesh Bavaikatte, has indicated as the plaintiff is only 4.5 years of age, it will be difficult for him to predict, likely future areas of the plaintiff's life needs, such as educational, hobbies and interests, which can only be explored when the plaintiff is older.

Dr. Sarah O'Doherty, clinical psychologist in paediatric neuropsychology, has indicated to your deponent that in the context of a young child's ongoing brain development, it would be next to impossible to anticipate the plaintiff's future psychological requirements at this time. She is of the view that her assessment of the plaintiff at this early stage is at a basic level and will not be a great predictor of his future cognitive capacity. Mr. Aburba Chakraborty the plaintiff's care and OT expert, has indicated that given the views of the plaintiff's neurorehabilitation and neuropsychologist experts in particular, it will be difficult for him to assess the plaintiff's long – term care and OT needs. Mr. Chakraborty is of the view that such an assessment at this stage would not be reliable.

I further say that the plaintiff's mother has informed your deponent that one of the defendant's experts, Ms. Christine Kydd, care expert, has indicated to her in the course of a recent assessment of the plaintiff that she too would find it difficult to assess the plaintiff's care requirements for the remainder of his life given his young age, or words to that effect.

Difficulties with PPO legislation

As indicated in this affidavit, I believe that the best interests of the plaintiff are served by a further three – year interim award or settlement. I am reinforced in that view, by the advice that I have received and a view I formed in relation to difficulties with the PPO legislation. In particular, I have concerns about the inability to return to court in the event of there being an unexpected change in the plaintiff's needs, particularly his care needs. I am also concerned about the adequacy of the indexation provision, which I am advised may well leave the plaintiff in a position where he has inadequate funds later in life, if the matter was compromised on a PPO basis.

Best interest of the plaintiff

I say that it is my view and those of the experts that are retained for and on behalf and of the plaintiff that the plaintiff's best interests are served by proceeding on a further interim settlement. I am not in a position to prepare the case on the basis of a

lump sum or a PPO at this point. The plaintiff urgently needs funds in order to continue with the treatments that he requires in the US. Therefore, the matter should proceed and it needs to be determined by this Court, as to the basis upon which it is to proceed.

I am also instructed by the plaintiff's parents that they are strongly of the view and desire for this matter to proceed on the basis of a three – year interim settlement. The plaintiff's parents are very much involved in his treatment regime. They obviously know the plaintiff best together with his needs (both current, changing and predicted) and they strongly believe that it is in his best interests to proceed with an interim settlement. I note that the defendants apart from asserting that it is in the plaintiff's best interests to proceed by way of PPO have failed to set out any basis for that despite being requested to do so".

11. On the 20th June 2019, Patrice O'Keefe, solicitor for the defendants, filed a replying affidavit in which she avers: -

"I first wish to deal with Ms. Fogarty's averments to the effect that the defendant has already (it is said) agreed to a trial of this action, in the manner sought by the notice of motion herein.

This matter was originally listed for trial on the 21st October 2016 and an interim compromise was reached which is dated the 25th October 2016. That compromise was to provide for the plaintiff's needs for a three – year period with the matter relisted for hearing on the 22nd October 2019. With particular regard to where Ms. Fogarty's affidavit describes the intention of the parties to the settlement as being inclusive of a desire to, in effect, repeat the same methodology of compromise, I would ask the court to have regard to paras. 5 – 7 of the settlement agreement of the 25th October 2016. Paragraph 5 says: -

> *'The parties agreed (subject to the clauses below) that the claims in respect of the plaintiff's needs be dealt with by periodic payment on foot of a periodic payments order up to the adjourned date; if legislation establishing a legal basis for same, has been enacted and commenced in this jurisdiction, by that date, the amount of such periodic payments order to be agreed between the plaintiff and the defendant or, in default of such an agreement, to be determined by the court'.*

Paragraph 6 of the settlement agreement says: -

> *'If, by the adjourned date, legislation for such orders shall not have come into effect, the plaintiff shall in default of agreement between the plaintiff and the defendant, be entitled to proceed, on the adjourned date, with the balance of his claim not covered by the payment of the sum provided for in para. 2, the amount thereof to be determined by the court in the traditional manner and on the basis of the law as it stood in October 2016.*

Paragraph 7 says: -

> *'Whether or not legislation for PPO's has come into effect by the adjourned date, in the event that the plaintiff reasonably concludes that by virtue of changes in the applicable law (whether relating to PPO's, taxation, damages or any other matter whatsoever), his entitlements to compensation under the law as it stood in October 2016 are superior to his entitlements under the law on the adjourned date, the plaintiff shall be entitled, on the adjourned date, to apply to have his damages assessed in the High Court, on the basis of the law as it stood in October 2016 giving full credit for damages already paid in October 2016.*

I set out the above, because I respectfully say the contents of Ms. Fogarty's affidavit regarding what was said to be the intention of the parties in October 2016 is not accurate. I believe the above paragraphs show that: -

(a) The intention was to proceed by periodic payment order in line with the then – expected legislation providing for same but that

(b) If that legislation had not come into effect then,

(c) That plaintiff could opt for a lump sum award and,

(d) In all cases and in any event, the plaintiff was entitled to consider whether or not changes in the law had rendered his rights in October 2019 inferior to those in October 2016.

I respectfully say that the above is important in that Ms. Fogarty swears that the defendant has, in effect, acted to 'unilaterally cast aside the interim agreement in place to date together with the agreement for that to continue when this matter appears before this honourable court later this year'. There was no such agreement as Ms. Fogarty sets out to, in effect, continue with another three – year (or alternative period) interim compromise. It is correct that on the 15th August 2018 this office wrote to the plaintiff's solicitors as set out . . . asking whether it was the plaintiff's intention to proceed by way of an interim payment. I respectfully say that whereas this question was asked, it occurred prior to the legislation governing PPO's, which legislation is referred to in the following paragraph of this affidavit.

The court will be aware that the Civil Liability (Amendment) Act 2017 inserts a new Part IV (B) entitled 'Periodic payment orders' in the Civil Liability Act 1961. This was commenced with effect from the 1st October 2018 in accordance with the Civil Liability (Amendment) Act 2017 (commencement order 2018 (S.I. 377 of 2018). In addition, O. 1 A of the Rules of the Superior Courts, 1986 was amended to take account of the above by the Rules of the Superior Courts (Personal injuries: periodic payments orders 2018 (S.I. 430 of 2018). As matters stand the above provides for a court - where awarding damages – to decide to order the whole or

part of damages that relate to various heads of claim to be paid by the defendant in the form of periodic payments as an alternative method of assessment of damages to that done by way of lump sum.

The State Claims Agency is the indemnifier for the defendant in this matter. Over the past number of years, the Agency has adopted the practice of entering into interim settlement agreements of the kind entered into in this case in 2016 under which, in general, payments were made for various categories of past loss and the assessment of future loss was adjourned to a future date, varying in duration from two to ten years. These agreements were entered into with plaintiffs whose representatives/guardians wished to do so in anticipation of expected PPO legislation and for the purpose of preserving the option of future loss being compensated by way of PPO's once the legislation was enacted. The agreement entered into in this case on the 25th October 2016 is a typical example of such agreements.

I respectfully say that now that this legislation is in place, the methodology for assessing damages will be either through the traditional means of a lump sum award or by means of PPO awards under and in accordance with the legislation, as the courts may decide.

I understand, however, from Ms. Fogarty's affidavit that the plaintiff's position (as informed properly by those experts instructed on behalf of the plaintiff in respect of assistive technology, dentistry and neurorehabilitation) is that the plaintiff's case cannot be appropriately tried under either the legislative regime set out above or on a lump sum basis, because the plaintiff's needs are not fully understood. Ms. Fogarty also says that the plaintiff's care expert would 'find it difficult' to assess the plaintiff's care requirements for life at this stage. I also understand that the plaintiff is presently in the United States which gives the plaintiff difficult in undergoing the necessary assessments for the 22nd October 2019.

Subject to whatever order may be made by the court on this application, one matter that will fall for consideration is the efficacy of an unconventional form of treatment upon which substantial sums are being expended on the plaintiff's behalf. The therapy which is very expensive, is known as Anat Baniel therapy. The plaintiff and his family have moved to California to facilitate the plaintiff receiving this therapy in California. This form of therapy appears to be premised on a theory of brain plasticity. To the defendant's knowledge, none of the plaintiff's doctors have prescribed this form of treatment and nor has any medical basis for same been set out nor, indeed, a medical basis for same to be provided for in California rather than in Ireland where, I understand it is available. This is not a recognised form of medical therapy and to my knowledge (and subject to correction) is not recognised by any national health service provider. There appears to be no scientific evidence establishing that this form of therapy confers any benefit to disabled persons over and above conventional medical therapies including physiotherapy, occupational

therapy and speech and language therapy. This is particularly important because para. 30 of Ms. Fogarty's affidavit appears to say that the immediate need for funds arises to continue this form of therapy in the United States.

As appears from the interim agreement of the 25th October 2016, the defendant specifically reserved its position regarding this therapy. This was on the basis of advice that it had received from Dr. Nicola Ryall consultant in rehabilitation medicine. Dr. Ryall is a leading Irish specialist in rehabilitation medicine based in the National Rehabilitation Hospital in Dun Laoghaire. Ms. O'Keeffe then exhibits her report.

On the basis of this advice, and such limited information that the defendant has at present regarding Anat Baniel therapy and subject to such further information that may be obtained from further investigation, it is likely that the defendant will object to the plaintiff's compensation being assessed on the basis of the cost of this therapy and that the court will therefore be asked to adjudicate on the question of whether the cost of such therapy is recoverable.

