

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)*

Delivered: **13/05/04**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND  
QUEEN'S BENCH DIVISION

**BETWEEN:**

**PATRICK JOSEPH QUINN, ACTING BY  
HIS NEXT FRIEND THE OFFICIAL SOLICITOR**

**Plaintiff;**

**-and-**

**ELAINE KEENAN**

**Defendant.**

**HIGGINS J**

[1] By Summons dated 27 March 2003 the defendant seeks -

1. That the amended Statement of Claim served on 27 February 2003 be struck out under Order 18 Rule 19 on the grounds that it is -  
a) scandalous, frivolous or vexatious; b) it may prejudice embarrass or delay the fair trial of the action; c) it is otherwise an abusive process of the Court;
2. Alternatively an Order staying the amended Statement of Claim under the inherent jurisdiction of the Court;
3. Further or in the alternative an Order pursuant to Order 33 Rule 3 that the legal rights of the plaintiff to claim for care and accommodation raised in the amended Statement of Claim be tried as a preliminary issue before trial of the action.

[2] The plaintiff sustained multiple injuries including a severe brain injury as a result of a road traffic accident alleged to have occurred on 21 December 1996. The plaintiff was a pedestrian and it is alleged that at the time he

sustained his injuries he was intoxicated. On 14 March 1997 he was transferred from the Royal Victoria Hospital to the Psychiatric Unit of Craigavon Area Hospital and further transferred from there on 25 April 1997 to St Luke's Hospital, Armagh. He remained there until April 2002 when he was transferred to a nursing home known as Bawn Cottage Residential Home (Bawn). He was admitted to St Luke's Hospital again in May 2003, but later returned to Bawn. At the time of the accident the plaintiff was almost 43 years of age and was alleged to have been employed as a self-employed scaffolder.

[3] The Statement of Claim alleges that the defendant caused the serious injuries sustained by the plaintiff through negligent driving. The Particulars of Personal Injuries recite at length the multiple injuries sustained by the plaintiff. These include a serious skull fracture and brain injury. The Particulars allege inter alia -

"He is now markedly disabled. He remains blind in his left eye and intellectually very confused with major psychological and psychiatric difficulties. His intellectual functioning has decreased considerably. His attention span has been markedly shortened and his memory capabilities greatly reduced. He is disinhibited and unable to control impulsive thoughts and actions."

[4] It seems clear that the plaintiff will be unable to exist independently in the community. A Statement of Claim was served on 16 September 1998. The Particulars of Special Damage claimed, inter alia, cost of domestic assistance, cost of future nursing care and possible cost in adapting or purchasing a home for the plaintiff. An amended Statement of Claim was served on 25 May 2001. The amendments related to the Particulars of Personal Injuries and the Particulars of Special Damage. The latter included -

"Estimated cost of future care and attention at an annual cost of £40,085 being £822,952;

Estimated Court of Care and Protection expenses  
£47,464."

[5] The total claim was for £1,088,042. The amendments included reference to a forensic accountancy report dated June 2002 that was annexed to the amended Statement of Claim. The plaintiff's solicitors received an amendment to Appendix 1 of the Accountancy report dated 23 January 2003. This led to a further amendment to the Statement of Claim dated 24 January 2003. This claimed, inter alia, future care and attention at £560,099 and Court of Care and Protection costs at £25,280. The total claim was then revised to £891,948. A further accountancy report dated 17 February 2003 was obtained

by the plaintiff's solicitors. This led to a further amended Statement of Claim dated 27 February 2003 to which the second accountancy report was annexed. This claimed, inter alia, -

“Past Care and Attention costs £24,646

Future Care expenses including, residential home costs, carers wages for implementing structured activities, carers wages for holiday attendances and care and cost of annual two week holiday £492,620

Court of Care and Protection charges £25,038

The total amount claimed is £834,396.”

