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**James Sinnott, (a person of unsound mind not so found suing by his mother and next friend Kathryn Sinnott)** Plaintiff v. **The Minister for Education, Ireland and the Attorney General,Defendants, and Kathryn Sinnott, Plaintiff, v.The Minister for Education, Ireland and the Attorney General** Defendants

[1996 No. 11170P and 1997 No. 54P; S.C. Nos. 326and 327 of 2000]

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| High Court | 4th October 2000 |
| Supreme Court | 12th July 2001 |

*Constitution - Personal rights - Education - State's obligation toprovide for free primary education - First plaintiff suffering fromprofound mental and physical disablement and autism - Whether Stateobliged to provide for primary education after age of majority -Adequacy of provision - Constitution of Ireland, 1937, Article 42.4.Constitution - Personal rights - Breach - Family - Cause of action -Whether family member had independent cause of action for wrongsuffered by that family member because of breach of constitutionalright of another family member - Constitution of Ireland, 1937.Constitution - Separation of powers - Mandatory injunction -Expenditure of public funds - Whether declaration of rights sufficient- Whether appropriate to grant mandatory injunction.*

Article 42.4 of the Constitution of Ireland, 1937, provides, *inter alia*, that "the State shall provide for free primary education â€¦ and, when the public good requires it, provide other educational facilities or institutions â€¦"

The first plaintiff was born in 1977 and developed autistic symptoms and mental and physical disfunction at around the age of four months. The second plaintiff, the mother and primary carer of the first plaintiff, failed in her endeavours to secure the provision of the appropriate treatment and education from the State despite assurances that such services would be provided to the first plaintiff.

Up to the hearing of the action, when the first plaintiff was 23 years old, he had received no more than about two years of primary education and training provided by or on behalf of the State.

The first plaintiff sought declarations that the State had failed in its constitutional duty to provide primary education for the first plaintiff, a mandatory injunction directing the defendants to provide for free education for the first plaintiff appropriate to his needs for as long as he was capable of benefiting from same and damages. The second plaintiff sought, *inter alia*, declarations that the State had failed to respect, defend and vindicate her constitutional rights as mother of the first plaintiff by failing to provide any education appropriate to the first plaintiff, imposing inordinate burdens on her. She also sought a similar mandatory injunction and damages.

The defendants contended that the first plaintiff was not autistic but that he suffered from a profound mental and physical handicap with some autistic features and

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that the available facility was suitable for his ongoing education and care. It was further submitted that the State's obligation under Article 42.4 of the Constitution ceased when a child reached 18. It was further submitted on behalf of the defendants that the first plaintiff's claims were tortious in nature, and that the tort in question did not exist until established by *O'Donoghue v. Minister for Health* on the 27th May, 1993, the date judgment was delivered, and that no claimant was entitled to maintain a retrospective claim prior to the date of that judgment.

*Held* by the High Court (Barr J.), in granting the plaintiffs a mandatory injunction, declaration and damages, 1, that, having regard to the provisions of Article 42.4 of the Constitution, there was a constitutional obligation upon the State to provide for free, basic, elementary education of all children. Such education constituted giving each child such advice, instruction and teaching as would enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental or moral, however limited these capacities might be.

*O'Donoghue v. Minister for Health [1996] 2 I.R. 20 followed.*

2. That there was nothing in Article 42.4 which supported the contention that there was an age limitation on a citizen's right to primary education provided by or on behalf of the State. It was evident that the right to primary education would be fundamentally flawed if narrowly interpreted as ending at an arbitrary age of 18 years.

3. That, in the absence of a specific provision in such terms, it would be wrong to imply any age limitation on the constitutional obligation of the State to provide for the primary education of those who suffer from severe or profound mental handicap.

4. That the ultimate criterion in interpreting the State's obligation under Article 42.4 to the grieviously disabled was based on need and not age. Where a child's disability was such that he or she required ongoing specialist primary education and training for life, the State's obligation to provide that service would continue into adulthood.

5. That, accordingly, the obligation to provide and continue to provide for primary education and ancillary services for the first plaintiff was open-ended and would continue as long as such education and services were reasonably required by him.

6. That *O'Donoghue v. Minister for Health* did not create a new right but declared an existing one. The first plaintiff's constitutional right to education existed from the enactment of the Constitution and breach of that right sounded in damages from at least the 1970s, when expert opinion widely accepted that sufferers of his disablement were capable of and would benefit from appropriate primary education. The first plaintiff's right and cause of action arose when he was diagnosed and treated in October, 1981, and it continued into the future.

*Murphy v. Attorney General [1982] I.R. 241 distinguished; McDonnell v. Ireland [1998] 1 I.R. 134 followed.*

7. That the duty of the State which gave rise to the plaintiffs' claims derived solely from the Constitution for which there was no corresponding duty in ordinary law and it was appropriate to bring a constitutional action. A claim for damages for breach of constitutional rights was analagous to a common law action in tort and the Statute of Limitations, 1957, applied to such a claim.

*McDonnell v. Ireland [1998] 1 I.R. 134 followed.*

8. That the first plaintiff's claim was instituted within the limitation period prescribed by the Statute of Limitations, 1957, and he was entitled to damages from October, 1981, up to the present and into the future.

*McDonnell v. Ireland [1998] 1 I.R. 134 followed.*

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9. That the second plaintiff suffered harm, loss and damage by reason of the State's failure to honour its constitutional obligation to provide adequately for the first plaintiff's education and training and this was a reasonably foreseeable consequence of the State's conduct in that regard. The second plaintiff's claim was analogous to a claim for personal injury in tort and was subject to the three year limitation period in the Statute of Limitations Act, 1957. The wrong done to the second plaintiff was a continuing one and she was entitled to damages for the harm done to her in the three years prior to the institution of proceedings and into the future.

*McDonnell v. Ireland [1998] 1 I.R. 134 followed.*

*Quaere*: Whether an award of punitive damages would be made against the State for a deliberate and conscious failure to comply with its constitutional obligations?

The defendants appealed to the Supreme Court. Prior to the hearing of the appeal, the defendants conceded that the constitutional right of the first plaintiff to free primary education up to the age of 18 years had been violated by them and informed the court that no appeal was being pursued in relation to the damages awarded to the first plaintiff. In relation to the second plaintiff's case, the defendants informed the court that the appeal was being pursued in respect of the entire judgment and order, other than the award of special damages.

*Held* by the Supreme Court (Denham, Murray, Hardiman, Geoghegan and Fennelly JJ.; Keane C.J. and Murphy J. dissenting in part), in allowing the limited appeal against the first plaintiff, 1, that the duty to provide for free primary education under Article 42.4. of the Constitution was owed to children and not to adults.

2. That the first plaintiff was entitled to a declaration that the first defendant, in failing to provide for free primary education for him up to the age of 18 years of age, appropriate to his needs as a severely autistic child with related profound mental and physical handicap, had deprived him of his constitutional rights under Article 42.4 of the Constitution.

*Per* Keane C.J. dissenting: That that part of the judgment of the High Court which found that the first plaintiff was entitled to damages in respect of his entitlement to free primary education up to the age of 22 years was not the subject of an appeal, an advisory judgment should not be granted in respect of the issue of whether the constitutional entitlement to free primary education was limited to children and did not extend to adults, and the first plaintiff was entitled to a declaration that the first defendant was obliged by Article 42.4 of the Constitution to provide for free primary education for the first plaintiff appropriate to his needs for as long as he was capable of benefiting from same.

*Att. Gen. v. Southern Industrial Trust Ltd. (1959) 94 I.L.T.R. 161 considered.*

*Per* Murphy J. dissenting: That the right to free primary education, which was basic scholastic education provided by teachers in classrooms, under Article 42 of the Constitution ceased when a person reached the age of 12 years.

*Per* Geoghegan J. (Murray J. concurring): Primary education included suitable education for mentally handicapped children. Whereas primary education might be regarded as education up to the age of 12 in the case of a normal child, because of slow learning or learning incapacity, the period to be covered by primary education might obviously have to be extended in the case of handicapped children and, in that sense, the defendants' arbitrary choice of the age 18 was not necessarily illogical.

*Per* Keane C.J. and Hardiman J.: It was normally sufficient to grant declaratory relief in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful

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applicant and the fact that the courts had powers to deal with the extreme circumstances in which a hypothetical government not only ignored a constitutional imperative and defied a court declaration was not a basis for the exercise of such powers in any other circumstances. The purported retention by the High Court of jurisdiction in the case after it had delivered its final judgment was an erroneous exercise of its jurisdiction.

*Per* Denham J.: While the courts assumed that, where an order was being made against the State, a declaratory order would be sufficient and appropriate, the court might have a jurisdiction and even a duty to make a mandatory order in a rare and exceptional case of protecting constitutional rights.

*Held* by the Supreme Court (Keane C.J., Murphy, Murray, Hardiman, Geoghegan and Fennelly JJ.: Denham J. dissenting in part), in allowing the appeal against the second plaintiff, 1, that there was no cause of action known to the law which provided that where the constitutional rights of a member of a family had been violated, the wrongdoer must compensate not only the person concerned but also any other member of his or her family, as constitutionally defined, in whom no independent right of action was vested, but who had suffered in some sense because of the wrong done to the other family member.

*McLoughlin v. O'Brian [1983] 1 A.C. 410; Mullally v. Bus Ã‰ireann [1992] 1 I.L.R.M. 722 ; P.H. v. John Murphy & Sons Ltd. [1987] I.R. 621 considered.*

2. That the second plaintiffs constitutional right of parental choice as to the nature of education which her child would receive was not breached by the defendants.

*Per* Denham J. dissenting: That the defendants' failure to provide free primary education to the first plaintiff constituted a breach of the second plaintiff's right to be held equal before the law as a parent and a mother under Article 40.1 of the Constitution and amounted to invidious discrimination. The second plaintiff, as a parent of a family, had a duty to the first plaintiff as a child of that family, and the second plaintiff was entitled under Article 41 of the Constitution to defend the institution of the family which suffered as a consequence of the defendants' breach of the first plaintiff's rights. The special constitutional recognition given to the role of women and mothers within the home must be read harmoniously with other articles of the Constitution when a combination of articles fell to be analysed.

Cases mentioned in this report:-

*Adoption (No. 2) Bill, 1987* [1989] I.R. 656; [1989] I.L.R.M. 266.

*Attorney General v. Paperlink* [1984] I.L.R.M. 373.

*Att. Gen. v. Southern Industrial Trust Ltd.* (1957) 94 I.L.T.R. 161.

*A.G. (S.P.U.C.) v. Open Door Counselling Ltd.* [1988] I.R. 593; [1987] I.L.R.M. 477.

*Barber v. Guardian Royal Exchange (Case C 262/88)* [1990] E.C.R. I - 1889.

*Boland v. An Taoiseach* [1974] I.R. 338; (1974) 109 I.L.T.R. 13.

*Brady v. Cavan County Council* [1999] 4 I.R. 99; [2000] 1 I.L.R.M. 81.

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*Breathnach v. Ireland* [2000] 3 I.R. 467.

*Bromley B.C. v. Needs Tribunal* [1999] 3 All E.R. 587.

*Buckley and Others (Sinn FÃ©in) v. Attorney General* [1950] I.R. 67.

*Byrne v. Ireland* [1972] I.R. 241.

*Comerford v. Minister for Education* [1997] 2 I.L.R.M. 134.

*Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305; [1991] I.L.R.M. 497.

*Crotty v. An Taoiseach* [1987] I.R. 713; [1987] I.L.R.M. 400.

*Crowley v. Ireland* [1980] I.R. 102.

*Defrenne v. Sabena (Case 43/75)* [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98.

*Director of Public Prosecutions v. Best* [2000] 2 I.R. 17; [2000] 2 I.L.R.M. 1.

*M.F. v. Superintendent Ballymun Garda Station* [1991] 1 I.R. 189; [1990] I.L.R.M. 243.

*D.G. v. Eastern Health Board* [1997] 3 I.R. 511; [1998] 1 I.L.R.M. 241.

*P.H. v. John Murphy & Sons Ltd.* [1987] I.R. 621; [1988] I.L.R.M. 300.

*Hanley v. Minister for Defence* [1998] 4 I.R. 496; [1999] 4 I.R. 392; [2000] 2 I.L.R.M. 276.

*Hanrahan v. Merck, Sharp and Dohme* [1988] I.L.R.M. 629.

*Kelly v. Hennessy* [1995] 3 I.R. 253; [1996] 1 I.L.R.M. 321.

*L. v. L.* [1992] 2 I.R. 77, 101; [1992] I.L.R.M. 115; [1989] I.L.R.M. 528.

*MacMathÃºna v. Attorney General* [1995] 1 I.R. 484; [1995] 1 I.L.R.M. 69.

*Matrimonial Home Bill, 1993* [1994] 1 I.R. 305; [1994] 1 I.L.R.M. 241.

*McCulloch v. Maryland* (1819) 17 U.S. (4 Wheat 316).

*McDonnell v. Ireland* [1998] 1 I.R. 134.

*McEneaney v. Minister for Education* [1941] I.R. 430.

*McGee v. Attorney General* [1974] I.R. 284; (1973) 109 I.L.T.R. 29.

*McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 1; [1996] 1 I.L.R.M. 81.

*McLoughlin v. O'Brian* [1983] 1 A.C. 410; [1982] 2 W.L.R. 982; [1982] 2 All E.R. 298.

*McMahon v. Leahy* [1984] I.R. 525; [1985] I.L.R.M. 423.

*McMenamin v. Ireland* [1996] 3 I.R. 100; [1997] 2 I.L.R.M. 177.

*Meskell v. Coras Iompair Ã‰ireann*  [1973] I.R. 121.

*Mullally v. Bus Ã‰ireann*  [1992] 1 I.L.R.M. 722.

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*Murphy v. Attorney General* [1982] I.R. 241.

*Murphy v. Dublin Corporation* [1972] I.R. 215; (1972) 107 I.L.T.R. 65.

*Murray v. Ireland* [1985] I.R. 532; [1985] I.L.R.M. 542.

*F.N. (a minor) v. Minister for Education* [1995] 1 I.R. 409; [1995] 2 I.L.R.M. 297.

*O'B. v. S.* [1984] I.R. 316; [1985] I.L.R.M. 86.

*O'Byrne v. Minister for Finance* [1959] I.R. 1; (1958) 94 I.L.T.R. 11.

*O'Donoghue v. Minister for Health* [1996] 2 I.R. 20.

*O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181.

*O'Shiel v. Minister for Education* [1999] 2 I.R. 321; [1999] 2 I.L.R.M. 241.

*The People v. O'Shea* [1982] I.R. 384; [1983] I.L.R.M. 549.

*People (Director of Public Prosecutions) v. Quilligan (No. 3)* [1993] 2 I.R. 305.

*R. v. East Sussex C.C., ex p. Tandy* [1998] A.C. 714; [1998] 2 W.L.R. 884; [1998] 2 All E.R. 769.

*Riordan v. An Taoiseach* [2000] 4 I.R. 542.

*Ryan v. Attorney General* [1965] I.R. 294.

*In re the School Attendance Bill, 1942* [1943] I.R. 334 (1943) 77 I.L.T.R. 96.

*The State (Browne) v. Feran* [1967] I.R. 147.

*The State (Healy) v. Donoghue* [1976] I.R. 325; (1975) 110 I.L.T.R. 9; (1976) 112 I.L.T.R. 37.

*The State (Nicolaou) v. An Bord UchtÃ¡la* [1966] I.R. 567; (1966) 102 I.L.T.R. 1.

*The State (Quinn) v. Ryan* [1965] I.R. 70; (1964) 100 I.L.T.R. 105.

**Plenary summonses.**

The facts are summarised in the headnote and are set out in full in the judgment of Barr J., *infra*.

By plenary summons dated the 17th December, 1996, the plaintiff in the second action claimed, *inter alia*:-

1. a declaration that the first defendant, in failing to provide for free education for the plaintiff's son, the plaintiff in the first action, appropriate to his needs as a profoundly mentally disabled child, and in discriminating against the plaintiff's son with respect to the provision of appropriate educational facilities*vis-Ã -vis* other children, has deprived the plaintiff of her constitutional rights under Article 40.1. and 40.3.1 to 2 and Article 42.1.2 to 4;

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2. damages for breach of the plaintiff's constitutional rights, negligence and breach of duty;

3. a mandatory injunction directing the first defendant to forthwith provide for free education for the plaintiff's son appropriate to his needs for as long as he is capable of benefitting from same and free transport to such educational facilities.

Proceedings were also instituted by plenary summons by the plaintiff in the first action seeking similar reliefs.

Statements of claim were delivered on the 31st January, 1997 and defences filed 10th November, 1997.

The actions were listed together and heard by the High Court (Barr J.) on the 2nd to 5th, 10th to 12th, and 30th November, 1999, on the 1st to 3rd, 8th to 10th, and 14th to 17th, December, 1999, on the 17th to 21st, 25th to 31st January, 2000, and on the 14th and 21st February, 2000.

*Paul Sreenan S.C.* ,*Michael Gleeson S.C.* and*Pearse Michael Sreenan* ) for the plaintiffs.

*James O'Reilly S.C.* and*John L. O'Donnell* for the defendants.

*Cur. adv. vult.*

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| **Barr J.** | 4th October, 2000 |

Both actions arise out of the same events and were tried together. I propose to treat them as one.

The evidence has established the following facts and conclusions on the balance of probabilities:-

The first plaintiff was born on the 11th October, 1977. He is now almost 23 years of age, the third child of nine. The second plaintiff, his mother, is separated from her husband for a number of years and has been the first plaintiff's primary carer all his life. At birth he was a healthy baby and developed normally for about the first four months. The second plaintiff is an American of Irish extraction. She came to live in this country at or about the time of her marriage and the first plaintiff was born here. Her father, Dr. John Kelly, is a surgeon who has maintained close ties with Ireland and has a house in County Cork at Enniskean where the second plaintiff and her children resided originally. When the first plaintiff was about four months old he was vaccinated in the usual way. Soon thereafter

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he began to develop autistic symptoms. Subsequently, in course of her endeavours on behalf of autistic children generally, the second plaintiff founded an organisation called The Hope Project. She stated in evidence that she has details of about 300 families on computer who came to her for help - each having a child suffering from autism or other condition within the autistic spectrum. In almost every case such children were, like the first plaintiff, normal for the first few months of life and then sustained an insult of one type or another and became "derailed into autism". Experience indicates that there usually is a precipitating event after which autistic symptoms emerge.

The first symptom which the first plaintiff displayed was that he began to scream incessantly as though in acute pain. He lost the ability to attach to the breast. He became extremely distressed at light and sound. He did not want to be touched or handled. The second plaintiff's description of him at that time was "He seemed to cry all of the time. The only times he seemed to be happy is if he was in bed away from all sound and lights dimmed, curtains closed and no-one touching him; then he could remain calm for short periods of time".The first plaintiff's problems also extended to physical incapacity. This was very clearly demonstrated on an occasion when he was about six months old. The second plaintiff's sister paid a visit and brought her son, Barry, who was a month younger than the first plaintiff. The second plaintiff described the two babies lying on the floor side by side. "Barry was looking at this mother and smiling and kicking and doing all of the appropriate six months things â€¦ the first plaintiff was lying next to him, unusually not cryingâ€¦ just lying there completely flat, he was not doing anything and he was not looking at anybody â€¦". This was in sharp contrast with the interaction of the two babies when together up to the time when the first plaintiff developed autism. The first plaintiff was then entirely normal in behaviour and was more advanced than Barry.

The second plaintiff's father carried out an assessment of the first plaintiff and became concerned about him. Dr. Quigley, the family G.P., was consulted and he referred him to the paediatric unit at St. Finbarr's Hospital in June, 1978, where he was assessed by Professor Barry. At that stage he had lost control of his jaw which had started to clamp. He has never regained full jaw control and since then up to the present time he drools saliva which causes him on-going distress as well as creating an element of revulsion in those who come in contact with him. The first plaintiff was detained in hospital for a period of observation and tests on the basis of which Professor Barry advised that the child was not reaching his milestones. He was healthy and they had found nothing physically wrong with him. It was reported that all of his tests were normal. On being pressed by Dr. Kelly, Professor Barry stated that he would not discount

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autism. His advice was that the first plaintiff be taken home and that they watch the autism develop. They were not directed to any other service where the child might receive treatment, nor were they asked to bring him back to the hospital for further assessment.

The first plaintiff was brought home and the second plaintiff embarked upon a search for appropriate treatment for her son which in turn developed into a crusade on behalf of autistic children generally - a huge struggle over two decades seeking to prevail on State health and education authorities to recognise autism and to provide appropriate education and training for those afflicted by it - particularly children like the first plaintiff with severe or profound physical and mental disabilities which are frequently a feature of autism. Anyone who heard the second plaintiff's evidence in court and witnessed her demeanour must have been moved by her account of intelligent, selfless dedication and heroism in contending over the years with so much official indifference and persistent procrastination which has continued up to and through this trial. It is a sad commentary that even at this late stage the State has failed to address realistically its constitutional obligation to provide for the on-going education of the first plaintiff.

The history of the second plaintiff's efforts for upwards of 20 years to obtain education and care for the first plaintiff and others seriously afflicted with autism and related symptoms is a very depressing story with many disappointments and set-backs arising out of failure on the part of officialdom to address the problem of autism and how it should be treated - notwithstanding substantial international progress in that area since the 1960's and earlier which is well-known and documented. The evidence of Mr. Matthew Ryan, a senior administrator in the Department of Education who has particular responsibility in the area under review, underlines the depth of ignorance of autism and its problems at official level. In the first plaintiff's case the difficulty was aggravated by actual professional misinformation on how he should be treated which contributed to setting back his education and training for years.

The second plaintiff's own family home is in Chicago, Illinois, where her father carried on practice as a surgeon. Having endeavoured without success to obtain treatment for the first plaintiff from several institutions in Cork, the second plaintiff decided to bring him to Chicago and see what might be done for him there. He was brought to the paediatric unit at Loyola University Hospital where he came under the care of Dr. Eugene Diamond. He was detained for five days and had a comprehensive series of tests under a team of specialists. He was found to be generally healthy and of good growth. It appears that his substantial disablement was diagnosed as autistic in origin with a major deficit in motor development which affected his muscles, skeleton and general movement. He was diagnosed as

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suffering from a psycho-motor problem the effect of which was that the brain was not sending messages to his muscles and limbs. The second plaintiff was informed that the first plaintiff needed intense therapy designed to teach the brain to send the messages necessary to put him back on track. The Loyola specialists recommended intensive intervention in the nature of occupational therapy, physiotherapy, speech and language training.

The first plaintiff was then enrolled at the Disfunctioning Child Centre at the Michael Reese Hospital, Chicago, the director of which was Dr. Naomi Abraham. The centre provides a range of therapists to deal with dysfunctional children, including those suffering from autism and related disabilities. The first plaintiff attended three sessions a week from the end of September until Christmas, 1978. There were two sessions with Ms. Elizabeth Osten, occupational psychotherapist, and one session with other therapists or undergoing tests. Every month a written assessment was made of the first plaintiff's progress by the therapists concerned in consultation with the second plaintiff and her father. She described that when her son arrived at the centre he was screaming continuously and when not screaming he was lying there like a spongy lump. He did not appear to see anybody or do anything. She described him as being "glazed over" and not wishing to be touched. He had also started to display repetitive autistic behaviour. An autistic person is self-centred in a literal sense who tends to shut out the world around him. He or she is also prone to repetitive behaviours such as pulling the hands and mouthing them. The treatment at the Michael Reese Hospital brought about substantial improvements in the first plaintiff's behaviour, physical capacity and enjoyment of living. He was watching people and giving some eye contact. He stopped most of his autistic repetitive movements. He started interacting with people around him. He ceased to cry and he even smiled. There was quite a traumatic change in his level of happiness. He was able to weight bear on his legs and to push with them. He was able to sit up and could be put in a high chair with the family at meal times. The second plaintiff described that she and the family could touch the first plaintiff and "he could be one of us in the midst of the family". As time went on he developed his capacity to interact and he started playing with toys.

An important part of the training at the centre involved the second plaintiff and the first plaintiff's elder siblings. Family collaboration and participation in the first plaintiff's education and care was regarded as being of particular importance. A detailed programme was developed with the intention of having it carried on when the first plaintiff returned to Ireland.

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The second plaintiff was asked what practical differences did the first plaintiff's improvement in Chicago make in her own life. In response she spoke of the difference of being able to get a couple of hours sleep. Previously she had to catnap when she could in the context of a very demanding, very upset baby. She was able to put on some weight herself and have some more energy, time and freedom to work with her son. She went on to say "As a mother having him actually look at me and acknowledge that he knew I existed, you know, that recharges a mother. It enabled me to bring much more of myself to him. In practical ways within the family the fact that he was looking at brothers and sisters re-enforced their interest in him. You know everything seemed to run better â€¦ every single thing he gained had huge practical consequences for us â€¦"

The second plaintiff returned to Ireland with the first plaintiff and her other children at Christmas, 1978. She was provided with a programme, notes and records from the Disfunctioning Child Centre and also medical records from Loyola Hospital. She also had her own notes about the treatment the first plaintiff had received while in Chicago. The intention was that all of these would be handed over to Professor Barry and others in the belief that continuing treatment and educational facilities would be made available to the first plaintiff in Ireland. Dr. Abraham also expected that that would happen. She had a particular interest because she had a home in west Cork which she visited frequently. She had been assured that there were facilities in Cork similar to those provided at her Centre in Chicago.

Sadly the hopes of the second plaintiff and Dr. Abraham were not realised. It seems that nothing was achieved with Professor Barry and the second plaintiff continued to be fobbed off by other organisations in Cork. All the while the first plaintiff regressed and gradually sank back to the situation he had been in before going to Chicago. One of those approached by the second plaintiff was Dr. Patrick Murray, now deceased. He was a Southern Health Board psychiatrist who worked with the Brothers of Charity institution at Lota which dealt with mentally disabled children. He did not respond at first.