The court, of course, should be made aware (if not aware already) that prior to the introduction of the PPO legislation Barr J. held in Miley v. Birthistle [2016] IEHC 196 that a jurisdiction existed both in O. 36, r. 34 (of the Rules of the Superior Courts) and pursuant to the inherent jurisdiction of the court to accede to an application by the defendant (where the State Claims Agency was the indemnifier) to adjourn a trial on the condition that the defendant pay the plaintiff sums to cover the plaintiff's needs for the adjournment period – i.e. the obligation to compensate was the condition of the adjournment sought by the defendant. The judgment of Barr J. on 19th April 2016 records the arguments of the parties and the authorities relied on and I expressly refer to this for the full information of the court.

Ms. Fogarty also refers to misgivings that the plaintiff is said to have regarding the legislative regime for PPO's now introduced. I respectfully say that this would be a matter for the trial judge when the matter falls for consideration. In any event, as I understand Ms. Fogarty's affidavit, it is that the plaintiff's long term needs are simply not known for the purposes of any kind of long term assessment of damages, whether by way of a PPO or a lump sum award.

12. The application for directions appears to have come before the President on the 24th June 2019 and certain submissions were made to the President, which are not before this Court. Following those submissions, a further affidavit was filed by the plaintiff's solicitor on the 27th June 2019. The main purpose of the affidavit as stated at para. 3 was to further the submissions made to the court on the 24th June 2019. Under the heading "Terms of motion" Ms. Fogarty avers as follows: -

"The motion that issued on behalf of the plaintiff sought to have a determination as to whether or not the court has jurisdiction to order the assessment of damages to proceed by way of interim settlement as opposed to a PPO (as provided for under

Part 2 of the Civil Liability (Amendment) Act 2017 which was commenced by S.I. 377 of 2018 with effect from the 1st October 2018), or a traditional lump sum. If the court determines it did have such jurisdiction, it was suggested that the court might then determine the basis upon which it could exercise this jurisdiction. The defendant appears to accept the court has jurisdiction to order the further assessment of the plaintiff's damages by way of further interim settlement. I say this as firstly the defendant has invoked expressly the Miley case in the replying affidavit and secondly, they did not suggest otherwise in the course of submissions to this Court on the 24th June 2019. The basis upon which the jurisdiction can be exercised pursuant to Miley, appears to your deponent to be what would be in the best interests of the infant plaintiff. The plaintiff's position is that the quantum experts cannot predict what the plaintiff's requirements are beyond the next three years. During the course of submissions before this honourable court on the 24th June 2019, it was observed that the defendant's experts must be similarly constrained or otherwise a contrary view would have been expressed in their affidavit. It was not, nor indeed was there any submission by the defendant to the effect that their quantum experts could predict the lifelong requirement of this plaintiff.

Defendant's policy decision

Notwithstanding the foregoing, I understand that the defendant as instructed by the State Claims Agency, has made a policy decision as alluded to before this honourable court on the 24th June 2019 that they require all catastrophic injury cases such as the plaintiff's case, to proceed by way of PPO under the Civil Liability Act legislation.

I referred briefly in my first affidavit to the deficits in the PPO legislation. I now do so in fuller detail below because of the apparent insistence of the defendant to impose a PPO on the plaintiff, notwithstanding what is set out above. I say and believe and am advised by counsel that the PPO legislation is unconstitutional. Therefore, I confirm that I have sent a copy of the motion and affidavits that have been exchanged to date, together with this affidavit to the Attorney General's office so that he can be put on notice of same.

Difficulties with PPO legislation – indexation

As I understand the decision in the case of Gill Russell v. HSE, the plaintiff is entitled to be compensated in full for the injury, loss and damage he sustained. The Russell decision led to a change in the real rate of return for the purposes of ensuring that a plaintiff was compensated in full. My concern is if this plaintiff accepts a PPO, he will not get full compensation in accordance with the Russell decision, but rather he will be left undercompensated. I say this because of the indexation provisions that are provided for in the legislation. The PPO legislation provides that the annual amount to be paid to a plaintiff under the terms of a PPO is to be index linked to the harmonised index of consumer prices (HICP) as published by the CSO or to such other index as is designated by regulations made by the Minister. The

difficulty with the foregoing is that the HCIP does not measure cost of increases in the cost of medical appliances or care workers' earnings which form major aspects of the plaintiff's claim (as it does in most PPO's). In Ireland, there does not appear to be a separate index of wage inflation for healthcare workers. In the UK when PPO's were introduced initially the payments were linked to the retail price inflation. However, in the case of Thompstone v. Thameside and Glossop Acute Services NHS Trust (2008) 2 ALLER 537, the English Court of Appeal accepted that the appropriate index to use to calculate the annual increase of periodical payments for care is ASHE 6115 and not the retail price index. This is because ASHE 6115 relates specifically to wages paid to care assistants and home carers. The net effect of the Irish position of applying HICP is that the indexation will result in a diminution of the value of the plaintiff's ability to pay for his care and other requirements into the future. This is a real problem in that I fear that this plaintiff if he has a PPO imposed on him, will arrive at a point where he will not be in a position to pay for the carers who will be required to assist him in his activities of daily living, such as getting him up, getting him dressed, washed, fed and so on. The plaintiff's compensation will run out.

The genesis of the PPO legislation is a report prepared by a committee chaired by Mr. Justice John Quirke (and subsequently chaired by Ms. Justice Mary Irvine) which was delivered to the government. The Working Group on Medcial Negligence and Periodic Payments Report was published on the 29th October 2010 and made an express recommendation in respect of indexation as follows: -

> *'Provision within the legislation must be made for adequate and appropriate indexation of periodic payments as an essential prerequisite for their introduction as an appropriate form of compensation. In particular, the Group recommends the introduction of earnings and costs-related indices which will allow periodic payments to be index-linked to the levels of earnings of treatment and care personnel and to changes in costs of medical and assistive aids and appliances. This will ensure that plaintiffs will be able to afford the cost of treatment and care into the future. The Group further believes that the competence and independent status of the Central Statistics Office uniquely qualify it to compile and maintain the indices required;'*

The Group also recorded at p. 32: -

> *'The Group is of the view that an earnings related index, similar to the ASHE SOC 6115 index applied in the UK, must be established in this jurisdiction to assist in quantifying changes over time in levels of care cost'.*

It is clear from the above report that the Working Group had consultations with the CSO. From those consultations it was clear that data could be collected by the CSO to provide for such an index as was recommended. This has not occurred.

My firm has been concerned for some time about the issue about the appropriate indexation that would apply to PPO's. Therefore, whilst the legislation was being drafted my firm sought under the Freedom of Information Act details of the advice received by the State which would form the basis for the selection of the index. This ultimately led to a disclosure of a report commissioned by the state from Towers Watson in March 2014.

I refer in particular to p.43 para. 5.4.3 of the Towers Watson report which states as follows: -

> *'We believe that there may be an option to use a more simplified formula based on CPI/HICP or CPI/HICP + a fixed percentage indexation. There may be some loss of precision in the result from year to year when compared to the draft legislation. We believe that the data underlying the construction of a bespoke index may be so sparse as to include an unacceptable level of statistical fluctuation. Over prolonged periods there may be a mismatched indexation. As a protection, the use of a simplified index could be associated with a longer term review of the process to ensure indexed compensation is reviewed in line with the original formula. This type of review process would increase the risks being borne by the insurer to risks similar to the use of a bespoke medical inflation index. If such a review mechanism were put into effect, it is likely to have a significant impact on the insurer/reinsurer pricing'.*

This excerpt appears to your deponent to indicate that there was a recognition of the problems with HICP and that is why it was recommended that there would be HICP plus a fixed percentage. This did not occur in the legislation. The excerpt further signifies that Towers Watson opined that there would be a loss of 'precision' utilising the CPI/HICP indexation. The reference to a 'mismatch between the claimants needs and the actual claim payments as a result of the simplified indexation' confirms this concern regarding this method of indexation. I note the legislature did not see fit to apply the 'fixed percentage' to the HCIP inflation as referred to by Tower Watson to compensate claimants in some way for the differential that will exist between PPO payments over the lifetime of the claimant and the actual cost of medical expenditure incurred by the plaintiff during the same period by utilising the CPI/HICP indexation. I interpret the final sentence in the above excerpt to exhibit a level of concern for the impact that (appropriate) indexation would have on insurer/reinsurer pricing. This may be proper from the insurer/reinsurer perspective but it does not take account of the impact it would have on a catastrophically injured person.

Following receipt by the Government of the Towers Watson report, your deponent's understanding is that there was a working group established, comprising of representatives of various government departments but did not include a patient/plaintiff representative. This working group considered the matter and ultimately recommended indexation tied to HICP. The basis for the recommendation

appears to have been the requirement for certainty for budgetary purposes. That may well be appropriate for budgetary purposes, but it is hardly the sole consideration and particularly it is not the consideration that a plaintiff would bring to bear. Rather, the plaintiff brings to bear a desire to ensure that they have certainty in terms of ensuring that there will be sufficient monies to pay for their carers as they grow older.

My firm has more recently taken the advice of Dr. Shane Whelan, actuary and Associate Professor, School of Mathematics and Statistics, UCD. Dr. Whelan has advised in a similar case to the plaintiff's case that the majority of the sum that will be expended on the plaintiff year in year out, will be on care. Thus, the most appropriate indexation would be a care index but, as aforesaid, this is not what applies to the indexation set out in the PPO legislation. Dr. Whelan's opinion, is a view that I am aware that has been expressed by at least one other actuary. Dr. Whelan is an expert in this area and he gave evidence in the Russell case.