[6] The forensic accountancy report dated 17 February 2003 revealed three matters. Firstly that the proprietors of Bawn advised the accountants that the weekly costs for a resident at the home were £390. In addition the plaintiff was provided with an activities programme costing £200 per week. Secondly that to date Armagh and Dungannon Health and Social Services Trust have been paying for the plaintiff's care at Bawn at the weekly rate of £265. This left a balance weekly claim for £125. The proprietors of Bawn were withholding collection of this balance to date, then the sum of £24,646, until the conclusion of this civil action. And thirdly, that a contribution towards the £265 paid by the Trust was deducted from the plaintiff's benefits.

[7] The nature of the plaintiff's claim was the subject of various reviews before a number of other judges. At one stage both the Trust and the proprietors of Bawn were joined as defendants or interested parties. Mr McCloskey QC was instructed on behalf of the Trust and he provided helpfully an analysis of the Trust's legal responsibilities towards the plaintiff under different legislation and regulations. The outcome of this analysis is that the Trust is bound to provide the plaintiff with after care services and that it is unlikely that the plaintiff would have to fund entirely any future residential accommodation. The Trust will be entitled to recover the costs of such care, up to the date of trial, should they be included in any compensation awarded to the plaintiff as a result of his claim. In respect of future care beyond the date of trial any compensation recovered by the plaintiff ( whether capital or income) will be administered by the Office of Care and Protection. The Trust will be unable to recover from the Office of Care and Protection any sum towards the costs of care for the plaintiff. The analysis provided by Mr McCloskey QC determined that the Trust would be entitled to recover past care costs and confirmed that the Trust would seek recovery of £11,417.27 (to date) in respect of that. This figure has varied. The Trust envisage that the plaintiff would continue to make contributions from his social security benefits. The Trust have also indicated that the day care programme devised

for the plaintiff could not be purchased from the Trust. The legal obligation of the Trust is "to meet assessed need to the extent that available resources permit".

[8] Much correspondence ensued over time between the parties relating to these various issues. The substantive point at issue between the parties is whether the plaintiff can claim for future care accommodation costs when same will be met by the Trust free of charge and without recovery from the plaintiff beyond any contribution he is required to make from social security benefits. The defendant disputes the deduction of the benefits on the basis that Article 19 of the Social Security (Recovery of Benefits) Order 1997 provides that certain listed benefits ( to which the plaintiff is entitled ) are to be disregarded in assessing any damages in respect of any accident or injury. The accountancy report dated 17 February 2003 prompted the defendant's solicitor to write to the plaintiff's solicitor requesting answers to two questions framed by senior counsel. These were -

"Does the plaintiff not accept that the whole point of the recent hearing before the Court was to direct by the Court that it would be the Nursing Home which would bring these claims for care and that the plaintiff would not bring such claim and would abandon it (sic).

If the plaintiff persists in bringing this claim we would like to know on what is the legal basis for bringing this claim in light of the acceptance of the fact that the regulations do not permit any taking of the plaintiff's capital income in to the circumstances of this case for care and accommodation. (sic)."

No reply to these questions has been furnished. The defendant's solicitor wrote again following a hearing before Cogle J and no reply was received to that letter either. It transpired that the proprietors of Bawn had contracted with the Trust to accommodate the plaintiff and it was alleged that the claim for extra money beyond the £265 paid by the Trust was without foundation. The proprietors withdrew from the proceedings and were not represented. The defendant asserts that the claim as formulated in the accountancy report will unnecessarily lengthen proceedings at trial and that either a portion of the plaintiff's claim be struck out or a preliminary hearing held into the nature of the claim. A substantive hearing of the summons took place during which statements were made about the status of the claim being made by the proprietors of Bawn and as to whether it was abandoned or being redirected towards the Trust. The Official Solicitor became involved and concerns were expressed about claims that might be made against the plaintiff in respect of his care. More correspondence ensued and the situation became somewhat

confused. Further hearings were required to determine the up to date position about the proprietors' claims as well as the Trust's claim to recover care costs to date. As at 31 May 2003 this claim was for the sum of £11,417.27. Essentially the defendant wishes to know what case they are obliged to meet. To that end, the plaintiff was offered the opportunity by Coghlin J, at a hearing in May 2003, to place an affidavit before the Court, but he did not avail of that opportunity. This Court was informed that, on the same occasion, counsel on behalf of the plaintiff stated that he did not propose to apply to amend the Statement of Claim. That position was maintained before this Court. In the absence of an application to amend, the Statement of Claim on which the trial would proceed would be, the Statement of Claim dated 25 May 2001.