The second plaintiff was asked how she reacted to her inability to obtain assistance for the first plaintiff and, in particular, continuation of the successful treatment he had received at Chicago. Her reply was "I was very upset. The way I reacted was no-one on the phone was straight with me. No-one on the phone ever said to me look these services do not exist, you need not ring again. That would have been honest. I would have done something about it. Maybe I would have returned to the States, I don't know. Instead it was all evasive. It was all vague. It was as if there was a wonderful service there but, but something â€¦" She concluded that one of

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the problems was living in Enniskean which is 28 miles from Cork. So she moved to basic rented accommodation in the city and incurred financial hardship for herself and family in the first plaintiff's interest. She explained her difficulties to Dr. Abraham who wrote to Dr. Murray and this led to an appointment with him. Unfortunately, Dr. Murray appears to have been misinformed as to the cause of autism in children. In the 50's and 60's in America a doctor called Bruno Bethelheim propounded the theory that children were made autistic by cold unloving mothers. What were referred to as "refrigerator mothers" rejected their children and thereby made them autistic. This theory had been discredited and rejected in the United States and elsewhere at the time when the first plaintiff was treated there. However, Dr. Murray did not appear to be aware of that. He told the second plaintiff that it was his policy to take an autistic child and cut him off from his known environment and put him into hospital for six weeks for the purpose of assessment. The second plaintiff was appalled by that suggestion, particularly having regard to her experience of watching the minimal attention which the first plaintiff had received as an in-patient in St. Finbarr's Hospital. She contacted Dr. Abraham who also shared her view that the proposal was "crazy". She contacted Dr. Murray but, it seems, the only compromise which he was prepared to make was that the second plaintiff might visit the first plaintiff at weekends or perhaps even take him home then "if things were going alright". The second plaintiff was not prepared to agree to that course because she realised that the first plaintiff's primary problem was isolation and she had been led to believe that to make him even more isolated was not the answer. She also knew very well that she was not a "refrigerator mother". The second plaintiff stated that she had Dr. Murray's lecture notes to nurses in which he propounded the discredited Bethelheim theory. She also discovered the practical application of it subsequently when dealing with nurses at the Cork Polio Nursery. Furthermore, she was informed later by three other parents who handed their autistic children over to Lota for six weeks at the behest of Dr. Murray that they deeply regretted having taken that course because when their children were returned to them a breach had been created which they were never able to overcome subsequently. It is appropriate to add that it seems to be accepted by all on both sides of this case that the second plaintiff is a loving, caring mother of exceptional dedication.

In November, 1979, the second plaintiff was successful, through the efforts of her landlady, a medical doctor, to have the first plaintiff assessed at Cork Polio, the forerunner of the COPE Foundation, by Dr. Irene Leahy, a psychologist, and Dr. McCarthy. They were interested in the treatment he had received in Chicago and recommended that he needed services for five days a week. However, that did not materialise. He was given the benefit

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of what transpired to be a"baby-sitting" service run by nurses who, though kind and loving, were not teachers or therapists but were carers only. It seems that they were also disciples of Dr. Murray's discredited theories on the cause of autism. The baby-sitting service commenced in January, 1980, for a couple of hours per day, once, twice, or three times a week. It broke up for the summer months and then recommenced.

As nothing was being done for the first plaintiff, who was regressing substantially, the second plaintiff decided that he should return to the Disfunctioning Child Centre at the Michael Reese Hospital, Chicago. She returned with him to her family home and he attended the centre as before for five months until April, 1981. They were particularly interested in having him back again as they felt that it was not only an opportunity to help the first plaintiff but also gave them a chance to see what could happen in rehabilitating a very young child through intensive services who had been seriously derailed by autism. He was the youngest child they had treated in that regard. They were concerned to ascertain how much of the long term disability could be avoided. In consequence, he was accepted as a research project and no charge was made for his treatment at the centre.

Lost ground was recovered and further progress was made. Under the overall direction of Dr. Abraham, the first plaintiff, again came under the care of Ms. Elizabeth Osten, occupational psycho therapist, and also Dr. Margaret Creedon, developmental psychologist, both of whom gave evidence at the trial. Each has long experience in the treatment of autism and related disabilities. Having presented in much the same way as he had been originally in 1978, great improvement was achieved and when he returned to Ireland in April, 1981, he was well on his way to walking, beginning to crawl, able to play with toys, responding to people and having spoken his first word. Most of the sessions at Chicago were videotaped. In the last two weeks before returning to Ireland a teaching video was made at the centre for the benefit of people who would deliver the services and treatment that the first plaintiff needed in Ireland. It was shown at the trial. The second plaintiff offered it to the staff at the Cope Nursery and also to Dr. Murray with whom Dr. Abraham had again corresponded and other possible providers of services for the first plaintiff, but no-one was interested.

As a result of further pressure exerted by Dr. Abraham on Dr. Murray she received assurances that appropriate services would be provided for the first plaintiff, including a pre-school service at a school operated by Lota in Fitton Street, Cork. In fact no such service eventuated and all he received there was more baby-sitting twice a week for two hours each session. No teacher was provided and a nurse was in charge. That service continued from September, 1981, until October, 1982. From then until 1985 Cork

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Polio provided one (and later two) afternoons per week "a baby-sitting facility". From 1985 until October, 1988, the first plaintiff attended Cork Polio, at St. John's, Strawberry Hill initially and then at Montenotte, five days per week which was also a baby-sitting service with no formal education provided.

In October, 1988, when the first plaintiff was 11 years old he participated in a course of education for the first time. Ms. Naomi Smith, a physiotherapist in Cork Polio, who had studied in Hungary at the Peto Institute set up an experimental conductive education unit for a period of six months at Tracton. It was designed chiefly for physically handicapped people. The first plaintiff was not considered suitable for it but it was put to the second plaintiff that if she could transport a neighbouring child to the course then the first plaintiff could attend also. The course was structured on a"one to one" basis and was physical in orientation. There was a lot of physical work which the first plaintiff needed and he got on very well. Walking, including use of stairs, was an important aspect. He also learned to feed himself and he got top marks for toileting. He was happier in himself and this was apparent at home. There were six children on the course and all made progress. The parents were encouraged to participate and attend the classes. Sadly, at the end of the trial period it was decided at Cope not to proceed with the project. This was regarded by the second plaintiff and the other parents as a disaster. There was at that time a waiting list of disabled children whose parents were hoping that the project would be expanded. There was also a difficulty about returning the first plaintiff to the Cope day centre. Before joining Ms. Smith's education project he was unsteady on his feet and inclined to fall which constituted a danger for other children. In consequence, he had been obliged to sit down all day and this gave rise to regression in his autism. The second plaintiff hoped that the first plaintiff would be allowed resume at the day centre with no restriction on walking as he had progressed so well on the Tracton course. However, to her dismay she found that there was no place available for him at Cope. This caused her to replicate as best she could with the aid of a neighbour the Tracton conductive education programme. She bought similar equipment to that used by Ms. Smith and had considerable success with the first plaintiff including an improvement in his mobility so that he could walk for two miles at a time. This continued from March, 1989, to January, 1991. Although reasonably successful, one difficulty was that the first plaintiff became lonely through lack of contact with other children. Fortunately, a place became available at the Our Lady of Good Counsel School at Lota which is for profoundly mentally handicapped children. The first plaintiff joined in January, 1991, when he was 131/2 years old. He was in a "blue report" class,*i.e.*, 12 children and one teacher, Ms. Yvonne

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O'Malley. She found that she could not manage 12 children together so the group was divided into two classes, one in the morning and one in the afternoon. By and large this was a successful experience for the first plaintiff. The main problem about it was that terms followed the same pattern as in primary schools. The long summer break caused much distress for the child who seemed to be at a loss to understand why the regime he enjoyed was discontinued for so long. He had a very good relationship with Ms. O'Malley who, in the second plaintiff's opinion, was an exceptionally gifted and dedicated teacher. Toilet training was a problem there, primarily because toilets were cold and substantially removed from the classroom. It had been much more successful during the conductive education period. The first plaintiff still required a nappy and continues to do so at 23 years of age.

The first plaintiff remained at the Our Lady of Good Counsel School for about two and a half years until June, 1993, when he was nearly 16 years old. At that time the Education and Development Centre at Lota was restructured with disastrous results. For reasons of funding the school became more health orientated than educational. The judgment of O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 which laid down a class size of six for children suffering from severe or profound mental handicap was ignored and so was the"blue book" recommendation of 12 such pupils per class which Ms. O'Malley had discovered from experience was unworkable. The new"school" had a class of 23, including all 12 from the first plaintiff's original class. Ms. O'Malley was the only teacher. In addition, there was a director of the project but she did not teach. The centre opened in October, 1993. Not surprisingly, Ms. O'Malley was unable to handle 23 seriously disabled pupils. By the following January she was obliged to take leave as her own physical health was suffering under the strain of an ill-conceived regime. The second plaintiff reminded the headmistress about *O'Donoghue v. Minister for Health* and the group of parents asked her to obtain three more teachers in accordance with its terms but nothing happened. Thereafter Ms. O'Malley confined herself to the original group of 12 children. Not only had she no help from any other teacher, but the volunteers who had assisted her previously were also informed by the Brothers of Charity that their services were no longer required. There has been no explanation of why that happened. The only available assistants were some health care staff who had no teaching experience. Eventually a second teacher was appointed for the remaining 11 younger pupils. The first plaintiff was allocated to the latter group but later was transferred to Ms. O'Malley's class. He was bullied and subsequently assaulted and seriously injured by one of the other pupils and required treatment in hospital. As a result of that he was transferred back to

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the younger children again which in terms of age was inappropriate for him. From June, 1995, there was no further education at the Child Educational Development Centre and it became a health facility only. The withdrawal of teachers also entailed the withdrawal of transport to and from the school as this had been provided by the Department of Education. Even before the withdrawal of teachers, the first plaintiff was receiving only one 45 minute teaching session per day with the result that 1994/5 was a bad year for him. The converted premises for the younger group was small with not much space to move around. Toilet training was not possible because the only toilet was downstairs and was used by the staff. The first plaintiff and some other disabled children may get tired during the day. He could not lie down anywhere because no beds or beanbags were provided. The point was taken up with the staff but the response was that if the first plaintiff was tired he should not go to school. An offer of beds made by the parents association was turned down. It was not appreciated that disabled children might get tired at school. All but the second plaintiff and one other parent were pressurised by the Brothers to accept a health orientated scheme in lieu of that which had existed before. The children of those who accepted the change were all resident at Lota and the parents did not wish to antagonise the Brothers by failing to support their proposition. The first plaintiff and the other child were day attenders. The end result for the first plaintiff in consequence of the change of orientation was that he lost much of his ability to walk and it was necessary to provide him with a wheelchair which had to be used at times even within his home. The second plaintiff described her son as being quite miserable at that time and he was not making progress in any area of his life. He also was having epileptic fits more often than had been the case in previous years. He had begun to have very short minor fits several years earlier. About 40% of autistic people suffer from such manifestations.

The second plaintiff was asked to contrast the first plaintiff's condition in March, 1995, when St. Martin's was dissolved as an educational model, with the way he had been when in Ms. O'Malley's class and in the conductive educational class earlier. She responded by saying that it was like describing night and day. He was not happy and he was not making progress. Sometimes he wanted to go to the school and sometimes he did not, whereas earlier he had always wanted to go to school. As already described, his capacity for walking had become severely diminished. The second plaintiff regarded St. Martin's as a failure and she stated that that was the consensus view of others at parents' meetings. That unhappy state of affairs continued for about two years in the first plaintiff's life. The plaintiffs' solicitors had correspondence with the Minister for Education in 1994/95. The information furnished by the latter about services allegedly

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being provided for the first plaintiff was untrue and indicates that the Minister appears to have been misinformed about the realities of the case (See Book 13, letter of the 19th September, 1994, and subsequent correspondence - in particular the Minister's letter of the 21st December, 1994).

Eventually the father of the other child who, like the second plaintiff, had supported the concept of an educational facility, contacted the press in Cork as a result of which the refusal of the State to provide educational facilities for his mentally handicapped daughter received major front page coverage. This brought about immediate capitulation and a special class was set up for Eimer and the first plaintiff in January, 1996, at St. Paul's School, Cope. Educational facilities with an enlightened qualified teacher, Ms. Miriam Kingston, was provided for five full school days per week. Ms. Kingston had specialised training in dealing with children with severe or profound mental handicap. She had some knowledge of autism; had much enthusiasm and was anxious to develop her ability in that regard. There followed a short golden period in the education of the first plaintiff which restored much lost ground and a variety of new talents were developed. It illustrates graphically what would have been achieved if he had received similar education from his early years. Ms. Kingston brought a lot of happiness into the first plaintiff's life which helped him greatly in overcoming the misery of the previous two years. He was then 18 years of age and it was necessary to lobby the Minister to obtain an extension of his education for another year. Eventually agreement was arrived at in that regard. The school year at St. Paul's had been lengthened in response to *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 and the summer holiday was only one month. Unfortunately, when the first plaintiff returned in September Ms. Kingston had left and this caused some disruption in his education - particularly when later in the year her successor took maternity leave and there was a succession of unqualified substitutes for several months.

In September, 1997, the first plaintiff's time at St. Paul's was finally up and the school was not prepared to educate him any longer, even though, manifestly, he needed a great deal more training to make up in some way for the many years when no education had been provided for him. An impasse emerged. The second plaintiff brought the first plaintiff to school as usual. He was allowed to sit in the class but received no education there. Eventually she was told that it was intended to move the first plaintiff to the Orchard, another institution at Cope, where he would join a class of six severely or profoundly mentally handicapped young adults of about his own age and would receive some education and instruction from an unqualified teacher who had little training in dealing with the profoundly handicapped and no experience at all of autism. The second

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plaintiff had serious reservations about the proposed move on the ground that by their own admission the authorities at Cope and the staff employed by them had no experience in dealing with any form of autism - far less severely autistic young adults like the first plaintiff. None of the others in his class were ambulatory. They were not autistic and none had a range of problems like his. No programme was devised for the first plaintiff's education and training until halfway through the trial when a grossly defective one was cobbled together in haste which was roundly condemned by the experts - even those called on behalf of the defence. It demonstrated a fundamental lack of understanding of autism and its problems. Professor James Hogg, a world renowned authority on autism, stated in evidence that if one of his staff had produced the Orchard programme he would have been genuinely dismayed. He went on to specify a series of fundamental flaws which it contained. Professor Peter Mittler, also a major world authority on autism, who was called on behalf of the defence, was critical of the programme and the best he was able to say of it was that it might be a beginning on which a proper programme could be built. In course of the trial a great deal of time was wasted by the defence in a forlorn effort to establish that the first plaintiff was not autistic but that essentially he is profoundly mentally handicapped with some autistic tendencies. In the end there was no sustainable case to support that extraordinary proposition having regard to the wealth of evidence and expert testimony, which I accept, that the first plaintiff is severely autistic and has been so afflicted since he was about four months old. (He was examined and diagnosed as autistic by, among other experts, Professor Hogg, Dr. Creedon, Ms. Osten, Mr. Willis and Mr. Reid.) That line was pursued in the hope of persuading the court that the regime at the Orchard is appropriate for the first plaintiff's education and training. Manifestly it is not. I am satisfied that the first plaintiff was moved to the Orchard as a temporary stop-gap measure without any realistic knowledge of what his educational requirements are. The decision-makers were, or ought to have been, well aware that having regard to his autism, it was entirely unsuitable for him, not least because of the absence of any staff with experience of autism and the special problems which it entails and the lack of crucial services such as speech and other therapies.

The second plaintiff gave evidence about the C.A.B.A.S. (comprehensive applied behaviour analysis system) school which was set up in Cork in the summer of 1999. It is a "one-to-one" teaching service with auxiliary staff, for 12 autistic three to five year old children. They suffer from varying degrees of autism, but three of them on entry were as disabled as the first plaintiff had been at the same age. It is run by an American professor, Burgus Grier, and his assistant Mrs. Keohane. The second

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plaintiff's daughter, Brigid, is a trainee teacher there who is studying for an M.A. postgraduate degree. It is a pilot project which is intended to run for three years. The school is having substantial success and the parents concerned are well pleased with it. One of them, Mr. Brendan Toomey, gave evidence to that effect. A particular success is in toilet training. The system devised is specially suited to the autistic mind. Brigid Sinnott has adopted the same method at home in training her brother, the first plaintiff, and in a short time she has had such success that it has been possible to discontinue the wearing of diapers. He now rarely has accidents in that regard. The second plaintiff has endeavoured to persuade Ms. Healy, the first plaintiff's teacher at the Orchard, to adopt a similar system for him there, but without success and the first plaintiff has reverted to wearing nappies at school. This is another illustration of the lack of co-operation between the Orchard and parents. The end result is that the first plaintiff has one system of toileting at home and another at school which causes him unnecessary confusion and sets back his progress in that crucial area.

The second plaintiff and her daughter, Brigid, explained the C.A.B.A.S. system of education. In essence the objective is to make everything very logical. They examine every message they give a child and every message a child is trying to give them and they endeavour to ensure that everything they do is in the logical pattern of the messages which are interacting between the child and the teacher. They are concerned not to give the wrong message to the child or to misinterpret a message received from him or her. No system of that sort obtains in the Orchard. The first plaintiff is the only person in his class who is ambulatory. The other five are confined to special chairs and so is the first plaintiff though it is unnecessary in his case. The second plaintiff is dubious about the amount of teaching hours (such as it is) which he receives per week as on several occasions when she has called to the Orchard at times when the class ought to have been receiving instruction, the teacher was not present and no instruction of any sort was in progress.

The second plaintiff has found that the disinterest in parental involvement at the Orchard differs greatly from Ms. Naoimi Smith's conductive education course where the parents were involved and were specifically brought in to watch what was going on. Ms. Smith and her colleagues worked with the parents as partners who then tried to carry on the instruction at home. She found a degree of partnership also with Ms. Yvonne O'Malley in her class at St. Paul's and again with Ms. Miriam Kingston in her class there. They were concerned to develop a co-operative relationship with the parents. She found that it was particularly beneficial for the first plaintiff when there was interplay between parent and teacher and they worked in partnership for the benefit of the child. The second plaintiff has

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found from experience that such collaboration is the only way forward. Her experience has been that the occasions when the first plaintiff has made most progress were in programmes based on partnership. Unfortunately, the general attitude at Cope is not conductive to that concept and there is little interaction and co-operation with parents.

The second plaintiff made it clear in evidence that her experience had been over the years that those caring for the first plaintiff had always been particularly kind to him. Her criticism of them relates solely to what she perceives as lack of experience, training and expertise and also the lack of a viable structured programme for his education and training devised in collaboration with her. Experience has established that educators have achieved more with the first plaintiff than health personnel. Teachers are also more likely to co-ordinate efforts between school and home. A few teachers, such as Ms. O'Malley and Ms. Kingston, have been successful in that regard and have achieved more with the first plaintiff than health orientated carers with the exception of Ms. Naoimi Smith.

The second plaintiff was asked about the time she had devoted to her son over the years. She responded that she had spent a great deal of time in doing a lot of things. Trying to be his mother, therapist and educator. "Coping with things like dressing and lifting and things that I feel wouldn't have been necessary and hopefully will not arise in the future." She referred to the fact that the first plaintiff suffers a lot of frustration, particularly in connection with changes in regimes or withdrawal of regimes which he enjoyed and periods of depression arising out of his frustration. The manifestation of depression is that he doesn't wish to move and curls into himself. This has a gloomy effect on the entire family. His physical capacity has also seriously deteriorated in times of regression - even to the extent of requiring a wheel-chair though previously he had learned to walk as much as two miles at a time. As to the future; she stated "I have always envisaged taking care of the first plaintiff and I have never planned on ever putting him into an institution as long as I can take care of him....". The effect of lack of services for the first plaintiff over the years on his mother was congently described by Bridget Sinnott in her evidence. When asked what percentage of her mother's time and thoughts were devoted to the first plaintiff and his cause over the years her reply was "a huge disproportionate amount".

Although at best the likelihood is that the first plaintiff always would have suffered from serious mental and physical incapacity arising out of his autism and related disabilities, even if he had received appropriate on-going education and training at an early age similar to that which he had in Chicago and which the C.A.B.A.S. organisation is pioneering in Cork, the expert evidence indicates a probability that his physical and mental

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capacity and his enjoyment of life would have improved substantially from an early age. It is reasonable to assume that, in particular, he would have been fully toilet trained from early childhood; his persistent drooling would have been cured or at least greatly improved long ago; he would have been substantially more mobile and would have developed greater dexterity with his hands. There are positive indications that his mental capacity probably would have improved and, through professional speech therapy, he may have developed in time a rudimentary capacity with language - though the latter development appears to be no more than a possibility. Early signs indicate a probability that he could have been successfully trained for sheltered employment similar to that of the towel-folding youngster employed in a gymnasium which was referred to by Dr. Walsh in course of her evidence. This would have done wonders for his self-esteem by giving him the status of a place, albeit a very simple one, in the work-force.

All of the experts agree that the earlier a severely autistic and mentally handicapped child such as the first plaintiff has specialised education and training the greater the likelihood of improving the capacity and quality of life of the sufferer. The first plaintiff has had less than three years of meaningful education and training so far in 23 years of existence. He has suffered grievously through the failure of the State to meet its constitutional obligation to provide him with such services and its negligence in that regard. The end result is that he has lost many years which in all probability would have been of great value to him in the improvement of his physical and mental capacity and quality of life through education and training. Whatever happens to him in the future, that loss can never be fully restored because, as the experts point out, education now is arriving too late in his life to achieve optimum results. Progress is more difficult and potentially more stressful for him than would have been the case if he had been educated from an early age. At best he has suffered through lack of educational training a diminution in the quality of his life which has been substantial up to now but which will also continue significantly into the future - even if he derives major benefit from the education and training now proposed for him. It is probable that he will have a life-long need for on-going basic education and training consistent with his requirements as they emerge in the future. Regular assessment will be important for him.

*Expert evidence*

Apart from the second plaintiff and her daughter, Brigid (a trainee), the following experts gave evidence on behalf of the first plaintiff:-

Ms. Elizabeth Osten, occupational psychotherapist; Dr. Margaret Creedon, developmental psychologist; Ms. Marie-Louise Hughes, education

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psychologist; Dr. Patricia Nonan Walsh, clinical psychologist; Ms. Gillian Boyd, principal of Foyle Special School, Derry; Ms. Jennifer Nowell, speech and language therapist; Ms. Judith Brereton, music therapist; Professor James Hogg; Chair of Profound Disability, Dundee University. Mr. Alan Willis, education and psychology consultant; Mr. Albert James Reid, educational and clinical psychologist; Professor Barry Carpenter and Dr. Michael Shevlin.

Some, such as Professor Hogg and Professor Carpenter, have major international reputations in the sphere of autism and profound mental handicap. Two other international authorities in that area, Professor Peter Mittler and Dr. Jean Ware, were called as witnesses for the defendants. There was no significant controversy between their testimony and that of the other experts.

*The defendants' evidence*

Apart from the testimony of Professor Mittler and Dr. Ware to which I have already referred, evidence adduced on behalf of the defendants was in three segments. First, that of Dr. M. J. Ledwith, psychiatrist, and Dr. Rita Honan, senior clinical psychologist of the Eastern Region Health Authority, in support of the contention that the first plaintiff is not autistic but suffers primarily from a profound mental and physical handicap with some autistic features. As already stated, the defence hoped to persuade the court to accept that assessment, even though it was against a formidable tide of expert testimony to the contrary, and to accept also that the Orchard is a suitable place for the first plaintiff's ongoing education and care - notwithstanding the established fact that none of the carers there have any experience of autism whether in the nature of so called "autistic features" or otherwise. The defence evidence failed to establish that proposition. Dr. Ledwith ultimately conceded that the first plaintiff is autistic and that the autistic aspects of his condition should have been taken into account in the provision of appropriate education for him. Dr. Honan, who was instructed in the matter on behalf of the State in course of the trial, deposed that through other work commitments she did not have sufficient time to carry out a full formal assessment of the plaintiff and she had so informed the defence. She was unable to carry out tests which would have been of assistance in formulating her diagnosis. She also had no time to read the reports and assessments made by fellow psychologists, Mr. Willis and Mr. Reid, nor to consider the various reports received from Chicago. She had obtained extensive professional documentation from the State but through lack of time she read only those documents referred to in her report. She did not see the Chicago or music therapy videos. Dr. Honan's assessment

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was based solely upon the first plaintiff's contemporary situation as it appeared to her at one short interview in November, 1999, supplemented by questioning the second plaintiff on that occasion which was also limited to her son's contemporary situation. She did not investigate his earlier history. It transpired in course of Dr. Honan's evidence that there were many significant aspects of the plaintiff's contemporary and earlier behaviour of which she was unaware and which were relevant to a diagnosis of autism. It seems to me that the criticisms made by other psychologists of her assessment of the first plaintiff and her opinion based thereon are well founded. I am satisfied that her assessment was based on an incomplete and insufficiently informed investigation. I reject her conclusions. I have no hesitation in accepting the wealth of expert testimony that the first plaintiff suffers, and has suffered almost all of his life, from severe autism and related profound mental and physical handicap. Even if both disabilities are not directly related, they each require specialist education and treatment. In practical terms it is unreal to attempt to differentiate between them. As previously stated I am satisfied that the Orchard is entirely unsuitable for the education and care of the first plaintiff and ought not to have been selected by the State for that purpose. It is of interest that the selection was made without seeking or obtaining any expert advice as to its suitability for the first plaintiff's education or the formulation of any programme in that regard. It is obvious that it was a hurried, ill conceived stop-gap solution.

The second segment of the defendant's evidence comprises the testimony of Mr. Matthew Ryan, the Department of Education administrator having responsibility for special education of those with severe or profound learning difficulties such as the plaintiff; Mr. Peadar McCann, the senior inspector of special schools in Munster and parts of Leinster and Connaught; Mr. Gerry Buttimer, the chief executive officer of the Cope Foundation and Ms. Louise Healy, the first plaintiff's teacher at the Orchard. The third segment comprises relevant documentation, including inter-departmental memoranda and correspondence which throws much light on the attitude of the State towards the education of the first plaintiff and its response to *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20.

The following conclusions emerge from the defendants' evidence:-

It is established that the primary weakness in our administrative structure which has given rise to the plaintiffs' claims is twofold. First, insufficient liaison between departments of State where a particular problem involves two or more of them (*e.g.* as in the first plaintiff's case where he requires continuing education/training and also medical type services including various therapies). The evidence of Inspector McCann and Mr. Ryan both senior officials in the Department of Education with long

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experience in the area of special educational needs, indicate that there is an urgent requirement for an integrated departmental approach to the fulfilment of the constitutional obligations of the State to disabled sections of society such as those like the first plaintiff who are profoundly handicapped and to whom a life-long obligation may exist. I understand from their evidence that they regard it as unreal to draw demarcation lines between the obligations of individual departments of State to such claimants. The reality is that the constitutional obligation to provide primary education, training and health care for the plaintiff and others like him is that of the State *per se*. It seems to me, as indicated by Messrs Ryan and McCann, that this must be recognised and accepted particularly in cases where the problem is obviously inter-departmental in nature. It is encouraging to learn that a beginning has been made recently in moving towards integration of education and health services for the profoundly mentally handicapped.