I have set out below for the court's benefit the view of Dr. Whelan regarding the deficits in the current HICP as set out in the PPO legislation. In short, Dr. Whelan is of the view that the HICP is likely to underestimate the rate of increase of both wages related to care and the increases in the costs of medical aid in the future.

The below graph highlights the inadequacies of the HICP indexation where the PPO payments utilising this indexation will lag behind the actual increases in the cost of care and appliances by about 1.5% per annum. When compounded, the PPO payments will meet less than half of the projected expenditure after 50 years. This plaintiff has, I believe a normal or virtually normal life expectancy. Thus, it is anticipated that he will live beyond another 50 years. Therefore, there is a real and significant problem that will become manifest in his later life, if a PPO is forced upon him.

In short and having regard to s. 51(L) of the 2017 Act, the idea behind the indexation to be utilised in PPO's seems to be to try it for five years to see whether or not the HICP indexation is appropriate. However, this trial experimental approach is of course at the expense of the most disabled in society including being at the plaintiff's expense, if the matter was to settle in accordance with the defendant's preference next October.

<u>Difficulties with PPO legislation – lack of provision for variation orders</u>

The second concern is in relation to the inability of a plaintiff, such as Jack Hegarty, to return to court should his condition deteriorate otherwise than was anticipated. For example, one can try and predict what payments would be required at various stages in one's life, and this may or may not be accurate. However, if there is a dramatic alteration in the plaintiff's condition, one cannot return to court. This may result in very significant increases in care costs, but there is no provision to return to court for that. As stated earlier in this affidavit, it would be very difficult given

the plaintiff's young age (4.5 years) to predict what is going to happen at future stages in his life. Therefore, there is a real risk that the damages awarded on a PPO basis may not accurately reflect what are the plaintiff's need in the future. In the Working Group report of Quirke J., it states: -

> *'The Group recommends that provision be made for the variation of periodic payments orders in certain limited circumstances'.*

Unfortunately, this recommendation did not occur in the legislation.

<u>Policy decision v. best interests</u>

Whilst in my grounding affidavit it was observed that the best interests of the infant plaintiff were paramount, it would appear from the 'policy decision' taken, that the defendant's position is to the effect, that Part 2 of the Civil Liability (Amendment) Act 2017, compels the court to invoke it, thus ignore those best interests. If it is the case that the plaintiff is obliged to go for a PPO contrary to his best interests, the plaintiff's position is that the Civil Liability (Amendment) Act 2017concerning PPO's is unconstitutional.

<u>Joinder of Attorney General</u>

Liberty is sought subject to the President's consent from this honourable court to allow the plaintiff to join Ireland and the Attorney General further to O. 60, r. 1 of the Rules of the Superior Courts to enable this issue to be litigated.

The above points in relation to the legislation may be expanded upon and I, also, pray that the court should direct appropriate further pleadings on this issue".

13. Arising from these affidavits, the President sought the opinion of senior counsel which was furnished to the court on 10th July 2019. I am told and accept, that on the basis of the evidence before him and the content of counsel's opinion, the President considered that the issue of the constitutionality of the new legislative regime was premature. On the 15th July 2019, on consent, the four issues set out at the beginning of this decision were formulated for the determination of the High Court.

14. This Court is satisfied on the basis of the evidence set forth, that the President was looking beyond the immediate needs of the ward for an interim payment and sought in the interests of the ward to have determined his wider right to a system capable of providing 100% compensation for his loss, whether under existing law or under the new statutory regime providing for periodic payment orders. It was to that end that witness statements in respect of all of the issues arising were directed to be filed, by the plaintiff by the 17th September 2019, and by the defendant by the 4th October 2019. To ensure that the needs of the ward were met, pending the resolution of the issues raised, a further payment of €350,000, as a payment on account of the damages which may ultimately be awarded in the case, was made and approved by the President.

Developments post the Presidents' Order of 15th July 2019.

15. Having been granted liberty to apply, on the 31st July 2019, counsel for the plaintiff applied to the President for a variation of his order, to provide for the simultaneous exchange of witness statements, instead of the sequential order directed on the 15th July 2019. This application was refused. On the 17th September 2019, the plaintiff filed thirteen witness statements. The first eight related to the plaintiff's treatment and ongoing care needs, most of which were referred to in the affidavits of the plaintiff's solicitor, Marian Fogarty. All of the medics and therapists are *ad idem* that it is too early in Jack's development to make an accurate prediction in relation to his long–term outcome and his future therapeutic and care requirements. At his current age of four and a half years, it is simply not possible to predict what his future needs will be, other than that they will essentially consist of care needs as well as ongoing medical interventions and therapies. The defendant's medical experts are in agreement with the plaintiff's medical experts that it is, at this stage, premature to attempt to assess the future care needs of the plaintiff.

16. In addition to witness statements from those treating the minor plaintiff, the plaintiff's solicitors have filed five statements relating to the effect and operation of the Periodic Payment Order legislation as enacted in 2017.

17. There is a witness statement from Dr. Shane Whelan who is an actuary with a Ph.D. in actuarial mathematics and who has a demonstrated interest in all areas of actuarial science.

18. The plaintiff's solicitors have also filed a witness statement from Prof. Victoria Wass, a labour economist, who has been involved in valuing personal injury claims since 1994. She has provided advice in relation to the differential between earnings and price inflation in the leading indexation trials in the UK in the context of periodical payments for care.

19. There is a witness statement from John Kay, an economist specialising in microeconomic issues, who, alongside a stellar academic career has provided expert evidence on economic, fiscal and financial issues in a wide range of countries such as England, Scotland, Australia, Hong Kong and for the European Court of Justice. He gave evidence in the High Court in this jurisdiction in the case of Gill Russell (a minor) v. HSE.

20. A witness statement has also been filed from Brendan Lynch, actuary, of Seagrave Daly and Lynch Limited.

21. Finally, the plaintiff has filed a witness statement of Richard Cropper, an independent financial adviser who specialises in providing authorised and regulated, whole of market, independent advice to recipients of personal injury and fatal accident damages in the UK. He has been involved in providing specialist independent financial advice to recipients of personal injury awards since 1993 and is involved in the preparation of expert reports with regard to periodical payments, and investment advice to the UK Courts and Court of Protection.

22. It is agreed between the parties that the witness statements of these experts constitutes evidence within the context of this case. The defendant has filed no expert evidence on the operation of the Periodic Payment Orders legislation. Nor did the defendant seek to cross–examine any of the expert witnesses whose statements were filed on behalf of the plaintiff.

23. By letter dated the 1st October 2019, the defendant's solicitors, being aware that their medical experts were in agreement with the plaintiff's medical experts wrote as follows: -

"As discussed, having regard to views which have now been expressed by our expert witnesses in these exceptional circumstances outlined (we) will agree to make a three – year payment to your client with a view to adjourning the assessment of damages herein for a further three years.

Once we are in receipt of your client's final schedule of special damages and once all of our quantum reports are to hand, our client's preference is to proceed by way of a payment on account. In effect this would mean that: -

(i) The defendant will make a payment of an agreed sum to satisfy the needs of the plaintiff for a three – year period.

(ii) The assessment of damages hearing to be adjourned for a further period of three years.

In three years' time the trial judge will be asked to assess damages from the 29th October 2019 with credit given to the defendant for any payment on account made.

In view of the above, we respectfully suggest that a hearing in October is now unnecessary because issues (i) and (ii) are now moot and issues (ii) and (iii) can conveniently be dealt with at the full quantum hearing which will take place in three years' time. A hearing on those two issues now would be premature, out of context and would serve no purpose other than to incur unnecessary costs. You might consider that and take instructions".

24. In reply, Messrs Cantillon said on the 1st October, the same date: -

"Please note the contents of your aforesaid letter mirror the contents of what you have indicated to the writer during our two telephone conversations on the 26th September last. In short, you were advised during the second telephone conversation that the plaintiff does not believe that the defendants' offer for a three – year payment to the plaintiff renders the four issues as set out in the issue paper moot. Furthermore, during that conversation you were advised that it is the plaintiff's position that the four issues still required to be determined by the court on the 22nd October next.

As discussed previously, these issues arose initially because of a policy decision taken by the State Claims Agency (and as expressed by the defendant's counsel before the

President). Moreover, when this matter came before the President last term, he stated that the issues identified in this case arise in other cases. Ultimately, therefore the President has seisin of this matter.

Furthermore, when the President ordered this matter to be set down for hearing on the basis of the four issues in the issue paper, he was aware that there had been an agreement for a payment on account in the sum of €350,000 for a further year. That agreement did not in his view make the matter moot. What you are now proposing is an extension of the payment for an additional 24 – month period which does not equate to the matters becoming moot either.

As matters stand you have since the 26th September 2019 been in possession of the plaintiff's various statements in advance of the hearing date. We have yet to receive the defendant's statements although I understand you are in possession of some of the defendant's statements already. That creates a litigious advantage in favour of the defendant and more particularly would be the case if issues (iii) (and presumably (iv)) were to be adjourned for three years as you are now suggesting.

In all the circumstances, the matter is proceeding as listed on the 22nd October next as the plaintiff requires and is entitled to a determination on the four issues as set out in the issue paper given the defendant's policy decision on catastrophic injury cases. Finally, we expect to receive the defendant's statements by the 4th October next in accordance with the order of the 15th July 2019".

25. On the 7th October 2019, the defendant furnished to the plaintiff's solicitors, the statements based on reports from four of its medical experts. Those statements were in agreement with the witness statements of the plaintiff's medical experts, namely that at this juncture having regard to the age and state of development of the ward, it is not possible to assess what his future care and medical needs would be. The defendant's solicitors stated: -

"Our client is now willing to engage in negotiations with a view to reaching a compromise on a three – year basis. With regard to the four issues set out in the issue paper, we are of the view that the matter is now moot and to seek to run the issues in this case is not a proper use of the court's time. The plaintiff issued a motion on the 6th June 2019 seeking a direction for the assessment of the plaintiff's damages to proceed on an interim basis for a further three years. Given that the defendant has now agreed to make a payment for the next three years, in our view the only issue to be determined is the issue of quantum.