[9] It was submitted by counsel on behalf of the defendant that the issue was essentially a point related to the pleadings. Can the plaintiff claim for future care and accommodation costs when same are met free of charge by the Trust (or the DHSS should the plaintiff be admitted to hospital). It was submitted that the plaintiff could only claim for future care and accommodation if he was liable to pay for them himself. It was not disputed by counsel on behalf of the plaintiff that this is the legal position. As the plaintiff's affairs are managed by the Official Solicitor neither the owners of Bawn ( or any other such home ) nor the Trust could have any claim against any capital or income held by the Official Solicitor on his behalf. Accordingly to maintain such a claim would involve the defendant in unnecessary expense through instruction to experts and the preparation of reports as well as lengthening this claim unnecessarily when it comes on for trial. Thus the defendant submits that the portion of the plaintiff's claim relating to future care and accommodation should be struck out or heard as a preliminary point. In addition it was submitted that the plaintiff was not entitled to claim the amount of his social security benefit which is used to assist in funding the costs of his care and accommodation in Bawn. Article 19 of the Social Security (Recovery of Benefits) (NI) Order 1997 provides that the amount of any benefit listed in Schedule II is to be disregarded in assessing any damages in respect of any accident or injury. Furthermore it was submitted that the claim in the accountant's report for the annual cost of maintaining a structured activities programme, recommended for the plaintiff by some of his medical advisers, cannot be sustained, as this will not be provided by the Trust due lack of resources.

[10] Counsel on behalf of the plaintiff submitted that the claim as pleaded in the Statement of Claim was based on the advice of the medical advisers responsible for the plaintiff's care within the health system. One of those medical advisers recommended that the plaintiff should reside in a community setting. Another adviser recommended, subsequently, that the plaintiff should not reside in the community nor should he be returned to St Luke's Hospital. The placement at Bawn was a result of this advice. The

Statement of Claim dated 27 February 2003 reflected the contents of the accountant's report and the information available from the proprietors of Bawn at that time. It was accepted that, any capital or income held on behalf of the plaintiff by the Office of Care and Protection, would be protected from a claim for the cost of care and accommodation by a Trust. However, it was submitted that the application made by the defendant, was an attempt to restrict the plaintiff's claim for care and accommodation to the minimum statutory resources available to the Trust for the foreseeable future. Furthermore it was submitted that the law did not require the plaintiff to confine his future accommodation to any particular home, whether funded by a Health and Social Services Board or a Trust or otherwise. It was submitted that it was open to the plaintiff or his relatives (in this case his wife) to place the plaintiff in a nursing home not controlled by a Board or Trust should they wish to do so. The plaintiff should be entitled to call evidence from members of his family and mental health experts as to the range of facilities and opportunities available to him and as to what is best or appropriate for him in the future. It was accepted that the plaintiff was not entitled to make an extravagant claim, but it was submitted that he is entitled to make a reasonable claim and the pleadings reflect an estimate of the cost of future care and accommodation should the plaintiff wish to reside in accommodation that he would be required to fund ( this I refer to as the private arrangement). The defendant is not entitled to assume that the plaintiff will remain living in Bawn or similar accommodation funded by the Trust. Indeed counsel for the plaintiff stated that the plaintiff would not remain in Bawn should alternative accommodation be obtained elsewhere. When his present accommodation is funded by the Trust and his benefits redirected towards it as a contribution, he is entitled to claim the deductions from his benefits and Article 19 of the 1979 Order does not prevent him doing so. His claim for a structured activities programme should not be determined by whether the Trust has the necessary resources or otherwise, if such a programme could be provided elsewhere. If the pleadings were struck out the plaintiff would be denied making that reasonable claim before the Court of trial. The present pleadings encompass all the situations that might arise for the plaintiff and the outcome will depend on the evidence at the trial of the action.