Secondly, the administrators in the Department of Finance, who play a major role in advising on the dispositioning of the financial resources of the State, appear to be insufficiently informed regarding the constitutional obligations of the State to the weak and deprived in society to enable them to assess realistically the degree of priority which should be attached to each such claim and the structure of priority which the State should devise in meeting its constitutional as distinct from other non-constitutional obligations. It is, of course, a fact of life that in times of economic difficulty the State may be obliged to rein back severely on expenditure, and many projects for which exchequer funding is sought may have to be postponed or curtailed through lack of resources at the particular time. In such circumstances the need for government, and financial administrators, to exercise a balance of constitutional justice where appropriate in prioritising such claims is of particular importance. This necessarily implies that the ultimate financial decision-makers and officials who devise annual revenue/exchequor budgets and administer State funds must have real awareness and appreciation of the constitutional obligations of the State to all sectors of the community and in particular to the rights of the grievously deprived in society, including those such as the first plaintiff who suffer profound mental disablement. Those entitled to State aid by constitutional right should not have to depend on numerical strength and or political clout to achieve their just desserts. Needs should be met as a matter of constitutional priority and savings, if necessary, should be made elsewhere. A citizen's constitutional right must be responded to by the State in full. A partial response has no justification in law, even in difficult financial circumstances which may entail the raising of new tax revenue to meet such claims - happily a situation which has not pertained for several years.

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The first plaintiff and those like him who are grievously handicapped have a profound need for on-going primary education, training and medical care and a constitutional right to such services from the State. Yet we find (as illustrated in the inter-departmental correspondence to which I have referred and the evidence of Mr. Ryan and the Mr. McCann) that the Department of Finance has persistently dragged its feet in recognising and implementing the obligations of the State as made abundantly clear by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. It seems that the reason for that unhappy state of affairs is a lack of understanding by finance providers of the status and implications of the constitutional obligations of the State and in consequence an inability on their part to prioritise in constitutional justice claims made on the resources of the State by those having such rights which the State has an obligation to vindicate in full and as a matter of urgency.

The circumstances of this case also indicate that another problem area of potential difficulty arises out of the long established practice of the State in meeting many of its constitutional obligations to society at large, and to the handicapped in particular, not by direct intervention but through the employment of others, notably charitable and religious institutions, to provide services on its behalf. The State is entitled to fulfil its obligations in that way and it may elect to discharge its duties through third party organisations. However, if it takes that course I believe that it has an obligation to the service providers and to the beneficiaries of such services to adopt in discharge of its constitutional obligations a hands-on approach, as advised by Professor Peter Mittler, to take a positive role in the organisation, provision and supervision of services offered on its behalf, and also to provide funds necessary to meet its constitutional obligations where they are contracted out in that way. Professor Mittler's observations on the practice in New Zealand, where the structure as to the provision of such services is similiar to that in Ireland, is of particular interest.

The sad history of the first plaintiff is an indictment of the State and cogently illustrates that it has failed to participate actively and meaningfully in the provision of appropriate services for him and those like him over the years. The history of some others referred to in this action comprise a similar indictment of the State. It is unfair to the Cope Foundation and other such institutions, who are trying with great dedication to do their best for those suffering profound mental disablement, not to give them all necessary support in organisation and finance - including the provision of expertise, equipment and appropriately trained personnel necessary to provide the services which such claimants require and the State has a constitutional duty to provide.

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The documentation submitted in evidence underlines the failure of the Department of Finance to accept the judgment of O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, that children with severe or profound mental handicap should have the benefit of a pupil-teacher ratio of 6:1 and also two child care assistants per class. The final paragraph of a speaking note for the Minister for Education and Science dated the 18th September, 1997, for a meeting with the Minister for Finance is particularly illuminating. It reads as follows:-

"Given the original High Court judgment [in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20], the Department of Finance has used the impending appeal as a justification for not conceding the pupil-teacher ratio of 6:1 and the two child care posts per class. As indicated above this excuse is no longer valid."

In fact there was never any validity in that excuse. In the light of the overwhelming expert opinion in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, in support of a pupil-teacher ratio of 6:1 and the finding of the Government's own Special Education Review Committee that reported in 1993, soon after the judgment of O'Hanlon J. and which also called for implementation of such a pupil/teacher ratio for the severe or profoundly mentally handicapped, it must have been obvious to all in the Department of Finance that there never was any hope whatever of successfully challenging in the Supreme Court the findings of O'Hanlon J. regarding pupil-teacher ratio and the provision of child care assistants for the education of those with severe or profound learning difficulties. Government approval was ultimately granted on the 29th October, 1998, more than five years after the judgment in *O'Donoghue* . In the meantime many hundreds of children with severe or profound mental handicap, including the first plaintiff, were deprived of education notwithstanding their established constitutional right to that service from the State.

It seems from the memorandum of the Secretary to the Government to which I have referred that it had been decided also that autistic children are to have a pupil-teacher ratio of 6:1, but with only one child care assistant per class. There is no evidence to suggest that any decision has been made at departmental or government level even yet about the provision of any ancillary services for sufferers from severe autism (*e.g.* speech, occupational and physio therapies and general health care) which are fundamental to their education and training. That omission further underlines the apparent lack of appreciation by the State of the basic problems associated with severe autism and related disabilities.

The documentation also confirms that there are hundreds of claims broadly similar to that brought on behalf of the first plaintiff which are outstanding against the State. This is an alarming situation which points to

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a fundamental problem which needs to be addressed urgently. It is the essence of a democratic society that we live under the rule of law. It is important that the State should be seen to lead the way in support of that fundamental principle - particularly in the area of constitutional obligations. It is unjust that the grievously handicapped, such as the first plaintiff, and their families should have to struggle painfully for years to obtain their constitutional rights; that they should have to contend with persistent obstruction and obduracy from officialdom as the evidence in these actions illustrates and that in the end they should be obliged to seek the aid of the courts as guardians of their constitutional rights.

In making the foregoing observations, I recognise that I should not trespass into the realm of executive or administrative decision-making by the State in which under the doctrine of separation of powers the court has no function. However, the evidence herein establishes that the difficulties encountered by the first plaintiff and his mother in pursuing their rights against the State are symptomatic of a widespread malaise. It seems to me that the court as the guardian of the constitutional rights of the citizen has a duty to criticise the response of the State to such claims. In the instant case the grounds for criticism are overwhelming. In my view the court would be failing in its responsibility as guardian of such rights if it did not allude to the perceived problem areas which appear to have collectively contributed to the failure of the State to honour its constitutional obligations to the plaintiffs which comprise rights into the future as well as in the past. It is now a matter for the State to assess the problem areas in its administrative and decision-making structure which have brought about its failure to honour constitutional obligations to the plaintiffs and other similiar claimants, and to remedy the situation thus revealed as in its wisdom it deems most appropriate. Suffice it to add that having regard to the hundreds of similar actions outstanding against the State and the likelihood of many more in the future if the present situation persists, it is obvious that such a review is imperative, not only in the interest of those who otherwise would become future claimants seeking constitutional redress against the State, but also in the interest of the State exchequer to avoid or reduce a potentially massive liability for damages and costs in such cases.

*The law*

The primary judicial authority relied upon by the plaintiffs in their respective actions is the judgment of O'Hanlon J. in the High Court in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. It is a major landmark in Irish constitutional law and jurisprudence. Paul O'Donoghue's situation

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was broadly similar to that of the first plaintiff. He was born in 1984. At the age of eight months he contracted an illness which left him physically disabled and profoundly mentally handicapped. He resided in Cork with his mother. His disability differs from the first plaintiff's in that he is not autistic. At the relevant time the Cope Foundation provided residential and day-care services for disabled children. It was the only institution in the Cork area which was equipped to offer full-time education facilities to children with both physical disability and profound mental handicap. When the applicant reached school age, his mother applied on a number of occasions to have him admitted there as a pupil. These applications were refused on the grounds that there were no vacancies and he was placed on a waiting list. His mother cared for him at home and arranged private education at her own expense. He benefited from and enjoyed the teaching which he received.

In 1992 the applicant, then eight years old, instituted proceedings against the respondents, seeking by way of judicial review an order of*mandamus* compelling the first and second respondents to provide him with free primary education. Shortly afterwards the applicant was informed that he would be provided with a place at the Cope Foundation in the following September where he would be educated in a group of 12 pupils by one teacher, assisted by care-workers.

In the High Court it was submitted on behalf of the respondents, first, that such efforts as were made to educate profoundly mentally handicapped children were of no real or lasting benefit to them, and that the applicant was effectively ineducable; secondly, that the education which the State was obliged to provide pursuant to Article 42.4 of the Constitution was education of a scholastic nature as exemplified in the curriculum for national schools, which could be of no benefit to the applicant; thirdly, that such training as could be provided for the applicant and as might benefit him could not be described as education or primary education, and, fourthly, that the applicant, having been provided with a place at the Cope Foundation, he had achieved the central relief sought and that the instant proceedings were accordingly moot.

It was held by O'Hanlon J.:-

(1) that having regard to the provisions of Article 42.4 of the Constitution there was a constitutional obligation upon the State to provide for free, basic, elementary education of all children;

(2) that such education consisted in giving each child such advice, instruction and teaching as would enable him to make the best possible use of his inherent and potential capabilities, physical, mental and moral, however limited these capacities might be;

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(3) that having regard to the evidence, which was to the effect that the applicant had made good progress and could make further progress, the applicant was not ineducable;

(4) that the curriculum advocated for schools for profoundly mentally handicapped children was directed towards the promotion of the child's physical, intellectual, emotional, social, moral and aesthetic development; that this curriculum differed only in degree from the curriculum used in schools for the mildly and moderately mentally handicapped, which schools were integrated into the national schools system; and that education for profoundly handicapped children could, accordingly, correctly be described as "primary education" within the meaning of that phrase in Article 42.4 of the Constitution;

(5) that it had been established on a world-wide basis for many years that children suffering from profound mental handicap could benefit from formal education. Accordingly, there was a constitutional obligation upon the State to provide for free primary education for profoundly handicapped children in as full and positive a manner as it had done for other members of the community;

(6) that while the respondents had granted the applicant a place at the Cope Foundation since the institution of the proceedings, this place was granted to him as a concession and could be withdrawn at any time at the discretion of the respondents [a situation similar to that of the first plaintiff at the Orchard];

(7) that the facilities which had been provided to the applicant at the Cope Foundation were inadequate, having regard, *inter alia*, to the pupil/teacher ratio, the hours of instruction, the age of commencement, continuity and duration of education, and that the said facilities, could not, accordingly, be regarded as meeting the State's obligation to provide the applicant with free primary education;

(8) that the applicant was entitled to an award of damages in respect of the respondent's failure to provide him with free primary education.

As to the requirements referred to at (7) above, O'Hanlon J. concluded in the light of the evidence of numerous expert witnesses on both sides that the pupil/teacher ratio should be 6:1 and that in addition there should be two assistants per group.

The judgment includes an extensive review and analysis of world-wide developments in the area of education for children who suffer from severe or profound mental handicap. As the State now concedes the finding of O'Hanlon J. that such persons are educable, it is unnecessary to reiterate in

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detail his analysis in that regard. Suffice to comment that the learned judge traced developments in that area from the report to the Government in 1965 of a commission of inquiry into mental handicap which recommended establishment of a network of schools for children suffering from mild and moderate handicap of that nature (which was duly done). He also examined in depth the report of a subsequent commission chaired by Mr. Sean Mac Glenoin, then Chief Inspector of the Department of Education, (who also gave evidence). This report was published in 1983 and is known as the "Blue Report". The commission concluded that children who suffer from severe or profound mental handicap are educable in special classes by appropriately trained teachers and that there should be a pupil teacher ratio of 12:1 in that regard.

O'Hanlon J. accepted the evidence of Professor James Hogg and others that the severe and profoundly mentally handicapped are and have been for many years widely regarded as capable of education in a real sense. He instanced developments in that field in England, Wales, Scotland and the United States of America, in all of which countries it had been made compulsory by law to provide education for the severely and profoundly mentally retarded. In bringing about the changeover from health to education in that area, Professor Hogg had stated that considerable international material had been available on the subject for many years. He instanced the United Kingdom Change from Health to Education Report (1971), the Warnock Report (1978) and many documents and Acts of Parliaments responding to these developments.

Mr. Jerry Buttimer, chief executive officer of Cope, gave evidence in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 that his foundation was the only place in Cork catering for those with profound mental and physical handicap. They had one teacher provided under the Blue Report recommendations as of July, 1992, and at that time they could cater for 12 pupils at most. He estimated that there were a further 24 disabled children in the Cork area living at home for whom they were unable to provide the necessary service and they were on a waiting list. Cope had applied to the Department of Education in 1991 for more teachers but had had no response. However, in 1992, when *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 was listed for hearing, sanction was given for one additional teacher. As to back-up staff; he expressed the opinion that at least four child care assistants were needed *i.e.* two for each group of 12 children. When asked about the feasibility of imparting education to severe and profoundly handicapped children Mr. Buttimer stated "we would be convinced that they are capable of being educated - I have been saying this for 20 years". (It is evident from Mr. Buttimer's evidence in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 that for upwards of eight years the

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State had been dragging its feet in the matter of implementing the basic recommendation in the"Blue Report" which had been formally accepted by government. More administrative foot dragging continued for five years after the judgment of O'Hanlon J. and persists to this day seven years later in relation to those, such as the first plaintiff, who suffer from autism in addition to profound mental handicap).

Mr. Mac Glenoin gave evidence in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 that his Commission recommended a pilot scheme that should be set up for the education of severe or profoundly mentally handicapped children. The pilot scheme was duly initiated in 1986. A *cadre* of 19 special teachers was provided. The Department of Education concluded in 1989 that the project was working reasonably well. However, the scheme was not developed and was held back not only by the Department of Finance but also by divisions of opinion between different interests and the need for the full co-operation and support of two separate Departments of State - Health and Education. (That problem too remains unresolved many years later although evidence in this case indicates that in recent times there has been some movement in that area).

It is also of interest that O'Hanlon J. quoted the following prophetic observation in chapter 11, para. 141 in the report of the Commission of Inquiry into Mental Handicap published in 1965:-

"Targets in the care of the mentally handicapped are constantly changing; what was regarded as adequate a decade ago is not so regarded today; what is regarded as adequate today may not be so regarded in another decade. In these circumstances, a continuous evaluation of the effectiveness of different forms of care and treatment is essential."

The third Irish report considered by O'Hanlon J. was that published in 1990 which was formulated by a review group on mental handicap services and is called the "Lilac Report". He quoted with approval,*inter alia*, one of the important conclusions which is recorded at p. 35 of the report:-

"The results of a number of intensive programmes over the past decade have shown that there is scope for considerable improvement in the quality of life of persons with a severe or profound intellectual disability. Such programmes require a major input of personnel resources. Provisions for this group of people simply by way of passive institutional care is no longer acceptable â€¦ An individual programme for each person is essential. Intensive personalised approaches to the needs of such people will also reduce problem behaviour â€¦ The education *curricula* of students of all relevant professions should be reviewed to ensure that they are aware of and trained to deal with intellectually disabled persons within the community."

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Clearly the foregoing pertinent observation includes autism. It has long been known and accepted, and it has been established again in evidence in this case, that those who deal with persons who suffer from severe autism require specific training as to the nature of that form of disablement and how it should be addressed. It seems that that need is not yet appreciated by finance administrators in Ireland.

In the course of his conclusions the learned judge adopted the definition of education by Ã“ DÃ¡laigh C.J. in *Ryan v. The Attorney General* [1965] I.R. 294 at p. 350:-

"Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral."

O'Hanlon J. continued at p. 62:-

"What the Chief Justice there stated is in harmony with the dramatic advances which have been made since that judgment was delivered in seeking to alleviate the lot of the mentally handicapped through education, initially focusing on the mild and moderate cases of mental handicap and in more recent times including all children, however serious their handicap in the educational system.

The whole momentum, as evidenced in the declarations emanating from the Vatican, from the United Nations, and in the protocol to the European Convention on Human Rights, has been towards the provision for every individual of such education as will enable him/her - in the words of the Chief Justice - 'to make the best possible use of his [or her] inherent and potential capacities, physical, mental and moral' - however limited those capacities.

Counsel for the respondents, in closing their case, urged me to hold that it still remained uncertain whether the efforts put in to the education of the severely and profoundly mentally handicapped were of any real and lasting benefit to these children, and whether any advances made were not lost again as soon as the stimulus of the teacher was withdrawn.

I am led to believe, however, by the evidence of Professor Hogg, of the applicant's mother and of the other mothers of handicapped children who were witnesses in the case, and by other evidence in the case, that this contention by the respondents is not well-founded. I am supported in this conclusion by the further evidence that for many years past it has been compulsory to provide educational facilities for this category of handicapped children in many countries, for example in the United States, in England, Scotland, Wales and Denmark, and it seems inconceivable that this enormous commitment of resources

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would have been undertaken without convincing evidence that it was worthwhile to do so."

O'Hanlon J. referred to Article 42 of the Constitution and continued at pp. 65 to 67:-

"I conclude, having regard to what has gone before, that there is a constitutional obligation imposed on the State by the provisions of Article 42.4 of the Constitution to provide for free basic elementary education of all children and that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his or her inherent and potential capacities, physical, mental and moral, however limited these capacities may be. Or, to borrow the language of the United Nations Convention and Resolution of the General Assembly - 'such education as will be conductive to the child's achieving the fullest possible social integration and individual development; such education as will enable the child to develop his/her capabilities and skills to the maximum and will hasten the process of social integration and reintegration'.

This process will work differently for each child, according to the child's own natural gifts, or lack thereof. In the case of the child who is deaf, dumb, blind, or otherwise physically or mentally handicapped, a completely different programme of education has to be adopted and a completely different rate of progress has to be taken for granted, than would be regarded as appropriate for a child suffering from no such handicap.

The State has hitherto responded generously to its obligations in relation to virtually all of these categories of handicapped children, as has been recognised in the reports already referred to, but has clearly lagged behind many other developed countries in what has been undertaken on behalf of the small but most seriously handicapped group of all - the category to which the applicant in the present proceedings belongs. Admittedly, it is only in the last few decades that research into the problems of the severely and profoundly physically and mentally handicapped has lead to positive findings that education in a formal setting involving schools and teachers, educational equipment of many kinds, and integration as far as possible in the conventional school environment, can be of real benefit to children thus handicapped. But once that has been established - and my conclusion is that it has been established on a world-wide basis for many years past, then it appears to me that it gives rise to a constitutional obligation on the part of the State to respond to such findings by providing for free primary education for this group of children in as full and positive a manner as it has done for all other children in the community â€¦ I therefore come to the

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conclusion that the education to which the applicant in the present case lays claim in reliance on rights derived from the provisions of Article 42 of the Constitution can be correctly described as 'primary education' within the meaning of that phrase as used in Article 42.4."

In assessing the services provided by the Cope Foundation O'Hanlon J. commented at p. 69 that:-

"â€¦ I am far from convinced, notwithstanding the very noble and dedicated work which is being carried out by those engaged in the pilot scheme at the Cope Foundation and elsewhere, that it can be regarded as meeting the specific obligation imposed on the State by Article 42.4 of the Constitution which provides for free primary education in the case of the applicant.

The evidence in the present case was sufficient to convince me that the provision of free primary education for children who are severely or profoundly handicapped, mentally and/or physically, requires a much greater deployment of resources than was thought appropriate even as recently as 1983 when the Blue Report was completed. To ask a single teacher to undertake the primary education of 12 severely or profoundly handicapped children, in my opinion, far exceeds the workload deemed appropriate for a teacher in the ordinary primary school where the pupils do not suffer from mental or physical handicap. Mr. O'Gorman, former president of the National Association for the Mentally Handicapped, gave evidence that the teacher/pupil ratio in the United Kingdom was 2:5, and in Denmark he found that 2 qualified teachers and 1 assistant had responsibility for 7 pupils."

The learned judge also expressed the following conclusions at pp. 69 to 70:-

"The evidence given in the case also gives rise to a strong conviction that primary education for this category, if it is to meet their special needs, requires a new approach in respect of:-

(1) Age of commencement: Early intervention and assessment being of vital importance if conditions of mental and physical handicap are not to become intractable.

(2) Duration of primary education: As this category will, in all probability never proceed further, and are unlikely to proceed far up the ladder of primary education itself, the process should, ideally, continue *as long as the ability for further development is discernible.* [Emphasis added. This seems to imply continuation into adulthood].

(3) Continuity of education: The lengthy holiday breaks which take place in the life of the ordinary primary school appear likely to cause serious loss of ground which may never be recovered in the

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case of children with severe or profound handicap. Accordingly, to deal adequately with their needs appears to require that the teaching process should, as far as practicable, be continuous throughout the entire year.

These factors lead me to believe that the respondents are misled in their belief that the arrangements already made to provide a place for the applicant at the Cope Foundation are sufficient of themselves to satisfy any claim that may arise in his favour under the provisions of the Constitution to have free primary education provided for his benefit.

â€¦ I am satisfied from the evidence in the case that the respondents have failed for some years past to carry out a duty imposed on them by the Constitution to provide for free primary education for his benefit, and for this breach of his constitutional right that they are liable in damages for any loss and damage thereby caused to the applicant."

I adopt with respect the learned judge's definition of education and his foregoing findings, including that relating to the right of the severely or profoundly mentally handicapped to primary education provided for by the State under Article 42.4 of the Constitution; the pupil-teacher ratio and care assistants ratio per group of six students.

In August, 1991, the then Minister for Education established the Special Education Review Committee comprising a group of 22 experts which was charged with the task of reporting and making recommendations on the educational position for children with special needs, including the linkage which should exist between the Department of Education and other Departments of State and the services provided under their aegis. By coincidence, the report of that body was furnished to the Minister almost coincidentally with the pronouncement of *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 and it was published four months later in October, 1993.

The report contains much information of importance and value in the assessment of the educational requirements of those who suffer from severe or profound mental handicap.

It is stated at pp. 19 to 20:-

"In charting the way forward into the next century, the Review Committee proposes the following seven principles which should serve as basic guidelines for the future development of the system. [There are two of these which are of particular interest in the present case] â€¦

Principle 3.

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The parents of a child with special educational needs are entitled and should be enabled to play an active part in the decision-making process; their wishes should be taken into consideration when recommendations on special educational provisions are being made â€¦

Principle 7.

The State should provide adequate resources to ensure that children with special educational needs can have an education appropriate to those needs."

In a section dealing with childhood autism (pp. 140 to 142) it is observed in the report under a heading entitled "Nature of the Disability":-

"This condition is recognised as one of the most severe mental disorders affecting children. While approaches to diagnosing autism may differ, there is general agreement that it is present from infancy â€¦ For children with autism, identification and intervention early during the pre-school period is a first priority. It will be necessary to take account of factors such as the pervasiveness and degree of severity of the autistic symptoms and the level of intelligence and language development when considering the question of the most suitable school enrolment in individual cases â€¦"

It is of particular interest and significance that the Review Committee recommended a pupil-teacher ratio of 6:1 for pupils with autism who have been identified in accordance with accepted criteria, with one special needs assistant for a class of six, or two special needs assistant where the students are also severely or profoundly mentally handicapped. It will be observed that the foregoing assessment is similar to that made by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 which, surprisingly, was appealed by the State. Not surprisingly the ground of appeal that children who suffer from severe or profound mental handicap are not educable was abandoned at the door of the Supreme Court on the 6th February, 1997, as was opposition to the pupil-teacher and special needs assistant ratios specified in the judgment. It is impossible to avoid the conclusion that such grounds of appeal were persisted in against an overwhelming tide of national and international expert opinion without any hope of success on the appeal but with the intention of delaying the implementation of *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 for as long as possible. In the event, there was no compliance with it until 1998 - five years after the judgment. Even then nothing was done for those suffering from autism. There is no doubt whatever that the judgment of O'Hanlon J. and the Review Body report in 1993, made it absolutely clear that the State had a constitutional duty to provide for the primary education of those who suffer severe or profound mental handicap and that performance of that duty was a matter of urgency.

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*Diagnosis of the first plaintiff's condition*

I note that in their closing written submission counsel for the defendants have again contended that the first plaintiff suffers primarily from severe or profound mental handicap with an overlay of autistic tendencies or characteristics (whatever that may mean). I have already commented on this persistent attempt during the trial to downgrade the autism from which the plaintiff has patently suffered since four months old and which has been well established by an abundance of expert testimony and other evidence, including video film and reports made by experts on the first plaintiff's condition over the years, some of which have emerged from the defendants' own discovery of documents. I have already commented that counsel sought to make that case for the first time during the trial when at a late stage Dr. Rita Honan was recruited to advise the defendants. Based on insufficient research and investigation she has advanced the "autistic tendencies" theory since espoused by counsel for the defendants. Her evidence has been discredited and, as previously stated, I reject the opinions expressed by her which are of no value in the light of the admittedly inadequate investigation which she made. It is of interest that two experts of high international repute, Professor Peter Mittler and Dr. Jean Ware, who gave evidence for the defendants, and who had been advising them before trial, did not challenge the first plaintiff's autism and were not invited to support Dr. Honan's theories. As previously stated, in the light of the evidence I have no doubt whatever that the first plaintiff suffers and has suffered since infancy from profound mental disablement, physical disablement and severe autism. Which of these conditions gave rise to which, and what connection, if any, there are between them does not seem to me to be of significance in the context of the primary education and training which the first plaintiff requires. The autistic symptoms which he has displayed over the years and continues to display are obvious, numerous and seriously disabling*per se*. His history makes it abundantly clear that his autistic symptoms require a specialist education and training by experts in that sphere. The primary education which he needs includes features which are irrelevant to other profoundly handicapped students who are not autistic. He is the odd man out in his class at the Orchard - none of whom are ambulatory or autistic. His autism, which is a major part of his disablement, is not being addressed there because, as Mr. Buttimer has stated, Cope has no staff trained in dealing with autism or facilities, such as speech therapy, which is required in the treatment of that condition. Sadly, experience has shown that the Orchard is not good for the first plaintiff. I accept his mother's evidence that he is regressing there. Nothing is being done by or on behalf of the State to put matters right and to provide him

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with meaningful primary education having regard to his particular needs either at the Orchard or elsewhere.

*Limitations (if any) on the first plaintiff's right to primary education*

Two arguments have been advanced on behalf of the defendants which comprise the kernel of their case. The first deals specifically with age limitation and the other with retrospection.