With regard to issue (i) and issue (ii), given that the defendant has agreed to make a three – year payment, it is clear that there is agreement by all parties that a three – year payment is in the best interest of the plaintiff. There is no dispute.

With regard to issue (iii) and issue (iv), given that the State is agreeable to making a three-year payment, the plaintiff is essentially asking the court to make a determination in respect of something which may not be an issue in 2022.

In our view, the defendant's agreement to make a three – year payment renders all four issues moot. With respect, we really do not think that it is practical to ask the court to determine a question of statutory construction as a preliminary issue in circumstances where it may or may not be relevant to this case. Having regard to the above, we would welcome an opportunity to engage in negotiations with a view to agreeing a three – year interim payment for the plaintiff".

26. On the 10th October 2019 the plaintiff's solicitors replied: -

"Moot or otherwise – we respectfully disagree that the matters are moot, not least because it is a matter for the court to determine as to what is in the best interests of the plaintiff. The court can do so based on evidence which is now being exchanged.

If you have any application to adjourn this matter or otherwise, you should make it on a timely basis and on a date that is suitable to the parties and the President as we have a number of witnesses lined up. (emphasis added)

27. By letter dated the 15th October the defendant's solicitors wrote again, stating: -

"Dear Sirs,

We refer to our exchange of correspondence regarding the preliminary issues which are specially fixed for hearing on the 22nd October 2019.

We remain of the view that the preliminary issues are now moot, given that the parties are agreed that this matter should be dealt with on an interim basis for three years. There is also no question of a PPO arising for those three years.

In light of your request by letter dated the 10th October 2019, that we raise the matter with the court, prior to the hearing date, in ease of the parties, we propose making application to Cross J. at the call over on the 17th October to have the matter taken out of the personal injury list on the 22nd October 2019".

28. The court notes that in this correspondence the defendants propose making an application to Cross J. at the call over list rather than to the President, to whom they had been invited to make any application in respect of mootness. In any event, Cross J. refused the application. Following the application before Cross J., a further letter was sent by the plaintiff's solicitors. It stated: -

"We respectfully suggest that the approach of the defendants requires clarity particularly after the concessions that were made in court during the application this morning by counsel for the defendant.

This is particularly so when some of the concessions appeared to have been rolled back from and it is entirely unclear as to what your client's position is in relation to the four issues that the President directed be heard. Would you please clarify what your approach to the issues are? Are you conceding the position or not? Please respond to this query.

Secondly, we have furnished you with various statements outlining the expert evidence to be given on behalf of the plaintiff at the hearing. Would you please let us know whether or not, the contents of any of these statements are admitted? If so, it will obviate the necessity for those witnesses to attend. If they are not admitted, then we are advised by counsel that the witnesses will have to attend to prove the content of the statement.

Given the proximity of the trial, we request that you respond as a matter of urgency".

29. That letter was responded to by way of letter dated the 18th October from the defendant's solicitors. Having referred to the mutual attendance in court before Cross J., the letter states: -

"For the avoidance of doubt, you might please note that the defendant is not disputing that the plaintiff has long term care needs. Furthermore, the defendant does not dispute issue (i) and agrees that the legislation does not oust the inherent jurisdiction of the court to assess damages for the ward's needs for three years from next October without imposing the PPO regime under the 2017 Act, whether by reference to the best interests of the ward or otherwise.

Issue (ii) – that a three – year interim payment/payment on account for three years is in the best interest of the plaintiff.

Given that these issues are no longer in dispute, we do not see any basis for requiring the plaintiff's medical witnesses to attend court on Tuesday, 22nd October next.

With respect, issues (iii) and (iv) are matters of law and statutory interpretation. In the first instance, we remain of the view that the issues are moot and should not be determined by the court on the 22nd October. Furthermore, and in any event, we are also of the view that the evidence of economists, financial advisors, actuaries or accountants has no relevance whatsoever to issues (iii) and (iv) which are essentially matters of statutory interpretation.

We remain of the view that it is imprudent and inappropriate for the court to embark upon the interpretation of statutory provisions in a vacuum and without any evidential or factual context".

30. The final letter in this series of correspondence was sent by the plaintiff's solicitors and stated: -

"Thank you for your letter of the 18th inst., and for clarifying the issues in relation to issues (i) and (ii). We would hope to be in a position to cut down on medical evidence and therapeutic evidence and we will take advice from counsel as to the extent of which the medical evidence and therapeutic evidence can be omitted.

With regard to the penultimate and ultimate paragraphs of your letter, these matters were ventilated before Cross J. yesterday and we think it would be disrespectful to second guess the court's determination and if we may say so it is somewhat disrespectful of the defendants to attempt to do so. The court has made a ruling and it should be respected.

We will be calling economic and other experts who will be giving evidence in accordance with their statements. If there are matters within the statements that can be agreed by you, please do so now".

Mootness and irrelevance of economic/actuarial evidence

31. The President, exercising his jurisdiction as protector of this ward, directed that four issues be determined. In formulating the issues to be determined, he had before him affidavit evidence questioning the capacity of the new legislative scheme to deliver to a plaintiff who has suffered a catastrophic injury, 100% compensation for his loss. The issues which arose on the application for directions, are clearly wider than the initial order sought on behalf of the minor plaintiff. At the end of his order, the President gave liberty to apply. If the defendant considered that the entire application had become moot, or that the witness statements directed by the President to be served had become irrelevant by reason of developments post the making of the order, then it was for the defendant to apply to the President, pursuant to the liberty to apply granted in his order, for a direction that all the issues which he had directed to be determined were now moot, or alternatively, that the evidence filed in respect of the issues was no longer relevant.

32. The court during the hearing asked defendant counsel why application had not been made to the President. No satisfactory answer was received. The court indicated that it was willing to afford the defendant an opportunity to make application to the President, but this was declined. The court is not prepared to gainsay the President's order and will proceed on the basis that the issues raised by him to be determined by the High Court are not moot and that the evidence referred to in the plaintiff's affidavit of the 27th June 2019 and substantiated by witness statements filed on the 17th September 2019 is not irrelevant to the issues fixed to be determined by the President.

The court's jurisdiction at common law

33. The common law jurisdiction of the High Court has been fully set out in two recent decisions. The first is the decision of the High Court and Court of Appeal in *Russell (a minor) v. the HSE* [2016] 3 IR 427 and *Miley (a minor) v. Birthistle* [2016] IEHC 196.

34. The common law system for compensating plaintiffs who suffer catastrophic injuries is to provide the plaintiff with a lump sum which, when invested, will fully meet the plaintiff's future care needs. As stated by Irvine J. at para. 64 of the Russell judgment: -

> *"In making an award of damages for pecuniary loss, the court must pursue the objective of providing a plaintiff with full 100% compensation for all of his or her probable future financial loss. In catastrophic injury cases, such as the present one, that part of the plaintiff's claim will inevitably include a claim for loss of earnings, the cost of aids and appliances and the cost of future care".*

35. The defendant in that case submitted that the court in determining the amount of compensation payable, should have regard not merely to the likely effect that the award might have on the defendant, but also on society at large. Reference was made to the likely effect of increased awards on public policy, the insurance industry, the State's finances, as well as the defendant's constitutional rights to private property and the principle of proportionality. The court roundly rejected those submissions, and at para. 66 of the judgment of Irvine J. states: -

> *"It is thus of vital importance to state, in no uncertain terms, that it is mandatory for the court to approach its calculation of future pecuniary loss on a 100% basis regardless of the economic consequences that the resultant award may have on the defendant, on the insurance industry or on the public finances. It is acknowledged that it is equally important that the sum awarded does not over compensate the plaintiff and that the defendant is given every opportunity to contest each integral component of the final award. Public policy has no part to play in the assessment of damages of this nature. If large awards in respect of claims of this nature have an adverse effect on insurance premiums or place pressure on the pockets of State defendants, that is not something that the court can take into account and, as a result, in some way moderate or reduce its award. The damages so awarded are, after all, destined to do no more than restore a plaintiff in financial terms to as close a position as they would have enjoyed in terms of wealth and independence had they not been the unwitting victim of the defendant's wrongdoing".*

36. The question at issue in the Russell case was the rate of return on lump sum investments. The plaintiffs argued that a plaintiff who was entitled to 100% compensation was entitled to have his lump sum calculated by reference to the most risk averse investments so as to ensure that the fund would meet the future care needs of the plaintiff, for his projected lifespan. The court accepted the plaintiff's arguments and held that a catastrophically injured plaintiff was entitled to seek to preserve his/her funds by investing in the least risky investments such as index linked gilts and securities. Because of the lower risk of such funds, the return is also lower.

37. In the course of its deliberations, the court heard evidence from Dr. Shane Whelan, who has also provided a witness statement on this hearing, and Prof. John Kay, economist, who too has provided a witness statement for this hearing, on the occurrence and effect of wage inflation in respect of a lump sum award. The Court of Appeal held that the learned High Court judge was clearly entitled to conclude on the evidence before him, that wage inflation in general, would over the period of loss, exceed the consumer price

index at a minimum of 1% and that if no adjustment was made to reflect this, the plaintiff would not receive full compensation.

38. On the basis of the evidence, the Court of Appeal concluded that the High Court was correct in concluding that the appropriate rate of return for the least risky investment in ILGS's was 1.5% and that a real rate of return of 1%, was appropriate in calculating future care needs, by reason of the finding that wage inflation is higher than the general inflation represented by the consumer price index.