[11] Counsel on behalf of the defendant responded that this was unsatisfactory as the defendant is entitled to know the case he is required to meet. This was the first occasion that it was alleged that the plaintiff might seek private care. The application before the Court is for the pleadings based on the accountant's reports to be struck out. Their report does not make a case for private care. The defendant challenged the suggestion that the plaintiff could make a case for private care when the Trust, in fulfilment of its statutory obligations, will provide reasonable accommodation and services appropriate to the plaintiff's needs, without charge. In addition it was submitted that in Northern Ireland the Trust was the only agency that could

provide the care that the plaintiff requires and it was not suggested or pleaded that the plaintiff was going to reside elsewhere. Counsel for the defendant queried whether, either in principle or in a practical sense, it was open to a plaintiff to arrange private care and accommodation in these circumstances. Who would the private care home owner make his contract with and who would pay him ? The defendant accepted that the plaintiff was entitled to call evidence about the arrangements which would best meet the needs of the plaintiff, but submitted that the defendant was entitled to reasonable notice of what is believed to be best for the plaintiff in order to consider what is proposed.

[12] The plaintiff suffered a profound injury to his brain as a result of which he has major cognitive and behavioural problems and is unable to live alone without assistance. The current view is that he should reside in a residential setting like Bawn and it is suggested that he would benefit from a daily structured programme to occupy his time. Article 98 (1) of the Health and Personal Social Services Order 1972 (the 1972 Order) enacts the general rule that 'health services' are provided 'free of charge' except where express provision is made to the contrary under the 1972 Order. Article 98 (1) provides -

"The services provided under this Order shall be free of charge, except where any provision contained in or made under this Order expressly provides for the making and recovery of charges."

Article 7 of the 1972 Order makes provision for the recovery of certain charges. It provides -

"(1) The Ministry shall make arrangements to such extent as it considers necessary, for the purposes of the prevention of illness, the care of persons suffering from illness or the after-care of such persons.

(2) The Ministry may recover from persons availing themselves of any service provided by the Ministry under this Article, otherwise than in a hospital, such charges (if any ) in respect of the service as the Ministry considers appropriate."

[13] On 1 January 1974 the Ministry became a Department. In 1991 the functions and services provided by the Health and Social Services Boards created under the 1972 Order, were taken over by Health and Social Services Trusts - see Article 10 of the Health and Personal Social Services (NI) Order 1991. It is accepted that the care and accommodation services now provided to the Plaintiff comprise 'after-care.... otherwise in a hospital' under Article 7