*Age*

It is argued that the constitutional obligation of the State under Article 42.4 to provide primary education for those who are severely or profoundly mentally handicapped is a benefit which by implication applies only to children and, therefore, ceases when the child reaches the age of 18 years. In that regard reliance was placed on the definition of education by Ã“ DÃ¡laigh C.J. in the Supreme Court in *Ryan v. Attorney General* [1965] I.R. 294 at p. 350 to which I have already referred. That definition was recited with approval by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. In course of his judgment he stated that education "constituted giving each child such advice, instruction and teaching as would enable him to make the best possible use of his inherent and potential capabilities, physical, mental and moral, however limited these capacities might be".

The issues which Ã“ DÃ¡laigh C.J. in *Ryan v. Attorney General* [1965] I.R. 294 at p. 350 and O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, were addressing did not include the question which arises in this case as to whether the State's obligation to provide for free primary education under Article 42.4 is subject to an age-limit or may be open-ended in particular circumstances. Neither had occasion to turn his mind to that matter. Each was dealing with a problem relating to all minor children in *Ryan* and a minor child of eight years of age in *O'Donoghue* . I do not accept that the foregoing definitions of education import into Article 42.4 an age limitation which is not stated in the provision itself. It is also submitted that if the court interprets it as being open-ended in given circumstances, that amounts to a declaration of an unspecified personal right under Article 40.3 which on the facts is not justified. I accept that where the court considers that a particular personal right ought to be regarded as an unspecified constitutional right that such a declaration

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amounts to a far-reaching exercise of judicial authority which if not justified would amount to an abuse of judicial power. The making of such a declaration opens up a difficult area of constitutional jurisprudence. Happily in this case those potentially hazardous waters do not require to be navigated by me. If the first plaintiff needs continuing primary education and related services from the State probably for life, which I am satisfied he does, it seems to me that his right to such services derives from Article 42.4 of the Constitution and is not a newly found and declared previously unspecified constitutional right. The sub-article enacts that "The State shall provide for free primary education â€¦ and when the public good requires it, provide other educational facilities or institutions â€¦"

As already stated there is general agreement that the first plaintiff suffers from severe or profound mental handicap with substantial autistic symptoms and has done so since he was about four months old. I have pointed out already that the only area of apparent disagreement is the relationship between his autism and his profound mental handicap. No one contends that the first plaintiff's autism does not require specialist education, therapy and training by experts who are capable of dealing with that condition. He will probably remain grievously afflicted for the rest of his life, but if given appropriate education and ancillary services his condition and the quality of his life can be significantly improved. The education which he requires includes specialised instruction to help him contend with his autistic symptoms. It also includes the ancillary services such as speech therapy, occupational therapy, physiotherapy, job training and general health care which are an integral part of the primary education package which a disabled person such as the first plaintiff requires as a minimum meaningful education and training. There is nothing in Article 42.4 which supports the contention that there is an age limitation on a citizen's right to ongoing primary education provided by or on behalf of the State. It is evident that the right to primary education would be fundamentally flawed if narrowly interpreted as ending at an arbitrary age - 18 years. It has been conceded on behalf of the Minister for Education that the first plaintiff at 23 years of age requires on-going primary education and training and that he will probably continue to do so indefinitely. However, it is submitted that his entitlement in that regard is not derived from Article 42.4.but, it seems, is an undefined "right" which is likely to be granted to him only by way of ministerial grace and favour. If the Oireachtas reduces the arbitrary threshold into adulthood as it has done in the past (from 12 to 18 years) does that entail also an arbitrary contraction of the citizen's constitutional right to free primary education? That cannot be so. The Oireachtas has no power to interfere with such rights - only the people by referendum may amend the Constitution.

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The first plaintiff's history graphically underlines the importance of ongoing education and training from early childhood as advocated by the experts on both sides which should continue for as long as it is required. It follows, therefore, that in his case, and others like him, there is a fundamental need for continuous education and training which is not age related. In my opinion, in the absence of a specific provision in terms, it would be wrong to imply any age limitation on the constitutional obligation of the State to provide for the primary education of those who suffer from severe or profound mental handicap. In the light of the foregoing I am satisfied that the constitutional obligation of the State under Article 42.4 to provide and continue to provide for primary education and related ancillary services for the first plaintiff is open-ended and will continue as long as such education and services are reasonably required by him.

In the final analysis the defendants' contention that the first plaintiff, and others who suffer from severe or profound mental handicap, have no constitutional entitlement to primary education and ancillary services after the age of 18 years has no reality. In my opinion the ultimate criterion in interpreting the State's constitutional obligation to provide for primary education of the grievously disabled is "need" and not "age". If a child's disability is such that he/she requires ongoing specialist primary education and training for life, then the obligation of the State to provide for that service will continue into adulthood for the lifetime of the child. To cut off a crucial educational life-line because a child has reached his or her majority and to thereby condemn the sufferer to the risk of regression in hard earned gains which have enhanced his/her life would amount to an appalling loss, the effect of which might be to negative the advantages of the constitutional right to education (if provided) enjoyed by the sufferer for many years during infancy. The argument advanced on behalf of the defendants in support of the submission that I am obliged to hold that the first plaintiff's constitutional right to ongoing education provided for him by the State ceased when he reached arbitrary adulthood, even though unsupported by the wording of the Article 42.4, is fundamentally flawed for the foregoing reasons. Such an interpretation would create an obvious constitutional injustice.

Notwithstanding the defendants' contention that there is no constitutional obligation to provide continuing primary education for the first plaintiff after he reached adulthood, a form of continuing education has been provided for him at the Orchard in consequence of this litigation. However, it does not meet the State's obligation under Article 42.4 and no alternative service has been made available to him. I have already referred to the inadequacies of the purported form of education which he is presently receiving at the Orchard. I note that there are plans to provide an

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adult educational service there for those suffering from severe or profound mental handicap, including autism, which may eventuate in or about two or three years time. No firm plans are yet in being. If and when such a service does come on stream it may meet the first plaintiff's on-going educational and related requirements. In the meantime the constitutional obligation of the State to provide for his continuing primary education should be met by the provision of sufficient funds for an alternative system of primary education, therapy and training which is suitable to his needs and such funding should continue, at least on an interim basis, pending the outcome of the possible developments at Cope.

*Retrospection*

Judgment in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 was delivered on the 27th May, 1993. The first plaintiff first obtained treatment for his disabilities at Chicago in October, 1981. He reached the age of 18 years on the 11th October, 1995, and his action commenced on the 6th January, 1997. His mother's action commenced on the 17th December, 1996.

It was submitted on behalf of the defendants that the first plaintiff's claims are tortious in nature. It is alleged that the"tort" in question did not exist until established by *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 and therefore the question of retrospection beyond the date of that judgment cannot arise. In support of that contention the State relied upon the judgments of the Supreme Court in *Murphy v. Attorney General* [1982] I.R. 241; *McDonnell v. Ireland* [1998] 1 I.R. 134, and judgments of the European Court of Justice in *Defrenne v. Sabena (Case 43/75)* [1976] E.C.R. 455 and *Barber v. Guardian Royal Exchange (Case C-262)* [1990] E.C.R. I-1889. *Murphy* declared unconstitutional certain provisions of the Income Tax Act, 1967, relating to the taxation of married women in a manner that failed to respect their rights under the Constitution. The effect of the judgment was that the relevant provisions in the Statute are deemed to be void from enactment. Nonetheless, the Supreme Court held that other claimants who had not commenced proceedings prior to the judgment in *Murphy v. Attorney General* were not entitled to mount claims retrospectively. Counsel for the defendants submitted that by analogy with *Murphy v. Attorney General* the constitutional right of those suffering from severe or profound mental handicap to the provision of primary education by the State was created by the judgment in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 and no claimant was entitled to maintain a retrospective claim prior to the date of that judgment. Accordingly, it was argued that the

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first plaintiff could maintain a claim under Article 42.4 only from the 27th May, 1993, until his eighteenth birthday in 1995. In my opinion that argument is not well founded. A crucial distinction between the particular facts in *Murphy v. Attorney General* and the circumstances of *O'Donoghue* is that in *Murphy v. Attorney General* the Supreme Court struck down a provision of the Income Tax Act, 1967, which until then had a presumption of legality. In *O'Donoghue* ,O'Hanlon J. did not create a new right but declared that the obligation of the State to provide for primary education under Article 42.4 of the Constitution applies to all citizens and that those who suffer from severe or profound mental handicap are not excluded from the constitutional benefit of appropriate primary education. That right has existed from the enactment of the Constitution in 1937 and failure to honour it has sounded in damages at least from the early 1970's when expert opinion widely accepted that those who suffer grievous mental disablement are capable of and would derive benefit from appropriate primary education. In short, the first plaintiff is not availing of a new right and cause of action which did not exist prior to *O'Donoghue* in 1993. The right which he enjoys existed from the time when he was diagnosed and treated in Chicago in October, 1981, and, it remains ongoing into the future. His entitlement to damages for breach of that right does not spring from the *O'Donoghue* judgment, the effect of which was to underline an existing right - not to create a new one.

*McDonnell v. Ireland* [1998] 1 I.R. 134 deals with the enforcement of constitutional rights and contains the following passage from the judgment of Keane J. (as he then was) at p. 158:-

"In *Meskell v. Coras Iompair Ã‰ireann*  [1973] I.R. 121, Walsh J. said at p. 132:-

'It has been said on a number of occasions in this Court, and most notably in the decision in *Byrne v. Ireland* [[1972] I.R. 241] that a right guaranteed by the Constitution or granted by the Constitution can be protected by action or enforced by action even though such action may not fit into any of the ordinary forms of action in either common law or equity and that the constitutional right carries within it it's own right to a remedy or for the enforcement of it.'

I think that passage is perfectly consistent with the constitutional right being protected by a new form of action in tort, provided, of course, the form of action thus fashioned sufficiently protects the constitutional right in question.

Nor do I see any conflict between that view and the passage in the judgment of Henchy J. in *Hanrahan v. Merck, Sharp & Dohme*

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*(Ireland) Ltd.* [1988] 1 I.L.R.M. 629 on which counsel for the plaintiff relied. The learned judge pointed out at p. 636:-

'A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskell v. Coras Iompair Ã‰ireann*  ); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right'."

Keane J. continued at pp. 158 and 159:-

"There is nothing in that passage to suggest that were a plaintiff is obliged to have recourse to an action for breach of a constitutional right, because the existing *corpus* of tort law affords him no remedy, or an inadequate remedy, that action cannot in turn be described as an action in tort, albeit a tort not hereto recognised by the law, within the meaning of, and for the purpose of, the Act of 1957.

Nor does the reference by Finlay C.J. in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305 to 'damages in tort or for breach of a constitutional right' assist the plaintiff. The learned Chief Justice was solely concerned at that point in his judgment with considering the differing headings of damages recoverable in Irish law, whether in an action for tort in the conventional sense or in an action for breach of a constitutional right. Whether the second category, actions for breaches of constitutional rights, could appropriately be grouped under the heading of 'actions in tort' in other contexts, such as the Act of 1957, was not under consideration in that case."

Later at p. 160 having referred to policy considerations which underlie statutes of limitation such as the Act of 1957, the following pithy observation was made:-

"I can see no reason why an actress sunbathing in her back garden whose privacy is intruded upon by a long-range camera should defer proceedings until her old age to provide herself with a nest egg while a young man or woman rendered a paraplegic by a drunken motorist must be cut off from suing after three years. The policy considerations identified by the learned Chief Justice â€¦ are applicable to actions such as the present as much as to actions founded on tort in the conventional sense."

Barrington J. in *McDonnell v. Ireland* [1998] 1 I.R. 134 on the topic of dual causes of action *i.e*. constitutional and at common law, referred by way of example to a citizen's constitutional right to his or her good name which also has the protection of the law of defamation. He stated that in

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such circumstances the victim is obliged to avail of his remedy in ordinary law which entails being bound by the appropriate limitation period.

The following conclusions emerge from the judgment of the Supreme Court in *McDonnell v. Ireland* :-

(i) Claims for damages for breach of constitutional rights as in the present actions are analogous to a common law action in tort and the relevant provisions of the Statute of Limitations, 1957, apply.

(ii) In the first plaintiff's case (and that of his mother) the duty of the State which gave rise to his claim is one deriving solely from the Constitution and there is no corresponding duty in ordinary law. Accordingly, it was appropriate for him to bring a constitutional action.

(iii) Apart from the fact that he is profoundly mentally handicapped, a condition which stops the limitation clock from running against him, he was an infant until his eighteenth birthday on the 11th October, 1995, and his action commenced within three years from that date. Accordingly, he is entitled to damages from October, 1981, (being the time when the State ought to have provided for his primary education) up to the present and into the future.

*The second plaintiff's claim*

Her claim is also based on breach by the State of constitutional rights enjoyed by her and there is no corresponding right in ordinary law. Defence counsels' submission dated the 8th February, 2000, seems to concede by inference that the second plaintiff has constitutional rights relating to the duty of the State to provide for appropriate primary education for her son, the first plaintiff. The case made against her is essentially concerned with retrospection and also a contention that her claim relates to rights created by the judgment in *O'Donoghue v. Minister for Health* delivered on the 17th May, 1993. As her action did not commence until the 17th December, 1996, it is contended that it is barred under s. 11(2) of the Statute of Limitations, 1957. In my opinion the latter submission is unfounded.

In essence the second plaintiff's constitutional rights*vis-Ã -vis* the State may be summarised as follows:-

(i) She is and has been at all material times a *de facto* single parent and head of the Sinnott family of which she is the primary carer. Her position and that of the family is specifically recognised

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in the Constitution. The State guarantees to protect the family in its constitution and authority â€¦ (Article 41.2). In *O'B. v. S.* [1984] I.R. 316 the Supreme Court held that "the provisions of Article 41 create not merely a State interest, but a State obligation to protect the family".

(ii) The second plaintiff and her family (in particular her son, the first plaintiff) are entitled to equality of treatment by the State and ought not to be deprived without just cause of basic advantages which the State provides for others (Article 40.1. "All citizens shall as human persons, be held equal before the law â€¦")

(iii) The State shall provide for free primary education - and when the public good requires it, shall provide other educational facilities and institutions (Article 42.4). This is a right for the benefit of the family as a unit as well as for individual members thereof. If the State fails in that duty the burden of providing primary education for a child of the family thus deprived will in the ordinary course devolve on the parents - in the present case on the mother as *de facto* sole parent.

(iv) The State has failed to honour its foregoing constitutional obligations to the second plaintiff and her son, the first plaintiff, the foreseeable consequence of which has been, *inter alia*, that she has had imposed on her an inordinate burden, which has dominated her life, of endeavouring to provide for the education of her profoundly disabled child. There is no doubt that the first plaintiff would have been a substantial problem for her even if optimum educational services and training had been provided for him. However, the evidence establishes that her burden has been greatly aggravated by the failure of the State to provide adequately for the first plaintiff's primary education and for that aggravation she is entitled to appropriate damages.

(v) Although the defendants' argument regarding retrospection which I have already addressed in the context of the first plaintiff's claim is in my opinion not well founded, the period of damage for which the second plaintiff is entitled to compensation differs from that of her son where infancy and mental incapacity are relevant factors in the context of limitation of action. Having regard to the judgment of the Supreme Court in *McDonnell v. Ireland* [1998] 1 I.R. 134, it follows that the second plaintiff's claim is analogous to a claim for personal injury in tort and is subject to the limitation period of

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three years as provided in the Act of 1957 in that regard. However, unlike a claim for personal injury arising out of, for example, a traffic accident where the date of the precipitating event determines the limitation period, the wrong done to her is a continuing one which existed from 1981 and has gone on since then. Her action commenced on the17th December, 1996. Accordingly, she is entitled to damages for the harm done to her from the 17th December, 1993, and into the future.

*The structure of the State's liability under Article 42.4 of the Constitution*

There is one other aspect of the State's obligations under the foregoing provision which requires to be addressed. In stipulating that the State shall provide *for* free primary education, the concept envisaged included a continuance of the structure which existed in 1937 when the Constitution was enacted on foot of which education was provided by non-state bodies, notably religious institutions, which were funded in whole or in part by the State. As previously stated, the latter does not have a constitutional obligation to provide education directly but may rely on other appropriate bodies to supply that service on its behalf. However, when the State elects to take that course in so doing it does not water down its obligation under Article 42.4. In my opinion it retains primary responsibility for the nature and quality of the educational service which is provided on its behalf. If that were not so then the State could shelter behind third party incompetence in a given case and seek to avoid constitutional responsibility for not providing a citizen with appropriate primary education.

*Duplicity of actions*

Finally, one other point has been taken by counsel on behalf of the defendants relating to the second plaintiff's action. It is contended that she had no justification for bringing separate proceedings from that of her son. Such an argument would have substance if two separate actions were tried. However, in fact both actions were listed together and for practical purposes I have treated them as one and that will be reflected in due course in the matter of costs.

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*Conclusions and summary of essential facts*

Having reviewed all of the evidence adduced at the trial, I am satisfied that the following conclusions which are summarised hereunder emerge beyond reasonable controversy in the light of the established facts:-

(i) In the course of his 23 years the first plaintiff has had no more than about two years of meaningful primary education and training provided by or on behalf of the State.

(ii) The first plaintiff was a normal child in good health up to the age of four months who achieved the usual milestones until then.

(iii) At or about that age there was a profound change in him. He has been diagnosed as suffering from symptoms of severe autism and mental and physical dysfunction. It is not in dispute that he is and will remain severely or profoundly mentally handicapped.

(iv) A period of partial schooling (two hours or less per day) which had continued for about 18 months came to and end in July, 1997, the explanation given being that by reason of age, the first plaintiff was no longer entitled to State education.

(v) From the 23rd September, 1998, in consequence of pressure deriving from this litigation which was then heading towards trial, a place was found for the plaintiff at the Orchard, Cope, which provides for severely or profoundly mentally handicapped people of about his own age. The group he joined also suffered from severe physical disablement and, unlike him, they were not ambulatory. None were autistic. The teacher in charge is unqualified and has no experience or training in autism and little training in dealing with the profoundly handicapped. There was not then and never had been a programme for the first plaintiff's training or education. In course of the trial an individual training course programme for the plaintiff was hurriedly assembled for the first time. It was fundamentally flawed and was severely criticised by all of the experts, including Dr. Ware and Professor Mittler, the defendants' witnesses. Counsel for the defendants, has conceded that it is inadequate and must be replaced. Mr. Gerry Buttimer, the chief executive officer at Cope, conceded in evidence that his foundation has no-one available to it with experience of autism and no facilities for the education or training of autistic persons. The regime at the Orchard has been (in my view rightly) criticised as being wholly unsuitable for the first plaintiff's education

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and training. The admittedly poor programme of instruction; the absence of essential therapies; insufficient facilities in that regard and the lack of any personnel who are trained in autism and its management amply bears that out. Alternative meaningful education and training for the first plaintiff is an urgent imperative.

(vi) The first plaintiff probably will need further education and training for the rest of his life. In my opinion those are not sustainable grounds for measuring his constitutional right in that regard in terms of actual age - particularly bearing in mind that the State has failed to honour its constitutional obligation to him for most of his life and in breach of duty has failed to provide such services for many years as a result of which he has suffered significant additional permanent harm. The first plaintiff has thereby lost valuable time which has not only caused him unnecessary distress, but has also significantly damaged his prospects of fully recovering lost ground in his education and training. All of the experts agree that early intensive intervention with continuing education and training thereafter is of great importance if optimum results are to be achieved for those, such as the first plaintiff, who are severely afflicted by autism and also physical and mental disablement.

(vii) The State has no alternative to the Orchard presently available to the first plaintiff. There are tentative plans afoot at Cope and a centre for education and training of adults suffering from severe autism and mental disablement may eventuate there in two or three years time. Whether it will be adequately staffed with trained personnel and will be suitable for the first plaintiff's on-going education, including job training which might lead to sheltered employment, remains to be seen.

(viii) The first plaintiff has suffered substantial personal harm and damage by reason of the breach of constitutional duty of the State, its servants and agents, and its failure to honour its constitutional obligation to provide him with education, training and health care appropriate to his particular situation. This has been aggravated by persistent failure to honour the terms of the judgment of O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 and also failure to provide the plaintiff, whose afflications include severe autism, with vital ancillary services such as speech, occupational and physio therapies.

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(ix) The State's breach of duty includes:-

- failure to provide or to have provided adequate primary education for the first plaintiff;

- failure to provide continuity of educational and other services for him;

- failure to provide necessary ancillary services, in particular speech therapy; occupational therapy; physiotherapy; and music therapy;

- failure to provide sufficient psychological and medical assessment and treatment for the first plaintiff;

- failure to devise and operate an appropriate curriculum for the first plaintiff's education and care;

- failure to devise, revise and keep in operation a viable programme for the first plaintiff's education and training and to do so in consultation with his mother;

- failure to keep adequate records of his education, training and treatment;

- Failure to keep his mother adequately informed of her son's progress and of intended plans for his education and training;

- failure to collaborate with his mother in devising plans for his education and training;

- failure to recognise and respond adequately to his needs;

- failure to give him adequate training in personal care, hygiene and mobility;

- failure to address and provide instruction and treatment for his on-going drooling problem which is and has been a major difficulty for the plaintiff since infancy and a source of continuing distress;

- failure to provide him with any occupational training which might enable him to obtain meaningful sheltered employment;

- failure to provide for the first plaintiff a teacher and other ancillary experts who are trained in autism and familiar with its problems;

- failure to establish and maintain reasonable co-ordination between the Orchard and the second plaintiff;

- placing the first plaintiff in an institution (the Orchard) which is unsuitable to his requirements and positively harmful to him by creating a climate for regression;

- failure to supervise adequately the services for the first plaintiff which the State contracted with the Cope Foundation

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and others to provide on its behalf from time to time;

- failure to take any adequate steps to ensure that such services were structured in a meaningful, appropriate way;

- failure to provide its contractors with the resources necessary to meet the constitutional obligation of the State to educate the plaintiff and to meet his special needs having regard to his particular disabilities as a person who suffers and has suffered from severe autism since the age of four months and major physical and mental handicap.

(x) Harm done to the first plaintiff includes many bouts of anguish, physical and mental damage, depression and misery; also deprivation of the degree of happiness, well-being and human dignity which on the balance of probabilities he would have enjoyed if the State had provided him with the primary education and training which was his right.

(xi) The second plaintiff has also suffered harm, loss and damage by reason of the failure of the State to honour its constitutional obligation to provide adequately for her son's education and training, all of which was a reasonably foreseeable consequence of the State's conduct in that regard.

*The relief*

Both plaintiffs are entitled to the declarations which they claim in their respective statements of claim and to damages arising out of breach of their constitutional rights, negligence and breach of duty by the State in that regard. In the first plaintiff's case further damages may be awarded on review of his situation in April, 2003. The mandatory injunction claimed in each action shall be considered by the court as part of the foregoing review, but, if necessary, the plaintiffs shall have liberty to make earlier application in that regard.

*Damages*

(a) *The first plaintiff*

Special damages have been agreed as part of his mother's claim.

As to the cost of future education and training; I have already stated that I accept the unanimous opinion of the experts on both sides that the first plaintiff is educable and is entitled to continuing education and training for so long as may be reasonably necessary in his particular circumstances. The expert assessment is that he will probably require such

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services for life and I note that that point has been conceded by Mr. Ryan. The plaintiff's rights in that regard are not limited by age. Expert opinion also indicates that it is probably too late now for the first plaintiff to achieve optimum results from education and training. The consensus view is that, none the less, substantial progress is likely if he receives the benefit of appropriate teaching and services. In the interest of justice it is proper that he now should have the best available primary education and training so that he may have the maximum prospect of making up lost ground and thus limiting the degree of permanent damage which he has suffered through the defendants' breach of duty. I have been much impressed by the evidence of Mr. Alan Willis about the Applied Behaviour Analysis home-based programme for sufferers from autism which is presently being successfully pioneered in England. I note that it has a methodology broadly similar to that of C.A.B.A.S. and the Disfunctioning Child Centre at the Michael Reese Hospital, Chicago. It comprises an intensive "one-to-one" education programme at home supported by a multi-disciplinary team comprising speech, physio, occupational and music therapists together with general medical care. Mr. Willis advises that the course should continue for two to three years followed by a review of progress. If necessary the experts required for providing the programme may be recruited in England or elsewhere. The estimated annual cost is about Â£21,000 sterling. Allowing for the present currency differential the equivalent annual cost in Irish currency is approximately IR Â£28,000*per annum*. Bearing in mind that there appears to be some tentative plans for providing a centre at Cope, for continuing education of autistic adults which might prove suitable for the first plaintiff, it seems to me that an equitable way of dealing with his future education and training is to have provided by the State a fund for a two and a half year Applied Behaviour Analysis programme as envisaged by Mr. Willis. Towards the end of that period the first plaintiff should be assessed and,*inter alia*, due regard should be had to the possibility that a place may be available to him at a centre for autistic adults in Cope if one exists at that time and it offers a suitable on-going programme of education and therapy run by a sufficient number of appropriately trained and qualified experts. In short, it may transpire then that the State is in a position to offer the first plaintiff acceptable on-going education and training at the proposed new centre in Cope or, in the absence of such a facility, it may be necessary for him to embark on a further Applied Behaviour Analysis programme or some similar alternative regime. In the latter event, of course, it also would be necessary for this court to award further damages to cover the cost of any additional programme which may be required. It occurs to me that during the Applied Behaviour Analysis"one to one" programme the first plaintiff may make sufficient progress to

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enable him to attend from time to time a FAS training workshop leading to meaningful sheltered employment. I envisage that such work instruction would be in tandem with the Applied Behaviour Analysis programme.

There is another element of potential further loss which the first plaintiff may suffer *i.e.* earnings from sheltered employment if it transpires that through protracted delay in his education he is unable to learn sufficient skills now to open up that possibility. On reflection, it seems to me that such a potential loss is too speculative to establish its likelihood on the balance of probabilities.

Taking all the foregoing factors into account I assess damages in the first plaintiff's case as follows:-

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| estimated cost of the Applied Behaviour Analysis programme of education for two and a half years at IR Â£28,000 *per annum* (subject to review on completion) | Â£70,000 |
| ancillary services for a like period (speech, physio, occupational and music therapists and medical care). Estimated annual cost | Â£37,500 |
| general damages for additional suffering, distress and loss of enjoyment of life from October, 1981, to date | Â£90,000 |
| ongoing distress in the future through gross delay in providing education and training, and permanent additional damage suffered by the Plaintiff on that account | Â£25,000Â |
| Total: | Â£222,500Â |

As the first plaintiff is of unsound mind, application should be made at an early date to the President of the High Court to bring the plaintiff into wardship and to administer the damages awarded to him.