39. In its extremely detailed and reasoned judgment, the Court of Appeal acknowledged that lump sum awards in respect of catastrophic injuries are a crude instrument which can give rise to injustice to a plaintiff or a defendant. It is I think worth repeating the observations of Irvine J. at the commencement of her judgment, where she stated as follows: -

> *"Before moving to consider the issues raised for the Court's consideration on this appeal, it is apposite to state that there is a major structural flaw in the present system which requires the court to assess, on a once off basis, the sum of money required to compensate a plaintiff with catastrophic/lifelong injuries for all of their future pecuniary loss. It is highly regrettable that, regardless of the outcome of this appeal, it is absolutely certain, that whatever award is made will visit an injustice on one or other party. The only issue will be extent of that injustice.*
>
> *While it is helpful that for the purposes of this litigation that the plaintiff's life expectancy has been agreed i.e. to the age of 45 years, it is inevitable that the parties' prediction in this regard will be wrong. The system will prove itself enormously wasteful should Gill not achieve his anticipated life expectancy, as in such circumstances he will have been over compensated. Regrettably, the converse scenario will also produce an injustice in that, if he outlives the agreed life expectancy, he will run out of money in the course of his lifetime, assuming that the annual sum awarded in respect of his care is spent each year. The greater the inaccuracy of the agreed predicted life expectancy, the greater the potential injustice.*
>
> *To state that the current law in this jurisdiction, which requires the court to award a lump sum intended to compensate a plaintiff for all past and future losses, and in particular future pecuniary loss, is inherently fallible and unjust cannot be disputed. It is also grossly outdated by reference to the approach now adopted by the courts in other Common Law and Civil Law jurisdictions. The reasons why this approach to the assessment of damages should be abandoned have been advanced and discussed in many reports published in this jurisdiction and elsewhere, going back many decades. Likewise, there is a substantial body of case law lamenting incorrect mortality and other predictions which result, at times, in either excessively generous awards to plaintiffs with the corresponding short changing of defendant or the opposite.*

The report of the Working Group on Medical Negligence and Periodic Payments ("the Working Group") chaired by Mr. Justice John Quirke, published on 29th October, 2010, is one which explores in significant detail the difficulties of achieving the objective of compensation within our law, having regard to matters such as the degree of uncertainty affecting the estimation of life expectancy, the future fluctuation in inflation levels likely to affect the accurate calculation of future pecuniary loss and the risks to which the investment of lump sums may be exposed.

The Working Group unanimously urged the government to legislate so as to enable the courts to move away from the assessment of damages by way of a once off lump sum and instead award damages by way of Periodic Payment Orders ("PPOs"), whether consensual or otherwise, in catastrophic injury cases where long term permanent care would be required.

As far back as 1972, the Committee of Inquiry into the Insurance Industry, in its interim report, observed the injustice meted out to a plaintiff who lives longer than expected under the present system. The shortcomings of the system also attracted the attention of the Law Reform Commission. In its report on Personal Injuries' Periodical Payments and Structured Settlements (LRC 54-1996), it referred to an additional concern, namely the ability of certain plaintiffs to deal with large sums of money in a manner that would ensure that their fund was not dissipated quicker than intended.

Nicolas Bevan, in The New Periodical Payments Regime [2005] 2 Civil Court News 36, summarised the position extremely well when he stated as follows: -

> *"The inherent fallibility of the 'snapshot' approach to valuing a plaintiff's future loss has been widely considered. It is generally accepted that the multiplier/multiplicand approach is almost guaranteed to miss the mark of fair and just compensation; it is usually Providence and not Science that decides whether the lump sum leaves a plaintiff unjustly enriched or under compensated."*

The Working Group went on to conclude that the English system of compensation by periodic payment order represented the most modern and effective model for the payment of ongoing care and associated costs in personal injuries actions, a conclusion consistent with the views expressed repeatedly in the reports of successive committees and commissions established by governments within this jurisdiction and elsewhere over the last forty years. This system has been in place in the UK since 2003 and was deemed by the Working Group to be the most appropriate comparator against which to measure any proposed change required within this jurisdiction to address the problems identified in the lump sum award system.

It is noted that, in May last, a general scheme of a Civil Liability (Amendment) Bill 2015 was finally published by the Minister for Justice, Equality and Law Reform, the expressed intent of which is to provide for damages to be awarded in the form of periodic payments to persons suffering catastrophic injuries, and that the draft measure is at present undergoing pre-legislative scrutiny by the Oireachtas Joint Committee on Justice, Defence and Equality.

The sad fact of the matter is that the parties to this litigation would not likely be in the position in which they find themselves today if that legislation were on the statute books. Particularly given that in October, 2012, the proceedings were adjourned for 2 years on the basis of an agreed interim payment in the hope that the relevant legislation would be forthcoming. Regrettably, it is not and the High Court had no option but to proceed to finalise this claim by making a lump sum award of damages to cover all aspects of the plaintiff's loss. The PPO regime would have removed all of the risks central to these proceedings including those which relate to life expectancy predictions and the likely return on various types of investments in international markets over the next several decades.

While mindful of the doctrine of the separation of powers, this Court is nonetheless satisfied that it would be remiss of it, in the context of this appeal, not to express its concern with the manner in which it is obliged to approach its current task. Accordingly, it would urge the Oireachtas to bring to an end, by legislative reform, the potentially unjust manner in which the court is presently required to assess damages for future pecuniary loss in catastrophic injury cases"

Interim awards

40. Partly because the legislative introduction of PPOs has been anticipated for almost a decade and partly because, commendably, the State Claims Agency has in recent years, conceded liability where such a concession is warranted, more promptly than heretofore, the phenomenon of interim payments in catastrophic injury cases has emerged. Where, as in this case, a new-born child suffers catastrophic injuries, his needs are immediate and continuing, but years could elapse before it is possible to take the "snapshot" referred to by Irvine J., to allow his lifetime needs to be assessed, for the purposes of making a lump sum award.

41. In the instant case, the court notes that the minor plaintiff's neuropsychologist has expressed the view that the minor plaintiff's brain development will not be complete until the age of 20, leaving a possibility that a final lump sum award would be premature before that age. Conversely, as happened in Miley, a beneficial therapeutic intervention might be available, which if successful, would reduce the level of future care required with a consequent reduction in the costs of future care. Where uncertainty exists for whatever reason, the High Court has been approving interim awards.

42. An interim award is a lump sum award designed to meet a plaintiff's needs for a specified period. It can as in this case, include a payment in satisfaction of a plaintiff's claim for general damages, as well as losses incurred to the date of settlement, in addition to the

costs of care for the specified period. Such payments are sometimes referred to, somewhat confusingly, as "periodic payments" but they have nothing in common with the periodic payment orders, now provided for in our legislation.

43. The issue of the court's jurisdiction to approve interim payment orders was comprehensively addressed in the High Court decision of *Miley v. Birthistle*. In that case the minor plaintiff through his next friend, sought a final lump sum award and as an element of his claim, was seeking the cost of two carers for his lifetime. The defendant maintained that a behavioural management therapy recommended for the plaintiff, might reduce the minor plaintiff's care needs to one carer into the future, and sought to make an interim payment pending the outcome of the behavioural management therapy, so as to ascertain with greater certainty, the plaintiff's future care needs. The plaintiff opposed the application and in doing so, relied on the obiter statement of Cross J. in Russell, that: -

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

44. Barr J., having set out the facts, reviewed the jurisprudence on the issue of the court's jurisdiction to direct an interim payment, including, *Corroon (a minor) v. Pillay's General Hospital Limited* (Unreported, Barton J., 29th October, 2014), *Grace O'Neill (A Minor) v National Maternity Hospital* [2015] IEHC 160, *North Western Health Board v. W. (H)* [2001] IESC 9, *Gillick (A Minor) v. Children's University Hospital* (Unreported, High Court, 12th April, 2016) and *O'Mahony (A person of unsound mind not so found) v. Southern Health Board* (Unreported, Moriarty J., 7th November, 2014). He considered both the inherent jurisdiction of a court to adjourn in order to do justice and the specific jurisdiction conferred by Order 36. R.34 which provides: -

> *"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".*

45. He concluded at para. 67 of his judgment: -

> *"I am satisfied that O. 36, r. 34 is sufficiently wide in its terms to give the court jurisdiction to adjourn a case in the circumstances which arise here. Even if I am wrong in that, I am satisfied on the basis of the decisions in O'Neill v. National Maternity Hospital and Gillick v. Children's University Hospital, that the court has an inherent jurisdiction to grant an adjournment of portion of a hearing if that is necessary in order to do justice in the case.*
>
> *The defendant argues that the plaintiff's need for two carers is based on his anticipated behaviour problems in adulthood. It is submitted that when the plaintiff undergoes*

behaviour management therapy, this may bring about a marked improvement in his behaviour, such that he may not require two carers. I am satisfied, from the content of the plaintiff's medical reports and the defendant's reports, that where the plaintiff has had therapy over a consistent period in the past, there has been improvement in his behaviour.

Furthermore, it seems to be accepted by the medical and care experts, that the plaintiff will have to be reviewed again in the future to finally assess his cognitive and behavioural progress and his consequent care needs.

It is reasonable to assume that improvement may be achieved in the future, when he has behaviour management therapy on a regular basis. In those circumstances, it seems to me that there would be a real risk of doing a grave injustice to the defendant to force the action on and to award a lump sum in damages for future care costs at this time, without giving the treatment which has been advised for the plaintiff, a chance to work. Where there is such a large discrepancy in the cost of future care, depending on whether there are two carers or one, it is necessary in the interests of justice that an adjournment should be granted to see if the behaviour management therapy will result in substantial improvement in the plaintiff's behaviour.