of the 1972 Order. Accordingly the Department have a discretion to recover charges if it considers it appropriate. Article 15 (4) of the 1972 Order creates a similar discretion in respect of 'the provision of residential or other accommodation facilities'. The Department have determined to seek to recover charges in respect of accommodation provided for the plaintiff up to the date trial of the plaintiff's claim. If the plaintiff is successful in his claim then other considerations apply in respect of any capital sum awarded and any future income arising from that capital sum. In Firth v George Ackroyd Junior Ltd and Another 2000 Lloyd's Reports 312 the plaintiff, who suffered severe injuries in an accident, had been living in a residential home where he was provided with care and accommodation paid for by his local authority. It was envisaged that the plaintiff would continue to reside there indefinitely. A question arose as to whether and if so to what extent the local authority were entitled to recover from the plaintiff past and future cost of the provision of care and accommodation at the residential home. Regulation 21(2) of the National Assistance (Assessment of Resources) Regulations 1992, as amended, provide that the local authority was bound to disregard from the calculation of the plaintiff's capital any capital specified in Schedule 4 to the Regulations. Paragraph 19 of Schedule 4 included reference to 'any amount which would be disregarded under paragraph 44(a) of Schedule 10 to the Income Support (General) Regulations 1987. Paragraph 44(a) specified 'any sum of capital administered on behalf of a person by the High Court under the provisions of Order 80 of the Rules of the Supreme Court ...or the Court of Protection, where such sum derives from ..(a) an award of damages for a personal injury to that person'. It was held that the whole amount of the award made to the plaintiff in the proceedings was to be disregarded when determining the extent of his liability to reimburse the local authority for the cost of the care and accommodation provided to him under the National Assistance Act 1948. The expression 'an award of damages for a personal injury' was to be construed as referring to the award as a whole and not to general damages for pain suffering and loss of amenity alone. Similar provision is made in Northern Ireland by the Health and Personal Social Services (Assessment of Resources) Regulations (NI) 1993, the Health and Social Services (Assessment of Resources (Amendment) Regulations (NI) 1998, the Income support (General) Regulations (NI) 1987 and the Income Related Benefits (Miscellaneous Amendments No 5) Regulations (NI) 1994. A similar approach was adopted in Bell v Todd 2002 Lloyd's Reports 12. In that case Stanley Burnton J ruled on similar issues in advance of trial to enable negotiations between the parties to proceed. Whether the issues were raised as preliminary points under the equivalent of Order 33 is not clear. The plaintiff was 19 years of age. Several years earlier he had been seriously injured in a road traffic accident and as a result was accommodated and cared for by the Camphill Trust at their centre in Yorkshire. He was also under the protection of the Court of Protection as a patient. It was held that both capital and income administered by the Court was protected from consideration of his resources for the purposes of contribution to his care. In Ryan v Liverpool Health



Authority 2001 AER (D) 15 it was held that income from capital administered by the Court was protected. In Firth, supra, it was held also that the plaintiff was not entitled to an indemnity against the defendant in respect of any costs of his care and accommodation that he might become liable to pay should there be a change in the law in the future. The conclusions reached in these cases was approved and followed by Andrew Smith J in Sowden v Lodge 2003 EWHC 588 QB. That case concerned a 23 year old patient who suffered a catastrophic head injury in a road traffic accident when she was 13 years of age and was accommodated in a residential home. The judge proceeded on the assumption that the local authority would fulfil its duty and provide accommodation appropriate to the plaintiff's needs. He went on to say 'at paragraph 54 'I add that I was invited to approach the case on the basis that local authorities will remain under their present obligations and not to speculate about possible changes in the statutory regime '. In that case it was submitted on behalf of the plaintiff, that she should be compensated so that she could live in her own home, that is a private arrangement, rather than in a residential arrangement put in place by her local authority. It was accepted by counsel on behalf of the plaintiff that 'an award of damages on that basis would only be justified if it was demonstrated that she would not be in an equivalent position in residential care and that this private arrangement would bring the claim benefits that a residential arrangement would not' - see paragraph 46. Andrew Smith J held that it had not been shown that it was in the plaintiff's interests to have a private arrangement and that damages were to be assessed on the basis of the 'residential arrangement'. The only two matters in that case the judge had to resolve related to damages for future loss, and it does not appear that these were raised as preliminary points.

[14] In the instant case the plaintiff's claim is as set out in the Statement of Claim dated 25 May 2001. It was not submitted by counsel on behalf of the plaintiff that he relied on the first Statement of claim or indeed on any of the later versions. The Statement of Claim dated 25 May 2001 is based on the accountancy report dated 2 February 2001. The particulars of special damage specifies at paragraph d) 'estimated cost of future care and attention at an annual cost of £40,085 being £822,952'. There is no reference to the 'structured daily activities programme'. All the accountancy reports are based on a 'residential arrangement' as opposed to a private arrangement. In the absence of an amendment to the Statement of Claim it is difficult it see how the plaintiff could present a case based on private care. The same difficulty may arise in relation to the activities programme. The plaintiff is entitled to claim what he reasonably may be required to expend. If he remains in a residential arrangement supported and funded by the Trust then, should the defendant be found to have been negligent, the plaintiff would have no claim for future care and accommodation. Therefore that part of the particulars of special damage, as pleaded, disclose no reasonable cause of action for such damages. Counsel for the plaintiff has stated that he wishes to call evidence as to what is best for the plaintiff and that may include evidence that a private