(b) *The second plaintiff*

The breach of duty of the State in failing to honour its constitutional obligations to the first plaintiff and to her has given rise to a corresponding loss suffered by his mother and primary carer which also will have some ongoing effect into the future. She has had the anguish of seeing substantial progress made by the first plaintiff frittered away through the failure of the State over and over again to respond meaningfully to his needs. She has seen time, a vital commodity for the first plaintiff, squandered by bureaucracy. It appears that she has worn herself quite literally to the bone struggling

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on behalf of her son. Her heroic efforts to have education and care provided for him have dominated her life to a degree far greater than in all probability would have been the case if the State had honoured its obligations to the first plaintiff and to her. She has been subjected many times over the years to the lack of understanding of an apparently disinterested bureaucracy. She has had to contend with the distress and indignity of having to deal with various problems of a child, now a man, which, if the State had provided appropriate services when required, probably would have been resolved many years ago - not least of these are his present lack of mobility, persistent frequent drooling and the continuing need for diapers at the age of 23 years. I have no doubt that all of these elements of avoidable anguish in the second plaintiff's life are consequences of the State's breach of duty in failing to honour its constitutional obligations to the first plaintiff and to her. She has responded to that failure with indefatigable love, courage and devotion but at great personal cost. In that regard she is following in the footsteps of Mrs. Marie O'Donoghue and Mrs. Annie Ryan who gave evidence at this trial and many other heroic parents of grievously disabled children who have had to contend with similar difficulties. The State's breach of duty and failure to honour its constitutional obligations has also created distress which for the reason explained in the first plaintiff's case will continue indefinitely, albeit to a lesser degree, even if his future education is reasonably successful.

As to damages; I note that special damages (which include the first plaintiff's case also) have been agreed at Â£15,000.

It is difficult to assess compensation for a devoted mother's overlay of distress and anguish in a case like this and for the burden of unnecessary work inflicted on her over the years both as a carer and in her struggle trying to achieve the first plaintiff's rights from a reluctant beaucracy. If, like him, the second plaintiff was entitled to compensation from October, 1981, I would have awarded her general damages of Â£80,000 from then until now. However, as she is entitled to compensation only for the wrong done to her from the 17th December, 1993, there must be a substantial reduction in that amount. She is entitled to a modest sum for probable continuing distress in the future arising out of the loss of time which militates against the first plaintiff making the degree of progress which he probably would have made if he had received from the State early primary education and training. That situation casts at least a minor cloud over the second plaintiff's future (including on-going avoidable work) which ought not to be there and for which in my opinion she is also entitled to compensation.

I assess damages for her as follows:-

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| agreed special damages  general damages from 17th December, 1993, to date  general damages in the future | Â£15,000 Â£30,000 Â£10,000Â |
| Total: | Â£55,000Â |

*Postscript*

The conscious, deliberate failure of Department of Finance administrators to pay due regard to and take effective steps to honour the obligations of the State to the first plaintiff on foot of *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 opens up an issue as to whether punitive damages should be awarded against the defendants. As that point was not argued, I do not propose to pursue it in this judgment. However, it is proper to lay down a marker that the issue of punitive damages will arise if it transpires in future litigation that this warning is not heeded and decision-makers persist in failing to meet the constitutional obligations of the State to the grievously afflicted and deprived in our society with the urgency which is their right.

[Reporter's note: On the 30th October, 2000, the High Court (Barr J.) granted a mandatory injunction that the first defendant provide for free education for the first plaintiff, to be reviewed in 2003].

By notices of appeal dated the 8th and 12th December, 2000, the defendants appealed the judgment and orders of the High Court. The appeal came on for hearing before the Supreme Court (Keane C.J., Denham, Murphy, Murray, Hardiman, Geoghegan and Fennelly JJ.) on the 27th, 28th and 29th March and the 3rd April, 2001.

*Eoghan Fitzsimons S.C.* (with him*James O'Reilly S.C.* and*John L. O'Donnell* ) for the defendants: The trial judge's findings of fact were not in dispute and for the purposes of the appeal, the State's constitutional obligation to provide primary education under Article 42.4. of the Constitution applied to those persons under 18 years of age but not to adults. Regardless of special needs, the constitutional obligation ceased once a child reached the age of majority and the trial judge erred in holding that the constitutional obligation was an open-ended one that continued for as

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long as education and special services referable to the first plaintiff's special needs were required.

To extend the obligation beyond the age of 18 years would permit any adult to claim a right to receive a primary education at any time in his life. Reliance is placed upon the references to "child " and"children" in Article 42.1, Article 42.3.1, Article 42.3.2 and Article 42.5 which, it is submitted, are consistent only with a child having the status of a minor or person under full age and not adults. The trial judge erred in applying the natural law, Christian and democratic nature of the State doctrine as a means to interpret"primary education" in Article 42.5. of the Constitution and a historical approach, as adopted in *Crowley v. Ireland* ,was the appropriate means of interpretation. The trial judge should have adopted the approach taken by Laffoy J. in *O'Shiel v. Minister for Education* and examined Article 42 in its entirety. The decision in *O'Shiel v. Minister for Education* was not considered in *Director of Public Prosecutions v. Best* . The State wanted to provide for persons such as the first plaintiff but not on a constitutional basis, and the Education Act, 1998, made provision for persons in the first plaintiff's position.

The first plaintiff's case relied upon Article 42.4 of the Constitution whereas the order made by the trial judge relied upon Articles 40.1, 40.3.1 and 42.3.2 and the defendants' appeal was predicated on the basis that the findings of fact pertained to Article 42.4 of the Constitution and it was submitted that the references to Articles 40.1, 40.3.1 and 42.3.2 did not form part of the *ratio decidendi* of the trial judge's decision.

The trial judge breached the separation of powers principle (as propounded in *Buckley and Others (Sinn FÃ©in) v. Attorney General* and restated in *Riordan v. An Taoiseach* )in making mandatory orders against the State. The High Court's jurisdiction did not extend to directing ministers of government or State authorities or agencies on what was required to give effect to an interpretation of the Constitution. The separation of powers (Articles 6, 15, 17, 28 and 34 of the Constitution) required that any such decision fell to the executive and the legislature within their respective spheres of government. The primacy of DÃ¡il Ã‰ireann in the raising of public revenues, and of the Oireachtas in enacting the Annual Appropriations Act, were relevant considerations. It was not claimed that the courts could never consider granting injunctive relief but, having regard to the fact that the State generally complied with declarations made by the courts and that the present case was different from that in *O'Donoghue v. Minister for Health* and was the first of its kind before the courts, the restraint exercised by the courts as a matter of practice, in relation to the granting of mandatory orders against the State, ought to continue. If the Supreme Court were to affirm the decision of the trial judge the appropriate

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relief would be to award damages for breach of the constitutional right to primary education and a declaration of his ongoing constitutional right to primary education. In considering the appropriate remedy, the trial judge should have taken all the factors into account, resisted making a mandatory order in explicit terms and allowed the State to attend to the implementation of the declaration and to prescribe the appropriate remedies as a matter of policy ( *Boland v. An Taoiseach* ; *Buckley and Others (Sinn FÃ©in) v. Attorney General* ; *Byrne v. Ireland* ; *MacMathÃºna v. Ireland* ; *McKenna v. An Taoiseach (No. 2)* ; *O'Reilly v. Limerick Corporation* ; *Riordan v. An Taoiseach* and *McMenamin v. Ireland* relied upon).

The order made by the trial judge, in terms of granting a mandatory injunction requiring that the first defendant provide for free education for the first plaintiff and awarding damages, and ordering a review in 2003, in reality, contemplated a dual award of damages for the same cause of action and, if a further order for damages was made in the future, it should only be made in the context of fresh proceedings.

The reference to negligence in the order made by the trial judge was included without the trial judge ever having made any finding of negligence or considered the elements of the tort.

The Supreme Court had not yet propounded principles in relation to the award of damages for breach of constitutional rights. Article 42.4 of the Constitution accorded the State a wide discretion in the implementation of policies providing for free primary education and, in terms of the principles used by the European Court of Justice to determine whether a national government had manifestly disregarded the limits to its discretion, Article 42.4 did not state clearly and unambiguously the interpretation that was subsequently afforded to it in *O'Donoghue v. Minister for Health* .

Because of the absence of case law to guide the State prior to the decision in *O'Donoghue v. Minister for Health* , made on the 23rd May, 1993, the defendants should not be liable for any alleged damages sustained prior to that date and, furthermore, liability should only extend to the date upon which the first plaintiff reached his majority, the 11th October, 1995.

The Irish courts could have regard to the approach taken by the Community courts, in relation to State responsibility for breach of directly applicable provisions of Community law, when establishing the principles on the basis of which damages should be awarded. This included the principles that: a declaration by the European Court of Justice that an item of Community legislation is void as contravening the European Union Treaty did not grant an automatic entitlement to damages; damages could only be considered where there was a sufficiently serious breach of a superior rule of law for the protection of the individual; and the Community did not incur liability for one of its institutions in the absence of the

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institution concerned manifestly and gravely disregarding the limits on the exercise of its power.

A temporal limitation on damages for breach of constitutional rights applied to such claims where the first plaintiff relied on a cause of action that was only recently declared by the superior courts. Where the first plaintiff sought declaratory constitutional relief and damages in a cause of action that was only pronounced by the superior courts on the 23rd May, 1993, and the first plaintiff had not instituted legal proceedings prior to this date, the courts were entitled to consider any such claim on the facts relied upon and proved after this date and restrict any claim for damages to those facts and not for damages allegedly suffered prior to this date. Furthermore, it was submitted that the claim for damages only extended to the date on which the first plaintiff attained the age of majority, the 11th October, 1995.

The trial judge's observations with regard to punitive damages in a postscript to his judgment were not addressed at any point during the hearing.

Notwithstanding the second plaintiff's reliance on Article 41 of the Constitution, her claim was essentially a mirror claim of the relief sought in the first plaintiff's case in terms of Article 42.4 of the Constitution. The relevant provisions of Article 41 did not create a remedy in damages and the second plaintiff's cause of action in reliance upon that article should be dismissed.

Any claim in reliance on Article 40.1 of the Constitution was properly addressed in the first plaintiff's proceedings and this provision did not extend to granting the declaratory and other mandatory relief claimed by the second plaintiff.

The second plaintiff's reliance on Articles 42.1 and 42.2 of the Constitution did not advance the substance of her claim which was focussed on the meaning of Article 42.4 of the Constitution and any duty under Article 42.4 was owed to the first plaintiff in the context of primary education and Article 42.4, which formed the substance of the second plaintiff's claim, was not relevant to her.

If the second plaintiff's claim was based on an assertion that the relationship between her and the first plaintiff was not as rewarding as it should have been, this did not fit within a cause of action based only on Article 42.4 of the Constitution and there was no constitutional principle equivalent to statutory claims for*solatium*.

The trial judge applied the Statute of Limitations, 1957, to the second plaintiff's claim notwithstanding the fact that the defendants did not plead it in their defence and if the court were to find that the defendants breached

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the second plaintiff's constitutional rights, she should be compensated for the breach.

There were no grounds to justify the trial judge replicating the relief granted to the first plaintiff to the second plaintiff. The trial judge erred in finding that the defendants' submissions conceded by inference that the second plaintiff had constitutional rights relating to the duty of the State to provide for appropriate primary education for the first plaintiff. Having determined the first plaintiff's case, it was unnecessary for the trial judge to separately consider a parallel and virtually identical claim by the second plaintiff.

The second plaintiff had no collateral rights and no cause of action automatically arose as a consequence of her being adversely affected as a result of a breach of the first plaintiff's constitutional rights. A separate cause of action might, however, arise if the breach of a child's constitutional rights was the proximate cause of his/her parent suffering damage, for example an actual psychiatric illness in terms of *Mullally v. Bus Ã‰ireann*  .

The second plaintiff had no claim against the defendants for fulfilling the constitutional duty owed by her to the first plaintiff under Articles 42.1. and 42.5. of the Constitution.

A grant of declaratory relief was not automatic and the High Court was required to cautiously exercise its jurisdiction to grant constitutional relief and this was not an appropriate case in which to grant such relief.

*Dermot Gleeson S.C.* and*Paul Sreenan S.C.* (with them*Michael Gleeson S.C.* and*Pearse Michael Sreenan* ) for the plaintiffs: We recognise that what might be referred to as "mainstream" primary education normally finished at about the age of 12 years. By conceding that pupils with certain disabilities were entitled to education to the age of 18 years, the defendants admitted that primary education in certain circumstances had to be seen as need rather than age related. If the defendants conceded an extra 6 years primary education for persons such as the first plaintiff, why should the arbitrary age of 18 be imposed if the needs continued beyond that age? The defendants' submissions were inconsistent in this regard. The first plaintiff relied upon Article 42.3.2, Article 42.4 and Article 42.5, together with the rights of the child springing from that article, namely; the right to benefit from the intervention of the State so as to receive a certain minimum education; to receive what was the State's duty to provide; and the right to have the State intervene and endeavour to supply the place of the parents in exceptional cases. ( *Crowley v. Ireland* ; *Comerford v. Minister for Education* ; *F.N. (a minor) v. Minister for Education* ; *In re the Adoption (No. 2)*

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*Bill, 1987* ; *M.F. v. Superintendent Ballymun Garda Station* and *O'Donoghue v. Minister for Health* relied upon).

The reference to "child" in Article 42.5. referred to the child of one's own parents or offspring, as opposed to a minor, and that the guarantees of minimum education in Article 42 extended to all persons including, in the case of severely or profoundly handicapped persons, persons who had passed the age of 18 years. The Irish translation of Article 42 supported this interpretation of "child" in its reference to "leanbh" or "leanaÃ­" and "clann" and that the obligation and direct promise therein was one with which the organs of state were bound to comply.

As a general principle, it is accepted that it would not generally be expected that a court would make mandatory orders against the State. However, the court had a power and duty to inquire into the degree and quality of primary education being provided to the first plaintiff, to make findings as to the adequacy and suitability of such education, and to make findings as to how the State's constitutional obligation under Article 42 should be discharged. This was particularly the case since the High Court had found as a fact that the first plaintiff was capable of benefiting from education; the first plaintiff had only received two years of primary education in his 23 years; and the defendants were deficient in their implementation of *O'Donoghue v. Minister for Health* . The education to which the first plaintiff claimed entitlement constituted "primary education" within the meaning of Article 42.4 and it was appropriate to adopt the analysis and reasoning of O'Hanlon J. on this point in *O'Donoghue v. Minister for Health* which accorded with the concept of "education" in the Constitution as established by the Supreme Court in *Ryan v. Attorney General* .

In circumstances where no free primary education had been furnished for a considerable length of time, the onus was on the State to rebut the *prima facie* evidence that the State was not performing its duty to provide for that education. The evidence at trial had established that the education facilities which had been provided to date were grossly inadequate and unsuited to the first plaintiff's needs and it was abundantly clear that what was provided, or could be provided, by the first plaintiff's family and by voluntary organisations could not succeed in providing what was required. In these circumstances, the State had and continued to have a duty to act directly and provide such education, in accordance with the principles recognised in *Crowley v. Ireland* . Contrary to the very first principle of arranging for educational needs, the Minister had no standard in relation to qualifications for persons educating autistic children or severely and profoundly handicapped persons and, in accordance with the principle adopted by O'Hanlon J. in *O'Donoghue v. Minister for Health* and adopted

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by the trial judge in this case, the State's obligation to provide suitable primary education for such persons was a continuing obligation which survived for so long as there was a clearly discernible ability on the part of the person for further educational development.

The State had failed to intervene notwithstanding that it had been expressly placed on notice of the first plaintiff's difficulties and those of the second plaintiff in meeting her son's educational needs. Therefore, the State did not adequately "endeavour" as guardian of the common good and as the guarantor of the first plaintiff's natural and imprescriptible rights (in this context as the "child" of his parents and not just, formerly, as a minor) to supply the place of his parents in meeting those needs ( *The State (Quinn) v. Ryan* ). In particular, the detailed technical and personal evidence at trial supported the entire catalogue of findings of failures on the part of the State to intervene. These failures constituted a particular breach of the State's positive obligation to intervene under Article 42.5 of the Constitution to ensure, insofar as may be possible, that the plaintiff received "a minimum standard of elementary education of general application". ( *A.G. (S.P.U.C.) v. Open Door Counselling Ltd.* ; *Boland v. An Taoiseach* ; *Breathnach v. Ireland* ; *Byrne v. Ireland* ; *Comerford v. Minister for Education* ; *Crotty v. An Taoiseach* ; *Hanley v. Minister for Defence* ; *McDonnell v. Ireland* ; *McKenna v. An Taoiseach (No. 2)* ; *Riordan v. An Taoiseach* ; *The State (Healy) v. Donoghue* ; *McMenamin v. Ireland* relied upon).

While the courts had recognised that there might be a quite exceptional need of a child, for which the State could not be expected under the Constitution to provide, this was not such an exceptional case.

The State had a particular obligation arising out of each of the provisions of Article 42 and from the corresponding educational rights of severely or profoundly handicapped persons including the plaintiff, to assess the educational needs and meet those needs and it was clear, from the judgment of the trial judge, that the State had failed to carry out this duty of assessment at perhaps the most critical point in the first plaintiff's early life and had failed in its continuing duty to assess his educational development and needs over the years with a view to vindicating his constitutional rights to a minimum education adapted to his special needs. To withdraw educational facilities from autistic persons after the age of majority would constitute an abdication of an express constitutional duty and the State was asking the court to allow it to benefit from the dereliction of its constitutional obligations to provide free primary education under Article 42.

The separation of powers between the three branches of government was not pure and its most important feature in the Constitution was the

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strong role given to the judiciary as guardian of the personal rights recognised therein. The trial judge recognised that he should not trespass into the realm of executive or administrative decision-making by the State and that it was a matter for the State to assess the problem areas in its administrative and decision-making structure and to remedy the situation as in its wisdom it deemed most appropriate. In circumstances where the right was one which the executive did not have the competence to grant or withhold, but which was one provided for in the Constitution, the court would be failing to respect the Constitution in failing to vindicate that right in circumstances where the findings of fact established such a breach. In these circumstances, the High Court had ample powers to made such orders as were required to vindicate the plaintiff's rights and it acted within the boundaries of such powers in making the orders that it did. The State had always been subject to the enforcement of the law through the courts and this was never regarded as a violation of the separation of powers. When the jurisdiction of the High Court was invoked to protect the constitutional rights of the citizen, the High Court had power to issue such orders as might be necessary in order to ensure the proper vindication of those rights and the orders which might be granted were entirely discretionary for the High Court having regard to the facts of the case. The High Court did not give instructions to the Government and the Oireachtas on how they should apportion and determine priorities but interpreted the ambit of constitutional rights, found infringement of those rights as a matter of fact, found that that infringement was continuing, awarded damages and gave the necessary ancillary orders. All of the court orders were made in relation only to the first plaintiff. The facts of the case manifested persistent breaches by the State of its duty to the first plaintiff and, in those exceptional circumstances, the court was justified in making the orders.

Executive powers of the State referred to those powers which are characteristic of states as distinct from those which may be performed by individuals, commercial entities or charities. Many of the modern functions of the executive arm of government, such as the provision of roads, airports, railways, social welfare schemes, transport, hospitals, *etc.* had nothing to do with "the executive power of the State". The provision of a system of education fell into the same category of modern administrative state functions which was not properly regarded as "the executive power of the State" and accordingly, not subject to the doctrine of the separation of powers.

The defendants' assertion that the trial judge required the raising of additional tax revenue and failed to respect the pre-eminent position of DÃ¡il Ã‰ireann was an unfair characterisation of the trial judge's judgment and was contradictory because the DÃ¡il's position was not pre-eminent

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under Article 17.2 of the Constitution because it could not act without a request from the Government.

The cost of complying with a court order necessary to vindicate constitutional rights was not a relevant factor for the court's consideration. The absence of a funding allocation was not a bar to relief and the provision of funding could be compelled by an order of*mandamus*.

The entitlement to general damages was well recognised in Irish law. The trial judge did not err in granting damages for negligence and breach of duty because negligence was pleaded in the plenary summons and statement of claim, it was extensively referred to in the written and oral submissions and evidence was given of negligence. The contention that the trial judge failed to consider any temporal limitation on an entitlement to damages was not pleaded by the defendants, no witness was asked by counsel for the defendants to distinguish between damage caused to the plaintiff either prior or subsequent to 1993 and the defendants did not put the first plaintiff on notice of the issue in advance of raising it for the first time in their closing written submissions.

The defendants' submissions were misconceived insofar as they claimed that *O'Donoghue v. Minister for Health* comprised the first declaration of the profoundly mentally handicapped child's constitutional entitlement to primary education; *O'Donoghue v. Minister for Health* could not be given retrospective effect and enable the plaintiff to claim damages for breach of constitutional duty prior to the 27th May, 1993; and if *O'Donoghue v. Minister for Health* was applied, damages should be restricted to the special damages claimed and agreed at Â£15,000.00. The special damages of Â£15,000.00 in the case of the second plaintiff included matters arising prior to the 27th May, 1993, and it was inconsistent for the defendants to agree to pay such special damages and dispute their obligation to pay general damages for loss and damage suffered prior to that date.

It was conceded that punitive damages were not claimed nor awarded and there was no appeal against the failure to award such damages.

The parent of an ablebodied child ought not to have to spend their time fighting for the provision of education for that child. Where a non-disabled child was capable of benefiting from education, a school placement was made available in the immediate vicinity of the family home which provided an education appropriate to the child's needs and, if the child failed to attend, the child's interests were looked after and the parent might be prosecuted. The State owed a duty to the second plaintiff to treat her, as a human person, the same as other parents. However, as a parent of a disabled child, she was discriminated against, in breach of Article 40 of the Constitution, and no appeal was brought against the High Court's finding of discrimination in this regard.

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The inalienable right and duty of parents to educate their children under Article 42.1 of the Constitution was retained even where the parents chose to avail of the State's obligation to provide free primary education under Article 42.4 of the Constitution ( *O'Shiel v. Minister for Education* ). The second plaintiff had a right to be assisted by the State in discharging the inalienable duty she owed to the first plaintiff pursuant to Article 42.1 and she suffered by reason of the State's failure in this regard.

*Eoghan Fitzsimons S.C.* in reply: If the first plaintiff's contention was accepted, namely that the duty to educate him could not be realistically performed without continuing it beyond his majority, this would turn the Constitution on its head. The court should ignore the facts of the case in considering the ambit of the constitutional duty to educate. The Constitution does not meet or respond to all social needs and cannot be construed by reference to need at all times. The inconsistency between the State's concession that the first plaintiff was entitled to free education to the age of 18 years and the fact that it would be reasonable to construe "primary education" as continuing to the age of approximately 12 years was acknowledged.

The State, in an attempt to cater for the needs of persons in a position such as that of the first plaintiff, sought to extend the meaning of "primary education" to 18 years. The plaintiffs in contending that "child" ought to be interpreted as "offspring" sought to avoid the real meaning of "child". If the right in Article 42.4 was to be construed as continuing for life, then there was no reason why the parental duty in Article 42.1 should be interpreted any differently.

There were no reasons in the trial judge's judgment to justify the making of mandatory orders against the State. There were no factual findings that the State did not intend to comply with any declaration made by the trial judge and the court should assume that the State would comply with any order so made.

The trial judge's award of damages should be for a breach of constitutional rights up to the commencement of the proceedings, that any relief granted in the proceedings could only pertain to the situation prior to such commencement, and that the award of damages made into the future was to remedy continuing breaches of constitutional rights. As such, the education with which the first plaintiff would be provided in the future would remedy any perceived continued breach of constitutional right. This was so even though there was no finding in the judgment that the State would not provide education to the first plaintiff in the future. In the event of there

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being a breach of the first plaintiff's constitutional right in the future, the first plaintiff would have a new cause of action.

*Cur. adv. vult.*

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| **Keane C.J.** | 12th July, 2001 |

*Introduction*

The facts in these two cases are not at this stage in dispute and, for the purpose of this judgment, I would propose to adopt the comprehensive statement of them by Barr J. in the judgment under appeal. It is unnecessary to do more than summarise them and set out the inferences which the learned trial judge drew from the primary facts and which, again, are not at this stage in dispute.

The first plaintiff was born on the 11th October, 1977, and was, at the date of the trial in the High Court, nearly 23 years of age. He was the third of nine children born to the second plaintiff and her husband. The second plaintiff has been separated from her husband for a number of years and the primary responsibility for the care and upbringing of the first plaintiff has been hers.

At about the age of four months, having developed normally until then, the first plaintiff began to display symptoms of the condition known as autism. While this appears to have happened shortly after he had received the vaccinations usual for a baby at his stage, there is no finding, and nor was it necessary that there should be, that the autistic condition was caused or contributed to by the vaccination he received.

The second plaintiff is an American citizen and her father, Dr. John Kelly, is a surgeon who has a house in County Cork where she and her children originally lived. He became concerned about the first plaintiff's condition and Dr. Quigley, the family's general practitioner, was consulted. He referred him to the paediatric unit in St. Finbarr's Hospital in June, 1978, where he was assessed by Professor Barry. At that stage, he had lost control of his jaw which had started to clamp and he has never since regained full jaw control. As a result, he tended to drool saliva, a condition obviously distressing both to him and those in contact with him, from which he continued to suffer at the date of the High Court hearing. Pressed by Dr. Kelly as to why the child was not reaching his normal milestones, Professor Barry said that he would not discount autism. He advised that he be taken home and that they should watch the autism develop. The second

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plaintiff and her father were not directed to any other service where treatment might be given, nor was any arrangement made with them for a further assessment by the hospital.

There followed a depressing saga extending over 20 years in which the second plaintiff's efforts to persuade the State's health and education authorities to recognise autism and provide appropriate education and training for those suffering by it were met with what the trial judge described at p. 10 as "official indifference and persistent procrastination which continued up to and through this trial."

The second plaintiff's unremitting battle to secure proper treatment and educational facilities for her son eventually became a campaign on behalf of autistic children generally: her commitment to that cause cannot be praised too highly. It must be pointed out that the ignorance of the problems of autism in official circles was in stark contrast to the well known and documented international progress in the area since the 1960s and earlier. The problem was compounded in this case by misleading professional advice which set back the education and training of the first plaintiff for years.