I am satisfied that where therapy has been recommended for the plaintiff, which will be undertaken in the near future, and which may have a profound effect on the level of care needed by the plaintiff and where the success or failure of this treatment will be known in a relatively short period and where the difference in the amount of future care costs is of the order of €9,000,000, these are exceptional circumstances which justify the court in granting an adjournment on terms to enable this issue to be clarified.

I am further satisfied that it will only be when the behaviour management therapy has been undertaken for a reasonable period, that the plaintiff's future care needs will be finally crystallised. It is in the interests of justice to adjourn further consideration of that issue until the treatment has been undertaken for a reasonable period."

46. In *Miley v Birthistle*, the only element of the plaintiff's claim that was adjourned was the question of the plaintiff's future care costs. The court assessed the plaintiff's therapy and care costs for the period of the adjournment as well as other heads of claim that could be dealt with at that time.

47. Thus, the current position at common law may be summarised as follows:

    I. A plaintiff who suffers catastrophic injuries is entitled to be compensated to the extent of 100% for the loss and damage occasioned by the tortious wrong done to him;

II. Damages are paid by way of a once – off lump sum award calculated by reference to the plaintiff's lifetime needs established as a matter of probability;

III. Where there is real uncertainty as to the nature and cost of a plaintiff's future needs the court has an inherent jurisdiction to adjourn the consideration of a plaintiff's future needs and to make an interim award covering the plaintiff's established needs for the adjourned period. The interim award is a lump sum award based on the plaintiff's actual needs for the adjourned period. It can include payment of other ascertained items, such as losses already incurred, and a sum for general damages.

IV. Finally, the court notes that in this case and in others, payments on account have been approved and made. These differ from an interim payment in that they do not finally determine the damages due for a specific period, but are rather a down payment against the ultimate liability, when ascertained. These payments on account appear to the court to be within its common law jurisdiction on the same basis that interim payments have been held to be.

Statutory scheme for periodic payment orders under the Civil Liability Act 2017

48. As already stated the amendment to the Civil Liability Act 1961 to provide for periodic payments orders was commenced by S.I. 337 of 2018 and came into effect on the 1st October 2018. The new statutory scheme is inserted into s. 51 of the Act in eight lettered sections from 'H' to 'O'. 'H' is the interpretation section and *inter alia* defines catastrophic injury as follows: -

"'catastrophic injury' means, in relation to a person, a personal injury which is of such severity that it results in a permanent disability to the person requiring the person to receive life-long care and assistance in all activities of daily living or a substantial part thereof";

49. There is no dispute in this case that the injuries sustained by the minor plaintiff meet the definition of "catastrophic injury". Furthermore, there is no dispute in this case that the major component of the ultimate award to the minor plaintiff will consist of compensation for the future care needs of the plaintiff, the future costs of medical treatment, and assistive technology or other aids.

50. Section 51I sets out the provisions in respect of the award of damages by periodic payments. It provides as follows: -

"(1) Subject to subsection (2) and section 51J (which deals with the security of periodic payments), where a court awards damages for personal injuries to a plaintiff who has suffered a catastrophic injury, the court may order that the whole or part of such damages which relate to—

(a) the future medical treatment of the plaintiff,

(b) the future care of the plaintiff,

(c) the provision of assistive technology or other aids and appliances associated with the medical treatment and care of the plaintiff, and

(d) where the parties consent in writing, damages in respect of future loss of earnings, be paid by a defendant in the proceedings concerned in the form of periodic payments to the plaintiff in such amounts as the court may determine (in this Part referred to as a 'periodic payments order')".

(2) In deciding whether or not to make a periodic payments order, a court shall have regard to—

(a) the best interests of the plaintiff, and

(b) the circumstances of the case, including:

(i) the nature of the injuries suffered by the plaintiff; and
(ii) the form of award that would, in the court's view, best meet the needs of the plaintiff having regard to—
(I) the amount of any payments proposed to be made to the plaintiff,
(II) whether the court has made an order in the proceedings concerned expressed to be one of an interim nature with respect to the payment of damages to the plaintiff, and where such an order has been made, the amount of such damages,
(III) the form of award preferred by the plaintiff and the reasons for that preference,
(IV) any financial advice received by the plaintiff in respect of the form of the award, and
(V) the form of award preferred by the defendant and the reasons for that preference.

(3) Where the parties to an action to which this Part applies agree to the payment of damages wholly or partly by way of periodic payments to the plaintiff in relation to any matter referred to in paragraphs (a), (b), (c) and (d) of subsection (1)—

(a) the parties may apply to the court for a periodic payments order in accordance with the terms which have been agreed by the parties, and

(b) the court may, subject to subsection (2)—

(i) make a periodic payments order in accordance with the terms which have been agreed by the parties,
(ii) refuse the application, or
(iii) refuse the application and make a periodic payments order under subsection (1).

(4) Where it is anticipated that there will be changes in a plaintiff's circumstances during his or her life which are likely to have an effect on his or her needs, a court

may make provision in a periodic payments order that a payment under the order shall, from a specified date, increase or decrease by a specified amount (in this Part referred to as a 'stepped payment').

(5) The changes in circumstances which may form the basis of a stepped payment include:

(a) a plaintiff reaching 18 years of age;

(b) a plaintiff entering primary or secondary school;

(c) a plaintiff entering third level education; and

(d) anticipated changes in the care needs of a plaintiff, including a requirement that the plaintiff move into residential care.

(6) Where a court makes a periodic payments order under this section, the order shall specify—

(a) the annual amount awarded to the plaintiff,

(b) the frequency of the payments that are to be made to the plaintiff from the annual amount by the paying party,

(c) the amount awarded for damages in respect of the matters referred to in paragraphs (a), (b) and (c) of subsection (1),

(d) where, further to subsection (1)(d), the periodic payments order includes damages in respect of future loss of earnings by the plaintiff, the amount awarded for such loss of earnings,

(e) the method by which payments are to be made by the paying party to the plaintiff,

(f) that the payments under the order are to be made to the plaintiff during his or her lifetime,

(g) that the annual amount awarded to the plaintiff will be adjusted in accordance with the Harmonised Index of Consumer Prices as published by the Central Statistics Office or such other index as may be specified by the Minister under section 51L,

(h) where a stepped payment is provided for—

(i) the change in circumstances on which an increase or decrease in the amount of a payment (referred to subsequently in this paragraph as 'the relevant increase or decrease') is based,

(ii) the date on which the relevant increase or decrease shall take effect,

(iii) the amount of the relevant increase or decrease at current value, and

(iv) that the amount of the relevant increase or decrease shall, on the date that it takes effect, be applied to the annual amount awarded to the plaintiff as adjusted in accordance with the Harmonised Index of Consumer Prices as published by the Central Statistics Office or such other index as may be specified by the Minister under section 51L, and

(v) any other matter that the court considers appropriate.

(7) Where—

(a) a court provides in a periodic payments order for a stepped payment, and

(b) prior to the date that the stepped payment is due to take effect, it is evident to the plaintiff that the anticipated change in the plaintiff's circumstances on which that stepped payment was based will not arise, the plaintiff shall, as soon as practicable and not later than 10 working days before the date on which the stepped payment is due to take effect, notify the court that made the periodic payments order and the paying party in writing that the anticipated change in the plaintiff's circumstances which formed the basis for the stepped payment concerned will not arise.

(8) Where a court receives a notification under subsection (7) from a plaintiff in relation to a stepped payment specified in a periodic payments order, the court shall amend the periodic payments order concerned by making such adjustments to the order as it considers appropriate.

(9) Where a periodic payments order is amended under subsection (8), the court shall cause a copy of the order as amended to be sent to the plaintiff and the paying party".

51. Section 51 (J) deals with security of periodic payments orders and is not relevant to the issues which the court has to determine on this motion. Section 51 (K) deals with alterations to the method of payment, and again is not relevant to the issues to be determined on this motion.

52. Section 51 L deals with the indexation of periodic payments and provides as follows:-

"(1) A periodic payments order shall provide for the amount of a payment under the order to be adjusted annually by reference to the Harmonised Index of Consumer Prices as published by the Central Statistics Office or such other index as may be specified under this section.

(2) The Minister shall, not less than 5 years after the commencement of this Part, carry out a review of the application of the index referred to in subsection (1) (in this section referred to as an 'initial review') in order to determine the suitability of that

index for the purposes of the annual adjustment of the amount of payments provided for under periodic payments orders.

(3) The Minister shall, 5 years after the initial review and every 5 years thereafter, carry out a review of the application of the index referred to in subsection (1) or such other index as may be specified by him or her under this section, in order to determine the suitability of the index concerned for the purposes of the annual adjustment of the amount of payments provided for under periodic payments orders.

(4) Subject to subsection (5), where, pursuant to an initial review or a review under subsection (3), the Minister is of the opinion that an alternative index would be more suitable for the purpose of the annual adjustment of the amount of payments provided for under periodic payments orders, he or she shall, subject to the consent of the Minister for Finance, make regulations specifying the index to be used for that purpose.

(5) In forming an opinion for the purpose of subsection (4), the Minister shall have regard to—

(a) the relevance of the goods and services on which an index is based to the loss or expenditure, including cost of care and medical expenses, for which plaintiffs who are the subject of periodic payments orders are compensated,

(b) the body calculating the index,

(c) whether or not the index is accessible at the same time or times each year,

(d) the reliability of the index over time, and

(e) the reproducibility of the index in the future.