arrangement is more appropriate. The plaintiff has declined to amend his Statement of Claim and also declined the opportunity to file an affidavit in reply to the defence affidavit. I find this unsatisfactory. While the parties are entitled to adopt a certain tactic in their presentation of their case, modern litigation practice requires more openness and disclosure, to enable discussion and if necessary negotiation, where appropriate, to take place and thereby save costs. It seems to me that there is justification enough in this case to strike out the existing claim for future care and accommodation based on a residential arrangement. That may lead to an application to amend the Statement of Claim and the situation may not be further advanced. The summons before the Court seeks a striking out order in respect of the amended Statement of Claim dated 27 February 2003. That Statement of Claim is not yet formally before the Court and will not be without an application to amend, that counsel for the plaintiff has declined to make. The hearing of this summons proceeded on the basis that the Statement of Claim dated 27 February 2003 was formally before the Court. Paragraph 5 of the particulars of special damage in that Statement of Claim specify - 'future care expenses including residential home costs, carers wages for implementing structured activities'. Paragraph 21 of the accountancy report on which that Statement of Claim is based states - 'in respect of future cost we have claimed the full cost of the accommodation at Bawn Cottage'. Thus it is clear that to date the plaintiff has not prepared a case based on a private arrangement.

[15] The summons seeks as an alternative that the 'legal rights of the plaintiff to claim for care and accommodation' in the amended Statement of Claim dated 27 February 2003 be tried as a preliminary issue. As I have observed that Statement of Claim is not yet before the Court. However the issue that prompts the application applies equally to the Statement of Claim that is before the Court namely the Statement of Claim dated 25 May 2001. The Court has wide powers under Order 33 Rule 3. Rule 3 states -

"The Court may order any question or issue arising in a cause or matter, whether of fact or of law or partly of law, to be tried before, at or after the trial of the cause or matter, and may give direction as to the manner in which the question or issue shall be stated."

In addition to making an order that a cause or matter be tried before trial as a preliminary point, the Court can give directions as to the manner in which the question or issue shall be stated. If the plaintiff proposes to make a case based on a private arrangement for his future care and accommodation, which he has not made to date, then he is required to amend his Statement of Claim and to give to the defendant full particulars of that private arrangement. I will allow the plaintiff four weeks from this date to apply to so amend the

Statement of Claim. If the Statement of Claim is amended I order that the following issue be tried, prior to the main cause or matter –

“Whether the proposed private arrangement for the future care and accommodation of the plaintiff, in Northern Ireland or otherwise, is in the best interests of the plaintiff.”

[16] The defendant should file an amended defence within three weeks of receipt of the amended Statement of Claim. Immediately thereafter the case should be listed to fix a date for the trial of the preliminary issue. Should the plaintiff fail to amend his Statement of Claim in accordance with this direction or decline to do so, then the claim for future care and accommodation, in whichever Statement of Claim, will be struck out, on the ground that the plaintiff is not entitled to claim such care and accommodation as his future care and accommodation are and will remain to be funded by the local Trust free of charge.

[17] The claim relating to a structured daily programme will probably arise within the claim for a private arrangement. If the private arrangement is not pursued the structured daily programme should remain a separate issue from care and accommodation and may proceed as part of the main action. No issue relating to benefits should arise in any private arrangement claim. If the private arrangement is not pursued it may arise independently in the main action and can be dealt with then. Neither the issue relating to benefits nor the structured daily programme are raised in the summons presently before the Court.