At an early stage, he was brought to Chicago where the second plaintiff's father practised as a surgeon and where he was diagnosed as suffering from a psycho-motor problem, the effect of which was that the brain was not sending messages to his muscles and limbs. The second plaintiff was advised by the Chicago specialist that intensive intervention was required in the form of occupation therapy, physiotherapy and speech and language training. This treatment was made available to him at the Michael Reese Hospital, Chicago, the director of which was Dr. Naomi Abraham. There he had regular sessions with Mrs. Elizabeth Osten, an occupational psychotherapist, who gave evidence in the High Court, and with other therapists. The treatment brought about substantial improvements in the first plaintiff's behaviour, including the virtual elimination of the repetitive movements which are a feature of the autistic condition. An important part of the training at the centre involved the second plaintiff and the elder siblings: family collaboration and participation in the education and care of the first plaintiff was regarded as being of special importance.

Unfortunately, these encouraging developments ceased when the second plaintiff returned to Ireland with the first plaintiff and her other children at Christmas, 1978. Although she was provided with a programme, notes and records from the institutions in Chicago, she failed to make any progress with Professor Barry and received no co-operation from the other organisations in Cork. During this time, the first plaintiff regressed to the condition he had been in before he went to Chicago.

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At this stage, the second plaintiff consulted Dr. Patrick Murray, a psychiatrist with the Southern Health Board who worked with the Brothers of Charity Institution at Lota which dealt with mentally disabled children. Dr. Murray, who has since died, appears to have been unhappily misinformed as to the cause of autism in children. He espoused a theory advanced in the United States in the 1950s and 60s by Dr. Bruno Bethelheim that autism in children was the result of cold, unloving mothers. This was, it would seem, a wholly discredited theory, but Dr. Murray was not aware of this and advised the second plaintiff that the child should be isolated from his known environment and admitted to hospital for six weeks for the purpose of assessment. The second plaintiff was appalled by this suggestion and contacted Dr. Abraham who agreed that the proposal was "crazy". She contacted Dr. Murray, but the only compromise which he was prepared to make was that she might visit him at the weekend or perhaps even take him home, "if things were going all right".

However, in November, 1979, the second plaintiff succeeded in having the first plaintiff assessed at "Cork Polio", the forerunner of the Cope Foundation which featured prominently in this case, by Dr. Irene Leahy, a psychologist and Dr. McCarthy. They were interested in the treatment given in Chicago and recommended that he needed services for five days a week. However, all he was given in fact was a "baby-sitting service" by nurses who were not teachers or therapists and were also disciples of Dr. Murray's discredited theories on autism. Although they were kind and loving, it was clearly not a suitable form of treatment for the child and, since he was regressing substantially, the second plaintiff brought him back to the centre in Chicago, where he attended as before for five months until April, 1981. Some progress was made under the direction of Dr. Abraham and under the care of Mrs. Osten and Dr. Margaret Creedon, a developmental psychologist, who also gave evidence at the trial. A teaching video was provided to the second plaintiff for the benefit of people who would deliver the services and treatment that the first plaintiff needed in Ireland, but although this was offered to the staff at the Cope Foundation, to Dr. Murray and other possible providers of services, no one was interested. All that resulted was further baby-sitting services from September, 1981, until October, 1982. From then until 1985, Cork Polio provided a baby-sitting facility one and later two afternoons a week for him. From 1985 until October, 1988, the first plaintiff attended Cork Polio five days per week: this was simply a baby-sitting service with no element of formal education.

In October, 1998, when the first plaintiff was 11 years old, he participated in a course of education for the first time. This was conducted by Mrs. Naomi Smith, a physiotherapist in Cork Polio, who had studied in Hungary and had set up an education unit designed chiefly for physically

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handicapped people. The first plaintiff made some progress at this course, including in the area of feeding himself and toileting, but, unfortunately, at the end of the trial period, it was decided at Cope not to proceed with the project. The second plaintiff's difficulties were increased at this stage by the fact that there was no place available for him at Cope. However, from March, 1989, to January, 1991, the second plaintiff conducted her own education programme with the first plaintiff, based on Mrs. Smith's model, which was reasonably successful, but suffered from the disadvantage that the child was not in contact with any other children.

Matters improved somewhat when a place became available at the Our Lady of Good Counsel school at Lota which caters for profoundly mentally handicapped children. The first plaintiff joined in January, 1991, when he was 131/2 years old, but it suffered from the disadvantage that the terms followed the same pattern as in primary schools and the long summer break caused much distress to the child. Toilet training remained a problem, because the toilets were cold and far removed from the classroom. The first plaintiff was still wearing a nappy at this stage and continued to do so at the time of the hearing in the High Court at the age of 23 years.

He remained at this school for about two and a half years until June, 1993, when he was nearly 16 years old. There was, however, another unfortunate development when the optimum size for classes of children suffering from severe or profound mental handicapped - generally acknowledged to be six - was ignored. The teacher, Mrs. Yvonne O'Malley had to cope with a class of 23 seriously disabled pupils and found it impossible to do so. Ultimately, Mrs. O'Malley confined herself to a class of 12 children, but without any help from other teachers: the volunteers who had assisted her previously were informed by the Brothers of Charity that their services were no longer required. Eventually a second teacher was appointed for the remaining 11 younger pupils: the first plaintiff was allocated to the latter group but later was transferred to Ms. O'Malley's class. He was bullied and subsequently assaulted and seriously injured by one of the other pupils, requiring treatment in hospital. He was then transferred back to the group for the younger children, which, in terms of age, was not appropriate for him.

From June, 1995, no further education was available at this centre and it became a health facility only. The withdrawal of teachers also meant the withdrawal of transport to and from the school which had previously been provided by the Department of Education. Even before that development, the first plaintiff had been receiving only one 45 minute teaching session per day. Toilet training was not possible and there were no facilities for resting, although it is known that disabled children tend to get tired more

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easily than other children. The point was taken up with the staff but she was told that, if the child was tired, he should not go to school.

As a result of these defects in the centre, the first plaintiff lost much of his ability to walk and had on occasions to be provided with a wheelchair. He was also developing epileptic fits more frequently.

The next development of importance was the setting up of a special class for the first plaintiff and another child in a similar position at St. Paul's School, Cope. Here educational facilities were provided by a qualified teacher, Ms. Miriam Kingston, who had specialised training in dealing with children with severe or profound mental handicap and who had some knowledge of autism. The trial judge commented at p. 561 that:-

"There followed a short golden period in the education of the first plaintiff which restored much lost ground and a variety of new talents were developed. It illustrates graphically what would have been achieved if he had received similar education from his early years."

The first plaintiff was now 18 years of age and the Department of Education was asked to extend his education for another year. As a result, it would seem, of the judgment of the High Court in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, the school year at St. Paul's had been lengthened and the summer holiday was now only one month. Unfortunately when the first plaintiff returned in September, Ms. Kingston had left and this led to some further disruption.

In September, 1997, the first plaintiff's period at St. Paul's came to an end: the school was not prepared to educate him any longer. This obviously created considerable difficulties for the second plaintiff, since he needed further training in such basic areas as toilet training to make up for the long periods when he had received no education of any sort. Eventually the second plaintiff was told that it was intended to move him to the Orchard, another institution at Cope, where he would be in a class of six severely or profoundly mentally handicapped young adults of about his own age. The second plaintiff had serious reservations about the proposed move, having regard to the lack of qualifications of the teacher. None of the other young people in the class were ambulatory, they were not autistic and they did not have the range of problems which he had.

There was evidence at the trial of another school in Cork which followed what was called the C.A.B.A.S. system. This is an acronym for"comprehensive applied behavioural analysis system": it has a "one to one" teaching service and auxiliary staff for 12 autistic three to five year children and is run by an American professor and his assistant. (The second plaintiff's daughter was a trainee teacher there at the time of the High Court hearing.) This was a pilot project, intended to run for three years, and was having substantial success, particularly in the area of toilet training.

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The second plaintiff sought to persuade the Orchard to adopt a similar system, but without success, leading to the first plaintiff reverting to wearing nappies at school.

The trial judge summed up the first plaintiff's experience as follows at p. 562:-

"No programme was devised for the first plaintiff's education and training until half way through the trial when a grossly defective one was cobbled together in haste which was roundly condemned by the experts - even those called on behalf of the defence. It demonstrated a fundamental lack of understanding of autism and its problems. Professor James Hogg, a world renowned authority on autism, stated in evidence that if one of his staff had produced the Orchard programme he would have been genuinely dismayed. He went on to specify a series of fundamental flaws which it contained. Professor Peter Mittler, also a major world authority on autism, who was called on behalf of the defence, was critical of the programme and the best he was able to say of it was that it might be a beginning on which a proper programme could be built â€¦"

The trial judge continued at p. 564:-

"Although at best the likelihood is that the first plaintiff always would have suffered from serious mental and physical incapacity arising out of his autism and related disabilities, even if he had received appropriate on-going education and training at an early age similar to that which he had in Chicago and which the C.A.B.A.S. organisation is pioneering in Cork, the expert evidence indicates a probability that his physical and mental capacity and his enjoyment of life would have improved substantially from an early age. It is reasonable to assume that, in particular, he would have been fully toilet trained from early childhood; his persistent drooling would have been cured or at least greatly improved long ago; he would have been substantially more mobile and would have developed greater dexterity with his hands. There are positive indications that his mental capacity probably would have improved and, through professional speech therapy, he may have developed in time a rudimentary capacity with language - though the latter development appears to be no more than a possibility. Early signs indicated a probability that he could have been successfully trained for sheltered employment similar to that of the towel-folding youngster employed in a gymnasium which was referred to by Dr. Walsh in the course of her evidence â€¦

All of the experts agree that the earlier a severely autistic and mentally handicapped child such as the first plaintiff has specialised education and training; the greater the likelihood of improving the

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capacity and quality of life of the sufferer. The first plaintiff has had less than three years of meaningful education and training so far in 23 years of existence â€¦ Whatever happens to him in the future, that loss can never be fully restored because, as the experts point out, education now is arriving too late in his life to achieve optimum results. Progress is more difficult and potentially more stressful for him than would have been the case if he had been educated from an early age. At best he has suffered through lack of educational training a diminution in the quality of his life which has been substantial up to now but which will also continue significantly into the future - even if he derives major benefit from the education and training now proposed for him. It is probable that he will have a life-long need for on-going basic education and training consistent with his requirements as they emerge in the future. Regular assessment will be important for him."

The trial judge found that the primary weaknesses in the administrative structures of the State which gave rise to the claims of the plaintiffs were twofold. First, there was a lack of liaison between the two relevant departments of state - education and health - where a particular problem involved both of them. Thus, in the first plaintiff's case, he required both continuing education and training and also services properly classified as medical, including various therapies. The evidence established that it was accepted by senior officials at the time of the trial that it was unreal to draw demarcation lines between the obligations of individual departments of State to the claimant. He commented at p. 568 that:-

"The reality is that the constitutional obligations to provide primary education, training and health care for the plaintiff and others like him is that of the State *per se*."

The second feature of the administrative structures which gave rise to the weaknesses resulting in the institution of the proceedings was the role of the Department of Finance. The trial judge said it appeared to him that its officials were insufficiently informed as to the constitutional obligations of the State to the weak and deprived in society. Having observed that it was a fact of life that in times of economic difficulty the State might be obliged severely to curtail expenditure and other projects for which exchequer funding is sought, he said that the need for government, and financial administrators, to exercise what he described as "a balance of constitutional justice" in determining the priorities of competing claims was of particular importance. He concluded, at p. 569, that:-

"A citizen's constitutional right must be responded to by the State in full. A partial response has no justification in law, even in difficult financial circumstances which may entail the raising of new tax revenue

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to meet such claims - happily a situation which has not pertained for several years."

He summed up his findings by saying that the sad history of the first plaintiff cogently illustrated that the State had failed to participate actively and meaningfully in the provision of appropriate services for him and those like him over the years. He cited, at p. 570, in particular a "speaking note" for the Minister for Education and Science dated the 18th September, 1997, for a meeting with the Minister for Finance which said:-

"Given the original High Court judgment [in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20], the Department of Finance has used the impending appeal as a justification for not conceding the pupil-teacher ratio of 6:1 and the two child care posts per class. As indicated above this excuse is no longer valid."

The trial judge pointed out that government approval for these changes was not granted until the 29th October, 1998, *i.e.* more than five years after the judgment in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. His uncontroverted conclusion was that, in the meantime, many hundreds of children with severe or profound mental handicap including the first plaintiff, had been deprived of education, not withstanding their established constitutional right to the provision of such education by the State.

Finally, it should be noted that, since the institution of these proceedings the Education Act, 1998, came into force. The Act of 1998, which constituted the first statutory regulation of education in Ireland since the foundation of the State, contains special provisions dealing with the education of mentally handicapped persons which will be referred to at a later point.

*The proceedings*

The first plaintiff claims that, as a result of the facts already summarised, the first defendant had failed to provide for free education for the first plaintiff, had discriminated against him in the provision of free education facilities, had failed to vindicate his right to education and, in particular, his right to receive a certain minimum education, moral, intellectual and social, and had failed to supplement or give any reasonable aid to private educational initiatives for the provision of educational facilities for the first plaintiff. It was further claimed that the first defendant discriminated against the first plaintiff by failing to provide free transport for substantial periods of time to the limited facilities that had been made available to the first plaintiff. A declaration was claimed that, in the result,

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the first plaintiff had been deprived of his constitutional rights pursuant to Article 40 and 42 of the Constitution and in particular Articles 40.1, 40.3.1 and 2, 42.3.2 and 42.4. Damages were claimed for breach of the first plaintiff's constitutional rights, negligence and breach of duty. A mandatory injunction was also claimed directing the first defendant to provide for free education for the first plaintiff appropriate to his needs for as long as he is capable of benefiting from it. Special damages were also claimed in respect of the various treatments, *etc.* for which the second plaintiff had paid.

In their defence, the defendants said that the first defendant had provided for the free primary education of the first plaintiff for specified periods. It was denied that they had deprived the first plaintiff of any of his constitutional rights pursuant to Articles 40 and 42 of the Constitution.

In the second proceedings, the second plaintiff claims that, as a result of the facts already summarised, the defendants had failed to respect, defend and vindicate the second plaintiff's constitutional rights as the mother of the first plaintiff by failing to provide any education appropriate to him, imposing inordinate burdens on her, and discriminating against the first plaintiff in the provision of free primary educational facilities and in failing to provide free transport for substantial periods of time. She claimed a declaration that these actions had deprived her of constitutional rights pursuant to Articles 40.1, 40.3.1 and 2, 41.2.1 and 2 and 42.1 to 4 and a mandatory injunction similar to that claimed in the first proceedings. She also claimed special damages in respect of treatment etc. provided by her.

In their defence, the defendants again plead that the Minister had provided for the free primary education of the first plaintiff for specified periods and denied that they had deprived the second plaintiff of any of her constitutional rights pursuant to the Articles referred to.

The action was at hearing for 29 days in the High Court. In his reserved judgment, having set out the facts as already summarised, the trial judge cited with approval the conclusions of O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 and, in particular, his conclusion that in such cases, the process of primary education should continue "as long as the ability for further development is discernible". He concluded that, in the light of the facts, the first plaintiff was in need of continuous education which was not "age related". He said, at p. 41, that:-

"â€¦ I am satisfied that the constitutional obligation under Article 42.4 to provide and continue to provide for primary education and related ancillary services for the first plaintiff is open-ended and will continue as long as such education and services are reasonably required by him."

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Having rejected claims that both actions were barred under the Statute of Limitations, 1957, he held that both plaintiffs were entitled to the declarations which they claimed in their respective statements of claim and to damages arising out of the breach of their constitutional rights.

As to the damages to which the first plaintiff was entitled, the trial judge said at p. 595 that:-

"In the interest of justice it is proper that he now should have the best available primary education and training so that he may have the maximum prospect of making up lost ground and thus limiting the degree of permanent damage which he has suffered through the defendants' breach of duty."

The trial judge said that the ongoing education and training would be best provided in the form of a scheme called Applied Behaviour Analysis, a home based programme for sufferers from autism which was being pioneered successfully in England. The estimated annual cost of this programme was approximately Â£28,000. He said that, towards the end of the period, the first plaintiff should be assessed and due regard had to the possibility that a place might be available to him at a centre for autistic adults in Cope if one existed at the time. If a suitable facility did not exist, it might be necessary for him to embark on a further Applied Behaviour Analysis programme or a similar alternative regime. In the latter event, he said that it would be necessary for the court to award "further damages to cover the cost of any additional programme which may be required."

He accordingly awarded damages as follows:-

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| Estimated cost of the Applied Behaviour Analysis programme for education for two and a half years at Â£28,000 *per annum*:  Ancillary services for a like period at Â£15,000*per annum*:  General damages for additional suffering, distress and loss of enjoyment of life from October, 1981, to  date:  Ongoing distress in the future resulting from the delay in providing education and training,*etc*.:  Total: | Â£70,000 Â£37,500 Â£90,000 Â£25,000Â  Â£222,500Â |

The trial judge also found that there had been a breach of the second plaintiff's constitutional rights and that, in addition to agreed special damages of Â£15,000, she was entitled to the sum of Â£40,000 general damages.

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As to the claim for a mandatory injunction in both actions, the trial judge said at p. 594:-

"The mandatory injunction claimed in each action shall be considered by the court as part of the foregoing review, but, if necessary, the plaintiffs shall have liberty to make earlier application in that regard."

The order in the first proceedings provided in para. (1) that the first plaintiff should recover from the defendants the sum of Â£222,500 damages computed as already indicated. It then went on to order:-

"(2) that the first defendant do forthwith provide for free primary education for the first plaintiff appropriate to his needs for as long as he is capable of benefiting from same;

(3) that an application be made forthwith to have the first plaintiff taken into wardship;

(4)Â (i) that the first plaintiff be provided with the necessary funding for the Applied Behavioural Analysis home based programme for sufferers from autism for two and a half years estimated at Â£28,000 *per annum* subject to review on completion,

(ii) that the first plaintiff be provided with the necessary funding for home based ancillary services, speech, physiotherapy, occupational and music therapies and medical care estimated at Â£15,000 *per annum* subject to review on completion;

(5) that the mandatory injunction and damages granted herein be reviewed in April, 2003, and that a claim for further damages over and above the damages awarded by the court to date be adjourned to this review with liberty to the first plaintiff to re-enter or to apply in the interim in that regard."

Two features of the order should be noted. There was an element of duplication in respect of the relief granted at para. (4)(i) and (ii): the relevant sums are included in the total of Â£222,500 damages ordered to be paid in para. (1). It is also not clear that the trial judge envisaged the granting of an immediate mandatory injunction as set out in para. (2): he appears to have taken the view that it might arise on the review which was to be carried out in April, 2003.

It should be noted that the defendants did not contend in the High Court that the admitted constitutional right of the first plaintiff to free primary education ended at the age when primary education would normally cease: it was accepted that, having regard to his special needs, it did not cease until he reached the age of 18. His claim, however, and that of the second plaintiff to damages and other relief were resisted on the ground that (i) there had been no breach of his right to free primary education up to the age of 18 and (ii) he was not entitled to free primary education beyond the age of 18.

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*The appeal*

In both proceedings, the defendants filed notices of appeal in which they, in effect, appealed against the entire of the judgment and orders in both cases. However, in a letter dated the 23rd November, 2000, it was indicated to the solicitors for the plaintiffs in both cases that, not only was no appeal being brought from that portion of the orders of the High Court which awarded the plaintiffs the costs of the proceedings, but that the defendants would also meet the plaintiffs' costs of appearing as respondents to the proposed appeals to this court on a party and party basis, the costs to be taxed in default of agreement. It was stated that their decision to meet the plaintiffs' costs of the appeal was without prejudice to their clients' entitlement to appeal.

In a further letter of the 8th March, 2001, which followed earlier correspondence between the solicitors for the plaintiffs and the Chief State Solicitor, the latter stated:-

"Further to the [*sic*] your letter of today's date, the Minister's press release of this evening and our conversations of this evening, we confirm that the Minister intends to discharge the award of damages made by Barr J. in his judgment."

The plaintiffs then brought a notice of motion in each of the proceedings to this court seeking directions as to

"The scope of the issues (if any) which remained to be determined by this honourable court, in the light of communications by, or on behalf of, the defendants/appellants."

On the hearing of that motion, counsel for the defendants informed the court that, for the purposes of the appeal, it was conceded on behalf of his clients that the constitutional right of the first plaintiff to free primary education up to the age of 18 had been violated by them and that no appeal was being pursued in relation to the sums awarded to him by way of general and special damages amounting to Â£222,500. The appeal would, accordingly, in that case be confined to so much of the judgment and order as found the first plaintiff entitled to free primary education appropriate to his needs from the age of 18 onwards for as long as he was capable of benefiting from such education and to the reliefs by way of mandatory injunction and otherwise granted to the first plaintiff in respect of those findings at para. 2 of the order of the High Court. In the case of the second proceedings, counsel informed the court that the appeal of the defendants was being pursued in respect of the entire of the judgment and order of the High Court in favour of the second plaintiff, other than the award of special damages of Â£15,000 and the order for costs.

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*Submissions of the parties*

Counsel for the defendants said that it was accepted that no issue arose as to the facts in this case. Nor were the defendants seeking to set aside the award of damages to the first plaintiff. The defendants were, however, concerned with those aspects of the judgment and order of the High Court which proceeded on the basis that the first plaintiff, and other persons in a like situation, were entitled as a matter of constitutional right to free primary education without any limitation as to age. While he acknowledged that the posture now being adopted by the defendants was open to criticism on the ground that it was not consistent with their admission that the defendant was entitled to an award of damages in respect of the period up to the hearing in the High Court, during which the first plaintiff reached the age of 22 years, he said that the defendants' contention was that, even in the case of persons with special needs such as the first plaintiff, the constitutional right to free primary education ceased when they reached the age of majority at 18 and were no longer children. That did not mean that thereafter no facilities appropriate to his special needs would be available to the first plaintiff: on the contrary, such facilities would be provided to him for so long as they were required by him in the light of his special needs. They would be so available, however, he said, not as a matter of constitutional right, but in the appropriate exercise by the Minister of the powers and functions conferred on him by the Act of 1998 in respect of persons with disabilities or other special educational needs.

Counsel for the defendants submitted that the finding in the High Court that the guarantee of free primary education contained in Article 42 of the Constitution extended to adults in certain circumstances was in conflict with the language of the Article which, in both the Irish and English texts, made it clear that children, and not adults, were to be the recipients of the free primary education thereby guaranteed. It was also inconsistent with the interpretation of Article 42.4 adopted by this court in *Crowley v. Ireland* [1980] I.R. 102 and with the decision of the High Court in *O'Shiel v. Minister for Education* [1999] 2 I.R. 321. Counsel for the defendants further submitted that the approach adopted in the High Court was based on an unwarranted extension of what had been said as to the right to free primary education of persons with disability in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20.

Counsel for the defendants submitted that the form of relief granted by the High Court Judge, other than the award of damages in respect of the breach of his constitutional rights up to the time of the hearing in the High Court, was in violation of the doctrine of the separation of powers enjoined by the Constitution. The court was, in effect, usurping the exclusive roles

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of the Oireachtas and the executive in giving directions to those organs of State as to how monies should be expended in order to meet any special educational needs of the first plaintiff. It was, he said, undertaking a function which had required elaborate legislative provisions in the United Kingdom, such as the Education Act, 1993, and the Education Act, 1996, and which the court had neither the legal authority nor the necessary resources to discharge.

Counsel for the defendants further submitted that the court, in reserving to itself the right to award further damages to the first plaintiff at the "review date" in April, 2003, was proceeding on the assumption that the defendants would fail to comply with the order in para. (2): the provision for the assessment of damages at that point in time was a form of *in terrorem* remedy. He said that this assumption was without any justification in law and that the course adopted was unprecedented and contrary to principle.

As to the claim made on behalf of the second plaintiff in the second proceedings, counsel for the defendants submitted that the proceedings disclosed no cause of action known to the law. The claim pursued on behalf of the second plaintiff was a purely derivative one arising from the admitted breach of the constitutional right of the first plaintiff to free primary education. No such right of the second plaintiff had been infringed by the defendants. Counsel for the defendants said that, in those circumstances, the second plaintiff had been driven to relying on the provisions of Article 41 affording protection to the family as an institution. The fact that the constitutional right of a member of a family had been infringed entitled that member to appropriate relief to remedy that wrong, but there was no justification for affording a similar remedy to other members of the same family whose rights had not been infringed in any way. He cited in support the decision of the High Court in *P.H. v. John Murphy & Sons Ltd.* [1987] I.R. 621.

Counsel for the plaintiffs submitted that the guarantee of free primary education contained in Article 42 should be construed in the light of its unique character as the only provision expressly requiring the State to spend money on a specific social objective. There was no such provision, they said, in respect of what would nowadays be regarded as such essential features of the State's obligations as the health services and social welfare benefits. They submitted that, while the most obvious beneficiaries of a free primary education are children who have not reached the age at which secondary education normally began, there was nothing in the wording of Article 42 which would justify the withholding of free primary education from a person such as the first plaintiff who, because of his special needs, would continue to require it long after that age. It was indeed conceded on

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behalf of the defendants that he was entitled to it as a matter of constitutional right at least until the age of 18, at which stage he would have clearly passed the age level at which primary education normally ceased and secondary education began. They submitted that the constitutional guarantee of free primary education was not subject to an implied restriction that it would be unavailable to persons who, because of their disability, would require a longer period of primary education than more fortunately endowed children. The finding of the High Court Judge that need, and not a rigid determination related to age, should be the criterion for determining whether a person was constitutionally entitled to free primary education was correct and should be upheld: it was also in accord with the views expressed by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20.

Counsel for the plaintiffs submitted that, so far as the nature of the order in the first proceedings was concerned, the trial judge was not merely entitled, but bound, to fashion a remedy which would deal effectively with the wrongs inflicted on the first plaintiff by the defendants. Since this was a case, they urged, in which the High Court Judge had found as a fact that the first plaintiff had less than three years of meaningful education and training during the first 23 years of his life, a finding which was not disputed on this appeal, it followed that he also had to provide a remedy which would ensure that, within the resources available to the law, that situation was remedied in the future. That did not involve any violation of the doctrine of the separation of powers, since each of the organs of State was obliged to protect and vindicate the constitutional rights of the first plaintiff and the courts could not abdicate their responsibilities in that regard where there had been so single a failure on the part of the executive to perform their duty. While it was true that the implementation of distributive justice was a matter for the Oireachtas and the executive, this was not an instance of such justice: this was properly regarded as a case of commutative justice, which required the framing of such a remedy. They said that the High Court was perfectly entitled, in the light of the history of the case, to proceed on the assumption that the defendants would again fail in their duty to uphold the constitutional rights of the first plaintiff in the absence of continuing supervision by the High Court.