(6) The index specified in regulations under subsection (4) shall apply to an annual adjustment of the amount of a payment to be made under a periodic payments order where the annual adjustment is made after—

(a) the date of the making of the regulations, or

(b) such later date as may be specified in the regulations.

(7) Regulations made under this section shall be laid before each House of the Oireachtas as soon as may be after they are made and if a resolution annulling the regulations is passed by either such House within the next 21 days on which that House has sat after the regulations are laid before it, the regulations shall be annulled accordingly but without prejudice to the validity of anything previously done under the regulations".

53. Section 51 M deals with the assignment, commutation or charging of a right to periodic payments and is not relevant to the issues to be determined on this motion. Section 51 N deals with appeals and in effects restricts the right of appeal from the making of a periodic payment order by providing: -

> *"An appeal shall lie from a decision of the High Court under section 51I, 51J or 51M to the Court of Appeal on a point of law only".*

54. Section 51O deals with the application of the statutory periodic payments order scheme and the instant case is clearly within the ambit of the new scheme, which provides at 51O (b) -

> *"This Part applies to personal injuries actions relating to catastrophic injuries—*
>
> *(b) that have been initiated, and have not been concluded, prior to such commencement, and the actions to which this paragraph applies include an action in which the court has made an order of the interim nature referred to in clause (II) of section 51I(2)(b)(ii).".*

55. The foregoing is the context in which the court must consider and determine the issues directed to be determined by the President, in his capacity as protector of the Ward.

Question 1

Whether or not the legislation itself ousts the inherent jurisdiction of the court to assess damages for the ward's needs for three years from next October without imposing the PPO regime under the 2017 Act, whether by reference to the best interests of the ward or otherwise.

In essence, Question 1 asks whether the new legislative regime created by the *Civil Liability (Amendment)* Act 2017 ousts the common law jurisdiction of the High Court to make a lump sum award either by way of final payment or by way of interim payment. The court is confident that the answer to this question is no. The legislation creating Periodic Payments Orders does not purport to oust or replace the existing jurisdiction of the court, nor do the express terms of the statute have that effect.

56. The introduction of statutory regulation in an area does not automatically remove, replace or adapt the pre-existing jurisdiction of the court. Precedence indicates that the courts will presume that new legislation does not interfere with existing jurisdiction unless the intention to introduce radical change is expressed in very clear terms in the legislation. In *McEnery v. Sheahan* [2019] IESC 64 the Supreme Court reiterated that legislative changes should not be presumed to alter existing jurisdiction in the absence of clear evidence. The court stated at para. 19 that: -

> *"It is a well-established principle consistent with the Act of 2005 that the legislature does not intend to change the law beyond the immediate scope and object of an enactment and that the more radical a change can be said to be; the more weight is given to such presumption. See judgment of Finnegan J. in Meagher v. Luke J.*

Healy Pharmacy Ltd. [2010] IESC 40 (Unreported, Supreme Court, 16th June, 2010) where Finnegan J. adopted with approval the statement of the law contained in the textbook Statutory Interpretation - Bennion (2nd Ed.) set forth at s. 269 which stated:

> *"It is a principle of legal policy that laws should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is'"*

57. See also *A.M. v. HSE* [2019] IESC 3 where the Supreme Court rejected an argument that its inherent wardship jurisdiction was ousted by the provisions of the Mental Health Act 2001.

58. Looking at the terms of the relevant section and in particular, s. 51 I, it is clear that the power conferred on the court to make a Periodic Payment Order is discretionary. Section 51 I(1) states: -

> *". . .where a court awards damages for personal injuries to a plaintiff who has suffered catastrophic injury, the court may order that the whole or part of such damages.. be paid by a defendant in the proceedings concerned in the form of periodic payments...."*

59. 51I (2) sets out the basis for the exercise of the court's discretion and again refers to the court's decision 'whether or not' to make a Periodic Payments Order. This subsection lists 9 criteria for the exercise of the court's discretion, the first being 'the best interests of the plaintiff'. The court is satisfied that the statutory scheme is intended to supplement the court's existing jurisdiction rather than to oust or replace it. As counsel for the defendant submitted, the new legislative scheme adds another string to the bow of the High Court. Unfortunately, for reasons set out hereunder, it is a string which may not be played as frequently as might have been hoped.

Question 2

If jurisdiction is not ousted, a determination as to what are the best interests of the plaintiff herein (interim three-year assessment or PPO).

60. Subsequent to the formulation of the four issues, the defendant conceded that in the immediate term, the best interests of this plaintiff are served by the provision of a further interim payment, for a period of three years. All of the medics on both sides, are agreed that it is simply too early to assess the future medical treatment needs of the plaintiff; the future care needs of the plaintiff; the plaintiff's future need for the provision of assistive technology or other aides and appliances associated with the medical treatment and care of the plaintiff. These are the precise needs which a PPO is meant to cover, under the legislation. It is not possible at this time, to identify or provide for the minor

plaintiff's future needs, either by means of a lump sum award or by means of a periodic payment order.

61. However, that is not the end of the matter. Three years is a short period of time, and within a year or two the issue of a final lump sum payment or a further interim payment or a Periodic Payment Order will once again raise its head. It is in this context that the plaintiff's lawyers have raised their fundamental objection to the legislative PPO scheme, namely, that the scheme as currently structured will not provide the minor plaintiff with the 100% compensation for loss, to which he is entitled.

62. Section 51(I)(6)(g) provides that where a court makes a Periodic Payment Order under this Section, '*the order shall specify – that the annual amount awarded to the plaintiff will be adjusted in accordance with the harmonised index of consumer prices as published by the Central Statistics Office or such other index as may be specified by the Minister under S. 51(L).'* The court is given no discretion in the matter. If it decides to make a periodic payments order, it must specify that the annual amount will be adjusted in accordance with the HICP.

63. The evidence before the court, that indexation of periodic payments by reference to the HICP, will result in under compensation of a plaintiff, is overwhelming. The five experts whose witness statements constitute evidence on this hearing, and whose evidence has not been controverted, are unanimous in their view that a periodic payment linked to the harmonised index of consumer prices (HICP) will not provide the plaintiff with 100% compensation in respect of his future care and medical treatment needs. In their view, the annual amount needs to be linked to a wage based index to ensure full compensation for future care needs.

64. Dr. Shane Whelan, FFA, FSAI, whose evidence that wage inflation outstrips the consumer price index, was accepted and acted upon by the High Court and the Court of Appeal in the Russell case, states: -

> *'The Harmonised Index of Consumer Prices, being a measure of general inflation, is likely to underestimate the rate of increase of both wage-related loss and the increase in costs of medical treatments and aids in the future.*
>
> *Wages have risen faster than inflation in the past by about1.5% per annum over the long term past, although with some variation around this average. It seems reasonable to assume that wages will continue to rise higher than inflation in the future. I am of the opinion that an allowance that wages will rise by 1.5% per annum higher than inflation in the long term future is fair and reasonable.*
>
> *Similarly, evidence is marshalled that shows the cost of medical treatment and of aids associated with the care of the plaintiff have increased at a faster rate than general inflation. It seems reasonable to assume that such costs will continue to rise faster than inflation in future. I am of the opinion that an allowance that such health*

costs will rise by 1.5% per annum above inflation-the same real rate of increase of wages -is fair and reasonable.

Based on the analysis of historic wages and prices and other consideration, I am of the opinion that failure to index future payments with the appropriate index or indices will

(i) transfer to the plaintiff the risk that the cost of future care, medical treatments, aid appliances and earning loss, exceeds the payments made under the periodic payments order (PPO) and,

(ii) I estimate that future payments under the PPO increasing in line with the Harmonised Index of Consumer Prices (HICP) will lag the actual increase in such costs and loss by about 1.5% per annum."

65. Dr. Whelan has produced a dramatic graph showing how a Periodic Payment Order linked to the HICP is likely to fail to meet future care costs. As a matter of probability, after ten years the annual payment would only be sufficient to meet 86% of the plaintiff's care needs, leaving a shortfall of 14%. After twenty years the anticipated shortfall is 26%. By age 50, a Periodic Payment Order linked to the HICP index would only meet 48% of the plaintiff's annual care costs.

66. Professor Victoria Wass is a labour economist. She is a member of the Ogden Working Party which sets actuarial tables for use by courts in the U.K. in the assessment of future losses in personal injury and fatal accident cases. She provided expert evidence in relation to the differential between earnings and price inflation in the leading indexation trials in the U.K. in the context of periodical payments for care. Professor Wass in her evidence explains why the U.K. courts have adopted an index other than a CPI, when calculating the cost of a plaintiff's future care needs. At paragraph 1.6 of her statement of evidence, she states:

"It was the inability to capture wage growth in a prices measure, and the relative importance of wages in the plaintiff's care costs, that provided the rationale for using a measure of wages as a means of escalating UK care costs when awarded as a periodical payment. PPOs for care, case management and therapies are now linked to an earnings measure, with care the largest component linked to the growth in carers' wages as measured by a particular centile of the Annual Survey of Hours and Earnings(ASHE) series for the Standard Occupational Classification(SOC)(2000) 6115."

67. In her evidence, Professor Wass conducts an interesting examination of the process engaged in by the state in arriving at its decision to adopt the HICP as the index by which annual payments would be increased. While that process is of limited (if any) relevance to the issues which the court has to determine, the court notes that Professor Wass has concluded that the overriding concern of the Inter-Departmental Working Group in opting for indexation linked to the HICP, was to avoid or minimise volatility in the amount of annual payments. A report prepared for the executive emphasised the need to minimise

volatility in the measure and to facilitate liability-matching to avoid difficulties in the insurance and re-insurance market. Professor Wass quotes from a report of the Inter-Departmental Working Group of 2015 p.19 as follows:

> *"The Working Group considered that the index chosen should provide as much certainty as possible for defendants in terms of projected increases in their financial liabilities. The index should be published at the same time each year to enable accurate recording of changes to costs annually. The Working Group shared the Towers Watson assessment that the index to be chosen should not lead to an unacceptable degree of statistical fluctuation and should not be unduly volatile"*

68. The court mentions this policy approach simply because it is an approach which was firmly rejected by the High Court and the Court of Appeal in the *Russell* case. The court's duty and obligation is to provide 100% compensation to a catastrophically injured plaintiff, regardless of policy concerns. (See para 66 of the judgment of Irvine J. quoted above at Para. 25.)