As to the claim of the second plaintiff, counsel submitted that Article 42 of the Constitution acknowledged her primary role as a parent in the education of her children and her right to chose the form of education which she considered most suitable for them, provided it attained the minimum level required by the Article. In the case of the first plaintiff her parental right of choice had been infringed by the failure of the defendants to make freely available to her, as they were required to do, a form of

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primary education suitable to his special needs. The High Court Judge had found, and again this was not disputed for the purposes of the appeal, that the State's failure in this regard had placed a huge and unacceptable burden on the second plaintiff and, as in the case of any other violation of a constitutional right, she was entitled to the appropriate remedy, which in this case was the award of general damages made in the High Court.

*The applicable law*

Article 42.4 of the Constitution provides that:-

"The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

The corresponding provision in the Constitution of the Irish Free State was much shorter and simply provided that:-

"All citizens of the Irish Free State (SaorstÃ¡t Ã‰ireann ) have the right to free elementary education."

Article 42.4 was considered by this court in *Crowley v. Ireland* [1980] I.R. 102. In the course of their judgments, O'Higgins C.J. and Kenny J. laid emphasis on the use of the expression "provide for" rather than "provide". They pointed out that this carefully chosen language reflected the historical background to the Article: it was clearly envisaged that education, in the main, would not be provided in State schools, but in schools owned and managed by religious denominations, the necessary finances being provided by the State. As already noted, in the case of children, such as the first plaintiff, suffering from severe mental handicap, such facilities as were available have, for the most part, been provided in institutions run by religious orders. No issue arises between the parties, however, in this context: it is acknowledged that the extent of the State's obligation to provide for free primary education, which is at issue, is the same, whether the State provides that education itself directly, or indirectly by ensuring that the necessary finances are available to private bodies engaged in its provision.

The extent of the State's obligations was considered by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. The plaintiff in that case had, at the age of eight months, contracted an illness which left him physically disabled and profoundly mentally handicapped. He also lived in Cork and, when he reached school age, his mother applied on a number of occasions to the Cope Foundation to have him admitted as a pupil. She was

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informed, however, that there were no vacancies and the applicant was placed on a waiting list. His mother cared for him at home and arranged for him to be educated privately at her own expense. Following the institution of proceedings by him seeking an order of*mandamus* compelling the Minister for Health and the Minister for Education to provide him with free primary education, he was told that he would be provided with a place at the Cope Foundation at the beginning of the following school year, that he would be given day care facilities until that time and would be provided with free transport to and from the foundation, so far as was required.

The proceedings came on for hearing in the High Court when the applicant was aged eight. It was contended on behalf of the respondents that efforts that were made to educate profoundly mentally handicapped children, such as the applicant, were of no real or lasting benefit to them and that he was effectively ineducable. They also claimed that the education referred to in Article 42.4 was "of a scholastic nature" which could be of no benefit to the applicant and that such training as could be provided for the applicant and might benefit him was not "primary education" within the meaning of the Article. They also urged that the applicant, having been provided with a place at the Cope Foundation, had achieved the essential relief sought and that the proceedings were, accordingly, moot.

All of these contentions were rejected by O'Hanlon J. He concluded, in the light of the evidence, that the applicant was not ineducable and that, having regard to the explanation by Ã“ DÃ¡laigh C.J. in *Ryan v. Attorney General* [1965] I.R. 294 of what is meant by"education" in Article 42, the respondents had failed to provide for the free primary education of the applicant in breach of his constitutional rights under that Article. The learned judge was also of the view that, while the applicant had been granted a place at the Cope Foundation since the institution of the proceedings, this had been done as a matter of concession which could be withdrawn at any time and that in any event the facilities so provided were, in his opinion, inadequate. In the result, he held that the applicant was entitled to establish his continuing constitutional right to free primary education and to an award of damages in respect of the breach of that right which had already occurred.

The respondents appealed to this court and, on the opening of the appeal, the court was informed by counsel that the respondents were now providing for the applicant, education appropriate to his current condition. The court then substituted for the declaration in the High Court a declaration that the applicant was entitled to free primary education in accordance with Article 42.4 of the Constitution and that the State was under an obligation to provide for such education. The court noted statements by counsel reserving the positions of their respective clients as to the correctness

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or otherwise of the manner in which the learned trial judge had interpreted the obligation in question. Although it is not contended in this case, as it had been in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, that the first plaintiff is ineducable or that the free primary education referred to in Article 42.4 is confined to education in the purely scholastic sense, the basis upon which O'Hanlon J. arrived at that conclusion is of considerable assistance in resolving the matter which is at issue, *i.e.* the age, if any, at which persons in the situation of the first plaintiff cease to be entitled to free primary education.

In the earlier part of his judgment, O'Hanlon J. considered in some detail the developments that have taken place, particularly in the second half of the last century, in the field of the education of mentally handicapped children. He referred to two reports of particular relevance in the Irish context: the report of the working party to the Minister for Education and the Minister for Health and Social Welfare on the *Education and Training of Severely and Profoundly Mentally Handicapped Children in Ireland* (known as"the Blue Report") published in January, 1983, and the report of the Review Group on Mentally Handicap Services (known as "the Lilac Report") published in July, 1990. He also traced the evolution of changes in public awareness as to the benefit of educating children with more severe degrees of mental handicap in England and the United States which were reflected in legislation enacted in those jurisdictions making the provision of free appropriate education for all children compulsory, no matter how severe or profound their handicap, citing as examples the Education of All Handicapped Children Act, 1975 (United States Public Law 94-142), and the English Education Act, 1970. At pp. 44 to 45, he quoted a passage from p. 28 of the Blue Report as follows:-

"In the past, certain groups of handicapped children were excluded from access to education and training because of a very narrow definition of education, and it was felt that certain children's disabilities were so great that they could not benefit from the curriculum in schools. More recently, however, the aims of education have been broadened considerably and there is a world wide awareness that education can be of help in maximising human potential even for the most disabled people â€¦"

That report also referred to the following definition of education to be found in the Warnock Report in England, and was quoted by O'Hanlon J. at p. 45:-

"The aims of education are the same, whatever the advantages or disadvantages of the child concerned. These aims are, first, to increase the child's knowledge of the world he lives in and his imaginative understanding, both of the possibilities of that world and of his own

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responsibilities in it; and, secondly, to give him as much independence and self sufficiency as he is capable of, by teaching him those things he must know in order to find work and to manage and control his own life.

Children have manifestly different obstacles to overcome in their path towards this double goal, and for some the obstacles are so enormous that the distance they travel will not be very great. But for these children any progress at all is significant. For the most severely handicapped, education seeks to have them overcome their difficulties one by one."

The report went on to list three categories of skills in which education and training could be given to severely and profoundly mentally handicapped children. These were "basic skills", including"self-help skills", such as dressing, washing, feeding, toileting,"expressive skills", such as communication skills and "leisure skills" such as playing with toys and participation in simple games.

O'Hanlon J., at pp. 48 to 50, also summarised the contents of the primary school curriculum produced in 1951 which laid particular stress on three aspects of primary education which were regarded as of importance, although not, within the scope of the conventional subjects associated with schools, *i.e.* social and environmental studies, music and physical education.

Having referred to the provisions of some international conventions, including the United Nations Convention on the Rights of the Child which laid emphasis on the right of a mentally or physically disabled child to "a full and decent life", O'Hanlon J., at pp. 56 to 61, went on to consider the law applicable in this jurisdiction. At p. 56, he cited a passage from the judgment of Kenny J. in the High Court in *Ryan v. Attorney General* [1965] I.R. 294, the case in which the plaintiff claimed that the introduction of fluoride into the municipal water supply in Dublin was a breach of her constitutional rights. It was argued on her behalf that she was entitled to provide as she thought fit for the health and welfare of her children and that this was part of the process of education in respect of which the primary role of the parent was acknowledged by the provisions of Article 42 of the Constitution. Kenny J. rejected this submission saying at p. 310:-

"â€¦ It seems to me that the terms of the Article show that the word 'education' was not used in this wide sense in the Constitution. Section 1 of the Article recognises the 'right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children', but in section 2 it is provided that the parents are free to provide*this* education in their homes or in schools recognised or established by the State. The education

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referred to in section 1 must, therefore, be one that can be provided in schools and must, therefore, be one of a scholastic nature."

In this court, the judgment of Kenny J. was upheld, but Ã“ DÃ¡laigh C.J., delivering the judgment of the court, adopted a wider definition of "education" than that which had found favour in the High Court, saying at p. 350:-

"[Counsel] contends that the provision of suitable food and drink for children is physical education. In the court's view this is nurture, not education. *Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral.* To teach a child to minimise the dangers of dental caries by adequate brushing of his teeth is physical education for it induces him to use his own resources. To give him water of a nature calculated to minimise the danger of dental caries is in no way to educate him, physically or otherwise, for it does not develop his resources." [Emphasis added.]

Having said that, he considered the definition adopted by Ã“ DÃ¡laigh C.J. as more useful in the context of the case which he was deciding, O'Hanlon J. held that the education to which the applicant in that case claimed to be entitled under the provisions of Article 42 could be correctly described as "primary education" within the meaning of Article 42.2.

O'Hanlon J. went on to consider the claim that the case was in any event a moot and, as already noted, expressed his view that the education being provided at that stage in the Cope Foundation did not meet the plaintiff's constitutional entitlements. He then went on in an important passage at p. 70 to state that:-

"The evidence given in this case also gives rise to a strong conviction that primary education for this category, if it is to meet their special needs, requires a new approach in respect of:- â€¦

(2) *Duration of primary education: As this category will, in all probability never proceed further, and are unlikely to proceed far up the ladder of primary education itself, the process should, ideally, continue as long as the ability for the development is discernible. Professor Hogg suggests that age eighteen may not be unrealistic in this context*â€¦" [Emphasis added].

He accordingly granted the declaration already referred to and awarded the applicant the sum of Â£7,645.71 by way of damages.

The materials referred to in this judgment are also considered exhaustively by Barr J. in the judgment under appeal. He approved of the statement of the law by O'Hanlon J. in that case and applied the principles laid down to the facts of the present case which are, of course, similar in many respects.

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I am also satisfied that the statement of the law by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 is correct. It is not material in this context that the respondents did not proceed with their appeal in that case, since it would be open to this court in the present case to disapprove of the decision. However, although there is a suggestion (not elaborated upon) in the written submissions on behalf of the defendants that the approach of Barr J. in interpreting Article 42.4 was in conflict with that of this court in *Crowley v. Ireland* [1980] I.R. 102, I did not understand counsel for the defendants in his oral arguments to invite this court to disapprove of the decision in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. I think that his approach can be fairly summarised as being that the decision of the High Court in this case constituted an unwarranted extension of the principles laid down by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. To put it another way, he was contending that although O'Hanlon J. had found that, in the case of a severely mentally handicapped child, the entitlement to free primary education might last up to the age of 18, there was nothing in the judgment to indicate that he was finding by implication that the constitutional right continued into "adulthood", as found by Barr J.

Since the other provisions of Article 42 were also relied on in the course of the arguments as throwing light on the nature of the guarantee contained in Article 42. 4, they should be set out in full:-

"1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2. Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3.Â 1 The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

3.Â 2 The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4. â€¦

5. In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to

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supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

These Articles reflect a philosophy in which the State is seen as playing, in theory at least, a secondary role only in the provision of education, the primary role being that of the parents. The qualification is important, since practice in this area had travelled far from theory even at the time of the enactment of the Constitution. This is most graphically illustrated by the prominence given in the Article to the right of parents to educate their children at home. In modern conditions, the number of parents who elect to educate their children in this manner is a tiny minority, the vast majority obviously taking the view, apart from other considerations, that learning to associate with other children outside the home at work and at play is an important feature of education. The practical difficulties encountered by parents, who sincerely believe that they are acting in their children's best interests in attempting to provide such education in the home, are exemplified in the case recently decided by this court in *Director of Public Prosecutions v. Best* [2000] 2 I.R. 17.

In those schools and third level institutions where tuition and other fees are charged, the parents can be said to be providing, albeit indirectly, the education of their children. However, since the mainstream of Irish education takes place in primary and secondary schools and third level institutions, and not in the home, and is not provided by the parents save in the indirect manner indicated, the thrust of these provisions of the Article is to ensure that the right of parents to choose the form of education in schools and colleges which they deem most suitable to their own offspring is recognised and protected. In an age when there is increasing emphasis on the autonomy of children, parental choice becomes of less importance as they become older: it remains, of course, of great significance at the stage when children are not equipped to make the appropriate choices for themselves. It is probably unnecessary to add that, however theoretical, in some respects at least, the philosophy underlying these provisions appears to be in modern conditions, they must be fully upheld by the courts in any case where they become relevant.

It is, however, the case, in my view, that they afford little guidance to the appropriate construction of the opening words of Article 42.4 with which this case is centrally concerned. This is of some importance since a significant part of the argument in the case was directed to a meticulous parsing of both the Irish and English texts of these provisions with a view to ascertaining whether they lend support to the view that the only beneficiaries of the right acknowledged in those opening words are "children" who had not yet reached the age of 18. As it happens, while it is not of critical importance in this case, those opening words contain no reference

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whatever to children, whether in family units or otherwise, and do not differ substantially from the plain unvarnished text of the 1922 Constitution. It would also seem clear that the closing words, with their reference to "the rights of parents" were intended to qualify the obligation on the State to give reasonable aid to other initiatives and to provide educational facilities themselves. As noted in *Crowley v. Ireland* [1980] I.R. 102, the use of the words"provide *for*" in the opening words were sufficient to safeguard the rights of parents to have their children educated in schools of their own choice rather than State schools.

It is clear, accordingly, that while the principal beneficiaries of the right to free primary education recognised and protected in Article 42.4 are children in family units, they were not intended to be the only beneficiaries. Children without parents, natural or adoptive, whether they grow up in the care of institutions, foster parents or older relatives, are equally entitled to the right protected in Article 42.4. The issue with which the High Court and this court is concerned is whether the rights of the beneficiaries, whether they are children in family units or otherwise, cease when they reach a particular age, irrespective of the fact that they might still be reasonably regarded as being in need of primary education.

The next issue in the case is as to the form of relief granted by the High Court. Since the decision of this court in *Byrne v. Ireland* [1972] I.R. 241, difficulties in executing against any of the organs of the State have never been regarded as a ground for refusing relief to a person whose constitutional or even purely legal rights have been violated by the organ in question. It is of interest to note, that in his judgment in this court in that case, Walsh J. referred to the right acknowledged in article 10 of the 1922 Constitution to free elementary education as being one that was"clearly enforceable" against SaorstÃ¡t Ã‰ireann , if no provision had been made to implement that article. While the learned judge refers elsewhere in his judgment to the possibility of a decree against the State being executed by way of an order for *mandamus*, there is nothing to suggest that he would have regarded that as an appropriate remedy against the Oireachtas, since that would clearly be in violation of the separation of powers. Relief of that nature could, however, undoubtedly be granted against other organs of State, such as Ministers.

Where, however, the granting of the relief sought would trespass on the exclusive role of DÃ¡il Ã‰ireann , as the popularly elected house of parliament, in the raising of taxation and the appropriation of public monies, more difficult problems arise. Neither the High Court nor this court has ever gone further than finding, (in *McKenna v. An Taoiseach (No. 2)* [1995] 2 I.R. 10), that a declaration could be granted that the expenditure of monies by the Oireachtas on an unlawful object - in that

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case the use of public funds to encourage a"yes" vote in a referendum - was in violation of the Constitution. However, in that case, the court expressly refrained from granting an injunction restraining the expenditure of the monies already voted and I think it is clear that this court would not grant mandatory relief requiring the Oireachtas to provide funds for a particular purpose in order to uphold the constitutional or purely legal rights of members of the public: see *Brady v. Cavan County Council* [1999] 4 I.R. 99.

That is not to say that where a plaintiff successfully claims that his constitutional rights have been violated by the State in the past and will continue to be so violated in the future unless the court intervenes, the courts are impotent when it comes to the protection of those rights. That is of particular relevance in a case such as the present where it is not suggested that it is beyond the financial resources of the Minister to provide the facilities which the first plaintiff requires, the situation that arose in *Brady v. Cavan County Council* [1999] 4 I.R. 99. As Lord Browne-Wilkinson, speaking for the House of Lords, observed in *Reg. v. East Sussex C.C., ex p. Tandy* [1998] A.C. 714 at p. 749, where a local authority contended that it lacked the resources to maintain home tuition for a schoolgirl suffering from a particular condition:-

"My Lords, I believe your lordships should resist this approach to statutory duties. First, the county council has as a matter of strict legality the resources necessary to perform its statutory duty under s. 298. Very understandably it does not wish to bleed its other functions of resources so as to enable it to perform the statutory duty under s. 298. But it can, if it wishes, divert money from other educational or other applications which are merely discretionary, so as to apply such diverted monies to discharge the statutory duty laid down by s. 98."

*A fortiori* those observations apply to the allocation by a Minister of resources sufficient to meet a constitutional obligation owed to a particular person. In such cases, while in principle there is nothing to preclude the granting of mandatory relief directed to the Minister concerned, it is appropriate, in my view, for the courts to presume that where this court grants a declaration that he or she has failed to meet his or her constitutional obligations, the Minister will take the appropriate steps to comply with the law as laid down by the courts.

As to the claim on behalf of the second plaintiff, no authority has been cited for the general proposition that where the constitutional rights of a member of a family have been violated, the wrongdoer must compensate not only the person concerned but also any other member of his or her family, as constitutionally defined, in whom no independent right of action was vested but who suffered in some sense because of the wrong done to

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the other family member. Such authority as exists would appear to suggest that no such cause of action is known to the law.

Thus, in *P.H. v. John Murphy & Sons Ltd.* [1987] I.R. 621, the plaintiffs' father suffered severe personal injuries in the course of his employment with the defendant at the defendant's factory premises. Proceedings instituted on his behalf against the defendant alleging that his injuries were caused by the defendants' negligence were settled. The minor plaintiffs, suing by their mother, instituted proceedings against the defendant claiming, *inter alia*,damages in tort and breach of constitutional duty for the loss of the non-pecuniary benefits which the father of a family bestows on his children. The defendant denied liability and preliminary issues were tried as to whether, *inter alia*,the plaintiff's claim disclosed a cause of action against the defendant. In holding that the defendants had not been guilty of any breach of a constitutional duty imposed on them either by virtue of Article 41.1 or Article 42, Costello J. said at p.627:-

"[Article 42] contains an acknowledgment by the State that the Family is the primary and natural educator of the child and under its provisions the State guarantees 'to respect the inalienable right' of parents to provide for the education of their children. Certainly, in this case, Mr. H. is unable to exercise this right because of the fearful injuries he has sustained and his children's rights to be educated by their father (which I think are to be implied from this Article) have certainly been impaired by the negligent act which caused those injuries. Whether they have been unconstitutionally infringed will depend on whether the negligent act constituted a breach of constitutional duty imposed by this Article. I do not think it did. The State has given a 'guarantee to respect' Mr. H.'s right to educate his children, but I do not think that by these words the rights which Mr. H. enjoyed under this provision included an ancillary right not to be injured by a negligent act which interfered with his ability to exercise his rights *vis-Ã -vis* his children. His children would not therefore enjoy any implied ancillary right that their father would not be negligently injured. This being so the defendant's negligent act did not infringe any of their Article 42 rights."

In *Mullally v. Bus Ã‰ireann*  [1992] 1 I.L.R.M. 722, the High Court (Denham J.) found that a plaintiff whose husband and children had been involved in a serious bus accident, caused by the negligence of the defendants' employee, was entitled to damages in respect of the psychological damage she sustained as a result of having personally witnessed the appalling scene which followed the accident. That, however, was not based on the constitutional right of the plaintiff to damages: it was expressly treated by the learned judge as an appropriate development of the law of

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tort, similar to that which had taken place in England and Wales: see the decision of the House of Lords in *McLoughlin v. O'Brian* [1983] 1 A.C. 410 and in particular the speech of Lord Bridge in that case. It is accordingly of no assistance in considering the claim made on behalf of the second plaintiff in this case.

*Conclusions*

It is right to say at the outset that the posture adopted by the defendants in this case is, in purely legal terms at least, with which this court is exclusively concerned, not easy to follow. They acknowledge that, by virtue of s. 7(1) of the Act of 1998, the Minister is obliged:-

"â€¦ to ensure, subject to the provisions of this Act, that there is made available to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person â€¦"

While it is unnecessary, and indeed inappropriate, in the context of the present proceedings, to determine whether the expression "a person with a disability or who has other special educational needs" is confined to children who have not reached the age of 18, it is clear from the evidence in this case that the Minister, not surprisingly, takes the view that it is not so confined in its application and, specifically, that the first plaintiff is entitled to the benefit of this provision.

The claim made on behalf of the first plaintiff is, accordingly, resisted by the Minister solely on the ground that he was not entitled to those services as a matter of constitutional right beyond the age of 18. However, whether the first plaintiff is entitled to them as a matter of legal or constitutional right would, it might be thought, be a matter of indifference to the Minister, unless he proposed at some time in the future to withdraw them or to urge the Oireachtas so to do, a course of action which he predictably assures the court he does not contemplate. The same considerations would apply to those suffering from severe mental handicap who are in the same position as the first plaintiff.

The Minister's concerns, accordingly, arise because of what are seen as the more far-reaching implications of adults, as distinct from children, being entitled to free primary education.

It is undoubtedly the case that a significant number of children leave the primary system without having achieved the minimum level of education which it is designed - and constitutionally mandated - to impart. But that is not to say that the State has, in the case of those children, failed in its constitutional duty to them to an extent which requires intervention

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by the courts. The failure may be due to many causes, including the inability of the children to benefit to that minimum extent from any system of primary education, however properly structured and however ample the resources provided by the State may be. The learning difficulties of the children concerned may be such that the minimum result can never be achieved in their case. Moreover, defects in the system itself - whether they derive from overcrowded classrooms, inadequate school buildings or any other cause - which may similarly result in a failure to achieve the minimum standard are not necessarily remediable by the courts. That would involve the judicial arm usurping the function of the Oireachtas and the executive in the proper distribution of the resources available to the State, an issue to which I will return. It is sufficient at this point to say that it is an illusion to suppose that, because the High Court in this case has found that the first plaintiff's entitlement to free primary education extends beyond the age of 18, the courts will be obliged at some stage to treat other adults as enjoying an equivalent right, where their"need" for primary education results from an inherent inability to benefit from such education in their childhood or from the defects in the system provided by the State to which I have referred. None of these considerations arise in the present case: it is solely concerned with the constitutional rights of the first plaintiff and the second plaintiff, although the findings of the High Court, in so far as they have not been the subject of an appeal, and the findings of this court will necessarily extend to persons in the same situation as the plaintiffs.

In considering the contention advanced on behalf of the first plaintiff that his right to free primary education had not come to an end at the time of the hearing in the High Court and would continue into the future so long as he reasonably required such education, the sequence of events in this case is of some importance.

As already noted, in the defence to the claim of the first plaintiff delivered on the 11th November, 1997, when he was aged 20, the defendants denied that they had deprived the first plaintiff of any of his constitutional rights pursuant to Articles 40 and 42 of the Constitution. At the hearing in the High Court when he was aged 22, the defendants, while accepting that he was entitled to free primary education suitable to his special needs up to the age of 18, denied that he had not been afforded such education and further denied that his right to such education continued beyond the age of 18. Both those propositions were rejected by the learned High Court Judge who, as already noted, found the first plaintiff entitled to general damages in respect of the failure of the first defendant to provide him with the appropriate primary education up to the date of the hearing in the High Court.

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There is, accordingly, a finding by the High Court in this case that the plaintiff was entitled as a matter of constitutional right to free primary education suitable to his special needs up to the date of the hearing in the High Court and that his right to that education had been violated by the defendants. On the basis of that finding, the first plaintiff was awarded damages, not simply in respect of the period up to age 18, but also in respect of the period from 18 to 22. It is not suggested that there was any basis on which he could have been awarded damages in respect of the period from 18 to 22 other than his entitlement to free primary education under the Constitution in respect of that period.

It must be borne in mind that in deciding not to appeal from the finding of the learned High Court Judge that the first plaintiff was entitled to damages in respect of the period up to the hearing of the action, and not simply in respect of the period until he reached the age of 18, the defendants are not properly described as making a"concession" (for whatever reason) to the first plaintiff. Since it has not been appealed from - or, to put it more accurately, the appeal originally lodged in respect of it has not been pursued in this court - the careful and comprehensive judgment of the High Court, delivered after a lengthy hearing in which all the factual and legal issues were exhaustively ventilated and analysed, constitutes the law in this country unless and until another judge of the High Court or this court takes a different view of the law. The High Court is the only court with full original jurisdiction in all constitutional issues in this jurisdiction and its judgments are not to be treated as in some sense qualified as authoritative statements of the law because they have not yet been reviewed by this court.

However, if it were indeed the case that the first plaintiff was entitled to free primary education on that basis until the age of 22, there would be insurmountable difficulties confronting the State in arguing that free primary education is available under the Constitution only to children and not to adults. Hence, they have sought to argue in this case that, notwithstanding the unappealed award of damages, his constitutional entitlement ceased when he reached the age of 18.

That approach to the case by the State gives rise to two possible consequences. It is accepted that there are a significant number of persons in the same position as the first plaintiff who, as a result of the High Court judgment and irrespective of what is decided by this court on this appeal, may also be entitled to damages because of a similar breach of their constitutional rights. A finding by this court that the first plaintiff's entitlement came to an end at age 18 would seem to have as its necessary consequence awards of damages on a less favourable basis to the plaintiffs concerned than the unappealed award of damages in this case. It may be

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that plaintiffs in such a situation might be in a position to resist such a clear inequality of treatment by the court in accordance with the decision of this court in *McMahon v. Leahy* [1984] I.R. 525. It would, in any event, be pointless and inappropriate to prejudge in any way what might happen in cases which are still to be heard. Nor would it be fair to assume that the objective of the State, in adopting this course, was to achieve such a result.

The reason for the strategy adopted by the State is perfectly clear. It is evident from the correspondence between the Chief State Solicitor and the solicitors for the first plaintiff, to which I have already referred - and it is unnecessary to refer to any other materials such as statements made by public figures who are not parties to these proceedings - that the first defendant is unwilling to be seen as seeking a reduction in the award of damages to the first plaintiff and, for that reason, has declined to adopt the straightforward course of simply appealing from so much of the award of damages as related to the post 18 period. In the result, he invites this court to treat a finding by the High Court judge as wrong in law, which he has already accepted, by declining to appeal, as being right in law. To accept that contention as correct involves a feat of mental*legerdemain* of which I am incapable.