69. Professor Wass favours the use of the EHECS as an indexation measure for calculating the cost of future care need. EHECS stands for Earning Hours and Employment Costs Survey. It is a quarterly survey carried out by the CSO. Its objective is to produce indices, for the purpose of monitoring change in labour costs, in Ireland and across the European Union.

70. This wage based means of indexation was considered but rejected by the Inter-Departmental Working Group. Interestingly, this index has been used in courts in England and Wales when structuring PPOs for catastrophically injured persons who are based in Ireland. Both Professor Wass and Richard Cropper Independent Financial Advisor, whose evidence is also before the court, have given expert evidence in cases in which the English and Welsh courts were persuaded to use the EHECS as an earnings based measure to escalate periodical payments for claimants who were to be awarded damages under the UK Damages Act 1996, but who live in Ireland. Mr. Cropper also provided expert evidence as to how to implement the EHECS measure and has appended to his statement of evidence an example of a schedule setting out the manner of implementation of the Court's order.

71. Professor John Kay is a celebrated economist who also gave evidence in *Russell v HSE.* His evidence does not diverge in any material respect from that of Professor Wass or Dr Whelan. For the reasons set out in his statement of evidence, he concludes;

> *"In my opinion, full compensation for Jack's losses would best be achieved if care costs were indexed to average earnings in Ireland, and medical costs to either CPI or HICP plus 3% per annum, and other costs to CPI or HICP."*

72. In the courts view, the evidence of Brendan Lynch A.I.A and Richard Cropper Independent Financial Adviser does not offer any additional evidence in terms of analysis, and its benefit consists in the weight it adds to the already weighty evidence, that a PPO in which the annual amount is adjusted in accordance with the Harmonised Index of Consumer

Prices will, as a matter of probability, result in significant under compensation of the plaintiff.

73. It is undoubtedly the executive's and the legislature's prerogative to enact legislation which they consider appropriate to meet the needs of catastrophically injured persons. They have done so and they have chosen to adjust PPOs in accordance with the HICP. This too is their right. However, in circumstances where the expert evidence is unanimous that the indexation chosen (HICP) will not meet the future care needs of catastrophically injured plaintiffs, then no judge, charged with protecting the best interests of a plaintiff, which is the first requirement for the exercise of a court's discretion under the legislative scheme, could approve a periodic payment order adjusted by reference to the HICP. The court further notes that one of the matters required to be taken into account, by the court, in deciding on the exercise of its discretion to make a Periodic Payment Order under s. 51(I)(ii), is:

"any financial advice received by the plaintiff in respect of the form of the award'.

74. It is clear, on the basis of the expert evidence before the court, that no competent financial expert would recommend a periodic payment order linked to the harmonised index of consumer prices to provide for the future care needs of a plaintiff. In its current form therefore, the legislation is regrettably, a dead letter. It is not in the best interests of a catastrophically injured plaintiff to apply for a PPO under the current legislative scheme.

75. The court notes however, that there is one potential chink of light within the statutory scheme. It is provided at s. 51I(3). That subsection envisages the possibility of agreement between parties on the terms of a Periodic Payment Order. Such an agreement, at least in principle, allows for the use of a means of adjustment of the periodic payment order by an index other than the HICP. By agreement, parties could adopt an index measure would take account of the fact that wage inflation tends to be higher than general inflation.

76. In the event of such an agreement, the parties can. apply to the court for a Periodic Payment Order in accordance with the terms which have been agreed by the parties. If the court were satisfied that it met the best interests of the plaintiff and complied with the other provisions relating to the exercise of its discretion contained in subs. (2), the court could make a Periodic Payment Order in accordance with the terms agreed by the parties. Thus, it appears to me that if the parties can agree between themselves to apply a different indexation, this can be applied by the court. In any other situation, the court is bound by the Act to apply the HICP index to a Periodic Payments Order. It is perhaps unlikely, that any public body would agree to apply any index other than that set out in the legislation, but insurers, who have experience of the operation of PPOs in the UK since 2003, might view the matter differently. Time will tell.

Question 3

Whether the court is precluded by the 2017 Act from fixing an increase other than the amount specified in the HICP.

77. The short answer to this question is, yes, the Court is so precluded. The Act is clear. Section 51I(6)(g) provides that:

"Where a court exercises its discretion to make a PPO that order shall provide that the annual amount awarded to the plaintiff will be adjusted in accordance with the Harmonised Index of Consumer Prices as published by Central Statistics Office or such other index as may be specified by the Minister under Section 51L". (emphasis added)

78. So, if the Court were to exercise its discretion to make a periodic payment order, it is mandatory that it apply the HICP index to the annual payment. The Court doesn't have a discretion in that regard.

79. Section 51L,dealing with the indexation of periodic payments, at (1), repeats the requirement that '*a periodic payments order shall provide for the amount of a payment under the order to be adjusted annually by reference to the Harmonised Index of Consumer Prices as published by the Central Statistics Office or such other index as may be specified under this section.'* Thereafter in subsections (2) to (7) it sets out the process by which indexation is to be reviewed.

80. The power to review is conferred on the Minister. The first review shall not take place for at least 5 years from commencement i.e. October 2023, at the earliest. Whenever the first review occurs, further reviews are directed every 5 years thereafter. If upon review, the Minister forms the opinion based on criteria set out in the section, that an alternative index would be more suitable, he is empowered to make regulations specifying the appropriate index. This is not an unfettered power, because the section requires that before altering the index, the Minister must obtain the consent of the Minister for Finance. Even then, a change in indexation is not guaranteed, because any proposed change must be laid before each House of the Oireachtas and if a resolution annulling the regulations is passed by either House, the regulations shall be annulled.

81. The process for changing the indexation measure is complex and demanding and is reserved to the executive and the legislature. The act confers no power on the courts to alter, amend or adjust the HICP index, either to ensure that a catastrophically injured plaintiff is compensated to the extent of 100%, or otherwise. In the course of submissions, Counsel for the plaintiff referred to the leading case on indexation in the UK, *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] 1 WLR 2207 in which the courts fashioned an index other than the retail price index, to ensure that a catastrophically injured plaintiff would have his future care needs met. The fact is, that the court did so pursuant to a specific statutory power contained in s.2(9) of the Damages Act 1996. S.2(8) of the UK act provides for

periodical payments to be varied by reference to the retail price index, but s.2(9) provides' *But an order for periodical payments may include provision- (a) disapplying subsection (8), or (b) modifying the effect of subsection (8)'*. This statutory discretion allowed the courts to devise an indexation measure by which the periodic payment order would increase in a manner capable of ensuring that the plaintiff's future care needs were met.

82. There is no equivalent provision in our legislation. If any of our courts exercises its discretion to make a periodic payment order it must by law adjust the annual payment by reference to the HICP or such other index as is specified under s. 51L of the act. The Court is precluded by law, from adjusting an annual payment other than by reference to the HICP or other index specified pursuant to the provisions of s.51L.

Question 4

Whether and to what extent the court retains a jurisdiction to identify a means by which indexation of the recurring payment can be achieved that would avoid the risks of the recurring compensation falling behind having regard to wage and medical inflation.

83. Question 4 was a question which caused the Court some difficulty in that the Court wasn't initially clear as to what was being asked. The use of the words *"whether and to what extent the Court retains a jurisdiction"* suggests that there is some existing jurisdiction to identify a means of indexation. Counsel explained that the question is intended to go to the inherent jurisdiction of the court (if any) to fashion a measure of indexation of a PPO which would ensure that a plaintiff does not suffer losses in respect of increasing care costs over his lifetime. The courts have no inherent jurisdiction in relation to PPOs. Had such a jurisdiction existed, the repeated pleas of the courts to the legislature to enact legislation to provide for PPOs would have been entirely unnecessary. The court's power in relation to PPOs is as provided for in the statutory scheme. (See answer to Question 3.)

84. The Court is satisfied that the Court's jurisdiction at common law remains as it was prior to the enactment of the Civil Liability (Amendment) Act 2017. (see answer to Question 1). The court still has jurisdiction to make a lump sum award. Where the interests of justice require it, the court may award an interim payment in accordance with the jurisprudence set out in the Miley decision. A third option which the courts have deployed in exercise of their inherent jurisdiction, is to approve payments on account against the ultimate liability, when established. In this case, a payment on account of €350,000, was approved by the President pending the determination of the issues raised in this application.

85. The Court observes that in the case of an infant who is catastrophically injured, and in respect of whom the long term picture may not emerge for years, the use of payments on account against the ultimate award, be that a lump sum or a PPO with a revised index, is probably the most efficient means of ensuring that the plaintiff's ongoing needs are appropriately met. Such a process would not require repeated detailed and costly hearings, both in terms of money and court resources, which interim awards for a specific period may entail. Any dispute as to the appropriateness of a particular form of therapy,

such as exists in this case, could be resolved and if necessary, the figures reconciled, at the ultimate hearing.

86. That said, the Court acknowledges and accepts that it is for the President, as protector of this particular ward, to determine how best his needs can be met pending clarification of his long-term future needs.