It may be suggested that this is not, in the context of these proceedings, a matter of any great moment, since the Minister is naturally concerned that the law should not be left in a state of uncertainty in so important an area, while at the same time not being prepared to disturb the award of damages in favour of the first plaintiff. But that would be to have insufficient regard to an important feature of the jurisprudence of this court. On this aspect of the case - I leave aside entirely the issues as to the relief actually granted in the High Court and the award of damages to the second plaintiff in respect of which the Minister has pursued an appeal to this court as is his constitutional right - the Minister is seeking a determination in respect of a matter which is moot. He accepts that the first plaintiff is entitled to damages in respect of the period up to age 22 and, by implication, that his constitutional entitlement to free primary education lasts beyond the age of 18 for as long as the first plaintiff is in need of what is admitted to be a form of primary education. He accepts that the necessary facilities would continue to be available to the first plaintiff within the framework of the Act of 1998 for so long as the first plaintiff requires them. But he wishes to obtain a ruling from the court that, irrespective of what may be the position in this case, the entitlement to free primary education under the Constitution is limited to children and does not extend to adults.

This court, and its predecessors, has in general declined to grant advisory judgments of that nature to any party. Such precedents as exist for

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such a course are not encouraging. In *A.G. v. Southern Industrial Trust Ltd.* (1957) 94 I.L.T.R. 161, Lavery J., speaking for the former court, said at p. 173 that:-

"The parties have by a series of admissions (some of which might well have been withheld) presented net issues for the decision of the court. Their purpose clearly is to get a decision not merely in the particular case but one of general application. It was questionable whether the court should entertain a case so presented."

It was, accordingly, only with misgivings that the court proceeded to determine the appeal in that case. Unlike the present case, however, the strategy in that case was the result of an agreement between the parties: in the present case, the first plaintiff vigorously objected to the course being taken by the defendants.

Even if that part of the judgment which found the first plaintiff entitled to damages in respect of his entitlement to free primary education up to the age of 22 had been the subject of an appeal to this court, which it has not, I would have concluded that the judgment was correct in point of law and should be upheld by this court. In this connection, I do not think that any useful guidance can be derived from dictionary definitions as to what is meant by the expression "primary education". Its meaning, in the vast majority of cases, is clear. It denotes the stage of a child's education lasting from ages six to twelve and does not extend to the kind of training and human development that takes place from birth to age four. The latter normally takes place in the home and not in a school setting. The primary school curriculum in this country has since 1831 had as its central component education in literacy and numeracy, and now includes as already noted, in addition, mathematics, social and environmental studies, music and physical education. In addition, Irish is a compulsory subject in the primary school curriculum. It should be noted, however, as pointed out in *Director of Public Prosecutions v. Best* [2000] 2 I.R. 17 that the curriculum, as it now exists, represents more than the "minimum education, moral, intellectual and social" which it is the State's duty to ensure that children receive pursuant to Article 42.3.2.

That is not the form of "primary education" to which the first plaintiff was found to be entitled in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 by O'Hanlon J. and to which Barr J. found the first plaintiff in this case to be entitled. The latter's needs at this stage of his life still do not extend significantly beyond the basic skills which more fortunately endowed children acquire in the home between birth and four.

The evidence in this case, which is not challenged on behalf of the defendants established that the need for this form of education continues into

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what, in other people, would be regarded as"adulthood". As Mrs. Osten, an acknowledged expert, put it in her evidence:-

"â€¦ The feeling is that as long as you maintain a certain level of stimulation and care and learning where the individual is actively involved in their day to day process that they will do well, but I think in the first plaintiff's case if the plan for him to act stops you will again see regression. So an ideal situation for him in adulthood would be to be an active, particularly a physical, programme where he has to move and that that be maintained as long as his health allows.

133 Q. Barr J.: Right through life in other words?

Â Â Â Â Â A. Right through life â€¦" [Transcript, Day 3]

In *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, O'Hanlon J. pointed out that primary education for the category of the severely mentally or physically handicapped requires, in the legal context, a new approach and, in particular, so far as its duration is concerned, the process should, ideally, continue as long as the ability for further development is discernible. While Professor Hogg in that case suggested the age of 18 as realistic, the evidence in this case, so far as the first plaintiff is concerned, indicated a longer time scale than 18.

Even if it were open to this court to treat as incorrect the finding in the High Court that the first plaintiff was entitled to free primary education up to the age of 22, the defendants would encounter serious difficulties in acknowledging the constitutional right of the first plaintiff to free primary education up to the age of 18, because of his special needs, but not thereafter. If a person is in receipt of education on the eve of his 18th birthday, it is in the vast majority of cases a total misuse of language to describe that as primary education in the normal sense. However, it is properly regarded as primary education in the case of a person such as the first plaintiff, even though in chronological and physical terms he has ceased to be a person who would normally be regarded as being in receipt of such education.

If it is the law that a person in the position of the first plaintiff ceases to be entitled to free primary education at the stage in his life when he becomes an adult, it is for the courts alone, in the absence of any specific age limit to be found in Article 42, to determine when that stage would be reached. The contention on behalf of the first plaintiff is that he has not yet become an adult in terms of his educational needs and may never reach that stage. The contention on behalf of the Minister is that the age is fixed at 18 years. While that, as it happens, is the age fixed by legislation as the age of majority for a number of important legal purposes, it was not within the competence of the Oireachtas to subject the first plaintiff's constitutional right to such an age limitation and they have not attempted so to do in the Act of 1998. *A fortiori*,it is certainly not the function of the Minister to

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determine the age at which the constitutional right of a person in the position of the first plaintiff ceases. As the whole history of this litigation from beginning to end eloquently demonstrates, that is the function of the courts and the courts alone.

All those who survive that period of their life, which is properly and unarguably described as childhood, begin to pass certain legal and societal milestones. At the age of 14, they are capable of committing criminal offences. At the age of 16, they are no longer required to attend school and may, if the opportunity arises, enter the adult world of work. (The school leaving age was fixed at this level by s. 2(1) of the Education (Welfare) Act, 2000.) At the age of 17, their parents cease to be responsible for their welfare. (It should be noted, however, that s. 2(1) of the Child Care Act, 1991, defines a"child" as "a person under the age of 18 years other than a person who is or has been married".) Between the ages of 15 and 17, they are classified by the criminal law as "young persons" and may suffer what amounts to a form of imprisonment. At that stage, consensual sexual intercourse with them by a person of the same age or older ceases to be a criminal offence. At the age of 18, they are entitled to marry, to vote and to incur legal obligations under the civil law. Although the age of 21 is no longer the significant legal watershed that it once was, the custom of treating it as a form of entry into adult life does not seem to have entirely vanished. The Constitution itself does not recognise persons who have not reached the age of 35 as of sufficient maturity to be eligible to be President of Ireland.

Where in this spectrum can it be said with any semblance of truth that the first plaintiff passed from childhood to adulthood? So far as the evidence in this case goes, virtually none of these stages is of any significance in his case. He is one of a relatively small category of people in our society who, because of their mental handicap, can never enjoy life in all its diversity and richness but to whom at least a measure of happiness may be available. The uncontested evidence in this case is that, to attain even that low plateau, the first plaintiff requires continuing access to what, in his case, is education, as defined by Ã“ DÃ¡laigh C.J., albeit often extremely basic in character. No principled basis exists either in law or in the evidence for the contention advanced by the defendants that a person in his position ceases to be in need of primary education at age 18, at age 22 or at any age in the future which can now be identified with any precision.

I am accordingly, satisfied that the first plaintiff was entitled to a declaration that the first defendant was obliged by Article 42.4 of the Constitution to provide for free primary education for the first plaintiff appropriate to his needs for as long as he was capable of benefiting from the same. While counsel on his behalf are correct in their submission that, among

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what might broadly be described as the social services, education is uniquely under our constitutional arrangements the only one in respect of which the State are subject to a specific obligation in relation to its provision, it by no means follows, as was also urged on his behalf, that this necessarily involves the courts in the continuing supervision of its provision in any particular case. Where, as here, the State have conspicuously failed in their constitutional obligation to provide the education to which a citizen is entitled the courts will ensure that the right is given full legal effect by whatever remedy is appropriate. The next question that arises in this case is as to whether the form of relief granted in the High Court was appropriate in the light of the conclusions at which I have arrived.

I have already pointed out that it is by no means clear from the terms of the judgment that the trial judge envisaged the granting of an immediate mandatory injunction. In practice, it may not be of any great significance whether the relief granted is by way of a declaration or a mandatory injunction: the respect each of the three great organs of State owe to one another requires obedience to the order of this court or the High Court, whether it takes the form of a declaration or a mandatory injunction. The raising of taxes and the appropriation of public monies being quintessentially matters for DÃ¡il Ã‰ireann alone, however, I am satisfied that the appropriate form of relief in this case was a declaration rather than a mandatory injunction.

I am also satisfied that the purported retention by the High Court of jurisdiction in this case after it had delivered what was in every respect a final judgment, subject only to review by this court on appeal, was an erroneous exercise of its jurisdiction. I can fully understand the misgivings of the trial judge in the light of the previous conduct of the defendants in this case but, despite the strenuous submissions to the contrary on behalf of the first plaintiff, I have no doubt that the case should have been approached on the basis that, if the first defendant was at any stage in the future found by the High Court to have been in breach of his or her obligation, the powers of the court to ensure the upholding and vindication of the first plaintiff's rights would, in the famous words of Ã“ DÃ¡laigh C.J. in *The State (Quinn) v. Ryan* [1965] I.R. 70, at p. 122, be:-

"as ample as the defence of the Constitution requires."

In the judgment which he will deliver in this case, Hardiman J. cogently demonstrates that the approach which the court was invited to adopt on this issue is fundamentally at variance with the doctrine of the separation of powers which is at the heart of our constitutional structures. In particular, it would violate the exclusive role of the legislature and the *executive* in the distribution of the nation's wealth. I entirely agree with what he says and have nothing to add on this matter. I would, however,

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also wish to make it clear that I fully share his reservations as to the criticism, which is at least implicit in the judgment under appeal, of the decision by the State to appeal the judgment in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. That, as he points out, is the constitutional entitlement of the State as much as of any other person and anything I have said as to the inconsistency of the posture adopted by the defendants in this case on the hearing of the appeal should not be taken as questioning in any way the right of the defendants in this case under the Constitution to appeal from any part of the judgment and order of the High Court.

As to the claim of the second plaintiff to general damages for the breach of her constitutional rights alleged to have flown from the admitted breach of the first plaintiff's rights, I am satisfied that this claim is wholly unsustainable. Parents who find themselves in the position of the second plaintiff naturally evoke our respect, admiration and compassion, but those are not grounds in law for an award of damages. If the second plaintiff is to be entitled to damages, it would follow inexorably that every member of a family in the constitutional sense would also be entitled to damages where another member of the family suffered personal injuries affording him or her a cause of action in tort, unless the injury was so trivial that the resultant anxiety caused to the other family members was transient and of such little moment as to justify its being disregarded. In every other case, from a moderate whiplash injury to the most massive quadriplegia, since the constitutional rights of the plaintiff to his or her bodily integrity would unquestionably have been violated, the other family members would be entitled to damages if they could plausibly assert that they suffered some degree of anxiety as a result of the person's injuries. That is plainly not the law.

Confronted with that difficulty, counsel for the second plaintiff valiantly attempted to argue that the actions of the first defendant in this case were in some sense a violation of her right to choose the form of education appropriate to her child under Article 42. That again is a wholly unsustainable proposition. The parental right of choice as to the nature of the education which their children will receive is, of course, guaranteed by Article 42, but that was not what was being frustrated by the actions of the defendants in this case. It was the right of the first plaintiff to a form of primary education appropriate to his needs which was being denied and for that, as a result of the decision of the High Court, he was fully and properly compensated. Had the appropriate facilities which the first plaintiff required been available for him free of charge in a single institution in the Cork area capable of meeting his special needs, the second plaintiff would have had no complaint either in law or in fact and there is not the slightest

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reason to suppose that she would have instituted proceedings on her own behalf against the defendants.

I would allow the appeal against the award of general damages to the second plaintiff.

In the result, I would allow the appeal in the first case and vary the order of the High Court by deleting paras. (2), (4) and (5) of the order and substituting therefor a declaration that the first defendant is obliged to provide for free primary education for the first plaintiff appropriate to his needs for as long as he is capable of benefiting from same. In the second case, I would allow the appeal and substitute for the order of the High Court an order dismissing the second plaintiff's claim save in respect of the sum of Â£15,000 in respect of special damages.

**Denham J.**

1. *Two Appeals*

The appeals in the above entitled cases were taken together. In both cases the Minister for Education, Ireland and the Attorney General appealed against a decision of the High Court. The first plaintiff, was born on the 11th October, 1977, and is profoundly mentally disabled. The second plaintiff is the mother of the first plaintiff.

2. *The High Court*

In a judgment delivered on the 4th October, 2000, the High Court (Barr J.) determined the cases in favour of the plaintiffs. The learned High Court Judge treated both of these actions as one and, in his judgment, found at p. 551:-

"The first plaintiff was born on the 11th October, 1977. He is now almost 23 years of age, the third child of nine. The second plaintiff, his mother, is separated from her husband for a number of years and has been the first plaintiff's primary carer all his life. At birth he was a healthy baby and developed normally for about the first four months â€¦ thereafter he began to develop autistic symptoms."

He held that the first plaintiff had a right to have primary education provided for him with no age limitation. He stated at p. 583:-

"There is nothing in Article 42.4 which supports the contention that there is an age limitation on a citizen's right to ongoing primary education provided by or on behalf of the State. It is evident that the right to primary education would be fundamentally flawed if narrowly interpreted as ending at an arbitrary age - 18 years."

On the 31st October, 2000, the High Court declared:-

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"The court doth declare that the first defendant in failing to provide for free primary education for the first plaintiff appropriate to his needs as a severely autistic child with related profound mental and physical handicap and in discriminating against the first plaintiff with respect to the provision of appropriate educational facilities *vis-Ã -vis* other children has deprived the first plaintiff of his constitutional rights pursuant to Articles 40 and 42 of the Constitution and in particular Article 40.1, Article 40.3.1 and 2, Article 42.3.2 and Article 42.4."

And the court ordered, *inter alia*:-

(1) that the first plaintiff do recover against the defendants the sum of Â£222,500.00 damages for breach of the first plaintiff's constitutional rights negligence and breach of duty the aforesaid sum being computed as follows:-

(a) general damages to date -

(b) general damages for the future -

(c) special damages for a 30 month period commencing on the 1st November, 2000, to the 30th April, 2003, in respect of Applied Behaviour Analysis home

programme -

(d) Special damages in respect of ancillary services for a 30 month period commencing on the 1st November, 2000, to the 30th April, 2003 -

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|  | Â£90,000.00 Â£25,000.00 Â£70,000.00 Â£37,500.00; |

(2) that the first defendant do forthwith provide for free primary education for the first plaintiff appropriate to his needs for as long as he is capable of benefiting from same;

(3) that an application be made forthwith to have the first plaintiff taken into wardship;

(4)Â (i) that the first plaintiff be provided with the necessary funding for the Applied Behavioural Analysis home based programme for sufferers from autism for two and a half years estimated at Â£28,000 *per annum* subject to review on completion;

(ii) that the first plaintiff be provided with the necessary funding for home based ancillary services, speech, physiotherapy, occupational and music therapies and medical care estimated at Â£15,000.00 *per annum* subject to review on completion;

(5) that the mandatory injunction and damages granted herein be reviewed in April, 2003, and that a claim for further damages over and above the damages awarded by the court to date be adjourned to this review with liberty to the first plaintiff to re-enter or to apply in the interim in that regard.

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In relation to the second plaintiff the High Court ordered:-

"The court doth declare that the first defendant in failing to provide for free primary education for the second plaintiffs son, the first plaintiff, appropriate to his needs as a severely autistic child with related profound mental and physical handicap and in discriminating against the second plaintiff's son with respect to the provision of appropriate educational facilities *vis-Ã -vis* other children has deprived the second plaintiff of her constitutional rights pursuant to Articles 40.1, 40.3.1 and 2, 41.2.1 and 2, and 42.1 to 4 of the Constitution."

It was ordered that the second plaintiff do recover against the State the sum of Â£55,000 damages for breach of her constitutional rights, negligence and breach of duty (being the sum of Â£40,000 in respect of general damages herein and the sum of Â£15,000 in respect of special damages herein), that the first defendant do forthwith provide for free primary education for the first plaintiff appropriate to his needs for as long as he is capable of benefiting from same, and that the mandatory injunction granted herein be reviewed in April, 2003, with liberty to the first plaintiff to re-enter or to apply in the interim in that regard.

The learned High Court Judge summarised the second plaintiff's constitutional rights *vis-Ã -vis* the State as follows at pp. 588 and 589:-

"(i) She is and has been at all material times a *de facto* single parent and head of the Sinnott family of which she is the primary carer. Her position and that of the family is specifically recognised in the Constitution. The State guarantees to protect the family in its constitution and authority â€¦ (Article 41.2). In *O'B. v. S.* [1984] I.R. 316 the Supreme Court held that the 'provisions of Article 41 create not merely a State interest, but a State obligation to protect the Family'.

(ii) The second plaintiff and her family (in particular her son, the first plaintiff) are entitled to equality of treatment by the State and ought not to be deprived without just cause of basic advantages which the State provides for others (Article 40.1 'All citizens shall as human persons, be held equal before the law â€¦').

(iii) The State shall provide for free primary education - and when the public good requires it shall provide other educational facilities and institutions (Article 42.4). This is a right for the benefit of the family as a unit as well as for the individual members thereof. If the State fails in that duty the burden of providing primary education for a child of the family thus deprived will in the ordinary course devolve on the parents - in the present case on the mother as *de facto* sole parent.

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(iv) The State has failed to honour its foregoing constitutional obligations to the second plaintiff and her son, the first plaintiff, the foreseeable consequences of which has been, *inter alia*,that she has had imposed on her an inordinate burden, which has dominated her life, of endeavouring to provide for the education of her profoundly disabled child â€¦

(v) Although the defendants' argument regarding retrospection which I have already addressed in the context of the first plaintiff's claim is in my opinion not well founded, the period of damage for which the second plaintiff is entitled to compensation differs from that of her son where infancy and mental incapacity are relevant factors in the context of limitation of action. Having regard to the judgment of the Supreme Court in *McDonnell* , it follows that the second plaintiff's claim is analogous to a claim for personal injury in tort and is subject to the limitation period of three years as provided in the Act of 1957 in that regard. However, unlike a claim for personal injury arising out of, for example, a traffic accident where the date of the precipitating event determines the limitation period, the wrong done to her is a continuing one which existed from 1981 and has gone on since then. Her action commenced on the 17th December, 1996. Accordingly she is entitled to damages for the harm done to her from the 17th December, 1993, and into the future."

The learned trial judge found at pp. 596 and 597:-

"The breach of duty of the State in failing to honour its constitutional obligations to the first plaintiff and to [the second plaintiff] has given rise to a corresponding loss suffered by his mother and primary carer which also will have some ongoing effect into the future. She has had the anguish of seeing substantial progress made by the first plaintiff frittered away through the failure of the State over and over again to respond meaningfully to his needs. She has seen time, a vital commodity for the first plaintiff, squandered by bureaucracy. It appears that she has worn herself quite literally to the bone struggling on behalf of her son. Her heroic efforts to have education and care provided for him have dominated her life to a degree far greater than in all probability would have been the case if the State had honoured its obligations to the first plaintiff and to her. She has been subjected many times over the years to the lack of understanding of an apparently disinterested bureaucracy. She has had to contend with the distress and indignity of having to deal with various problems of a child, now a man, which, if the State had provided appropriate services when

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required, probably would have been resolved many years ago - not least of these are his present lack of mobility, persistent frequent drooling and the continuing need for diapers at the age of 23 years. I have no doubt that all of these elements of avoidable anguish in the second plaintiff's life are consequences of the State's breach of duty in failing to honour its constitutional obligations to the first plaintiff and to her. She has responded to that failure with indefatigable love, courage and devotion but at great personal cost. In that regard she is following in the footsteps of Mrs. Marie O'Donoghue and Mrs. Annie Ryan who gave evidence at this trial and many other heroic parents of grievously disabled children who have had to contend with similar difficulties. The State's breach of duty and failure to honour its constitutional obligations has also created distress which for the reason explained in the first plaintiff's case will continue indefinitely, albeit to a lesser degree, even if his future education is reasonably successful. As to damages; I note that special damages (which include the first plaintiff's case also) have been agreed at Â£15,000.

It is difficult to assess compensation for a devoted mother's overlay of distress and anguish in a case like this and for the burden of unnecessary work inflicted on her over the years both as a carer and in her struggle trying to achieve the first plaintiff's rights from a reluctant bureaucracy. If, like him, the second plaintiff was entitled to compensation from October, 1981, I would have awarded her general damages of Â£80,000 from then until now. However, as she is entitled to compensation only for the wrong done to her from the 17th December, 1993, there must be a substantial reduction in that amount. She is entitled to a modest sum for probable continuing distress in the future arising out of the loss of time which militates against the first plaintiff making the degree of progress which he probably would have made if he had received from the State early primary education and training. That situation casts at least a minor cloud over the second plaintiff's future (including on-going avoidable work) which ought not to be there and for which in my opinion she is entitled to compensation.

I assess damages for her as follows:-

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| agreed special damages:  general damages from the 17th December, 1993, to date:  general damages in the future:  Total: | Â£15,000 Â£30,000 Â£10,000 Â£55,000" |

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3. *Facts*

The facts are not in issue on these appeals. The State has taken no issue on the findings of fact of the learned High Court Judge. Thus the facts as found by the High Court are the basis for the decisions on the law and the Constitution in these cases.

The State has undertaken to pay all costs of the plaintiffs in these proceedings before the Supreme Court and in the proceedings before the High Court. The State has agreed to pay the general damages awarded to the first plaintiff and the education as ordered for three years and the special damages to the second plaintiff irrespective of the outcome of the appeals. The State has accepted that they were in breach of the first plaintiff's rights when a child. There were discussions as to whether this appeal was in fact a moot in view of the stance of the State. However, in view of the important legal issues at stake, the appeal proceeded. Consequently this appeal is an appeal only on certain issues of law and the Constitution.

4. *Constitution of Ireland, 1937*

The relevant articles of the Constitution of Ireland, 1937, are as follows:-

*Article 40.1*:-

"All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."

*Article 40.3.1*:-

"The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

*Article 40.3.2*:-

"The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

*Article 41*:-

"41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

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41.1.2 The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

41.2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

41.2.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

41.3.1 The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

*Article 42*:-

"42.1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

42.2 Parents shall be free to provide this education in their home or in private school or in schools recognised or established by the State.

42.3.1 The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

42.3.2 The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

42.4 The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

42.5 In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents,

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but always with due regard to the natural and imprescriptible rights of the child."

5. *Submissions*

Counsel for the defendants presented full written submissions and in addition submitted orally that there were five questions to be considered on this appeal. These were as follows:-

1. Does the Constitution of Ireland afford a constitutional right to education to adults?

2. Does the right to primary education envisaged by Article 42.4 of the Constitution of Ireland envisage a right to education for life?

3. Does a judge of the High Court have the right to formulate and direct the application of future policy in relation to educational needs?

4. Can a judge seek to award damages twice arising from the same cause of action?

5. In relation to the mother, does there exist a collateral constitutional right vested in individuals who suffer harm as a result of breaches of constitutional rights of others?

The State accepted that there was an obligation to provide for free primary education but submitted that it ceased when the first plaintiff was 18 years of age. Whilst the High Court has made an award of general damages and special damages and provision for education for the next three years, which the State has agreed to pay, it has done this on a "without prejudice" basis. Thus while the education for the first plaintiff will proceed until 2003, as a matter of law the State submitted that the first plaintiff's right exists only to the age of 18.

The State accepted that a person such as the first plaintiff needs education for life. However, the State submitted that, the Constitution does not make provision for free primary education after the age of 18. The State submitted that while 18 is an arbitrary age, it is consistent with the Constitution. Furthermore, it was argued that Article 42 provides for the education of children not the education of adults, that Article 42 cannot be construed in isolation, and in fact that it was stretching its interpretation to run it to the age of 18.

Counsel for the defendants informed the court that since the decision of the High Court the State has taken action to provide new support services for children with autism and a task force has been set up. It was submitted that the State had responded to the judgment.

Counsel for the plaintiffs presented full written submissions and submitted orally seven points, as follows:-

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1. The State has said that it would pay the damages on an *ex gratia* basis. However, the general damages awarded for the delay in getting education was made on the premise of the two and a half years' intensive education ordered and a potential arrangement for the future being put in place in 2003. He submitted that the first plaintiff's constitutional rights were infringed and that he is entitled to damages insofar as they flow from that fact. Counsel submitted that the first plaintiff was entitled to the full order of the High Court and that if he were not to receive it then he was entitled to more future damages. Counsel pointed out that the State had conceded that it had violated the first plaintiff's constitutional rights and had conceded damages, therefore, he argued that, the first plaintiff should get damages as a matter of law and not *ex gratia*.

2. Counsel stressed the particular nature of the obligation established under Article 42 of the Constitution. He submitted that there is a mandatory spending obligation under Article 42 that gives it a unique character that sets it aside from all other personal rights provisions of the Constitution. Article 42.4 sets this part of national expenditure on a plane above and apart from a whole range of expenditures that we now consider at the core in our nation. Counsel submitted that the language of Article 42.4 is unique. He submitted that the vast majority of choices as regards spending are political issues and that the courts have no place in the making of such choices. However, he argued, that in the Constitution of 1937 the people made a promise, a promise for future generations, that there would be free primary education.

3. Counsel addressed the nature of education. In this case it was conceded by the State that what the first plaintiff was receiving now was education. The education that the first plaintiff gets is simple yet complicated. He is taught simple things. However, teaching him is complicated. He is taught how to get out of a wheelchair, he is given toilet training, he is taught not to drool. Such simple matters are taught to other children pre-school by their parents. However, counsel submitted that for handicapped children these social skills are part of their education. Further, this education has to be reiterated all the time. Whereas the first plaintiff can learn to walk, if it is not continuously reinforced, he regresses.

Counsel admitted that there is not the remotest chance of the first plaintiff reaching elementary education. It is a question of keeping up achieved learning: how to walk, toilet training, signal he has a headache, signal he is thirsty, etc. This training needs to continue

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for the rest of his life. It is very basic, physical and social. It is education to his capacity. It has to do with human dignity, happiness, comfort. This is an education that never ends. Counsel submitted that the nature of the education was not in issue in this case.

4. Counsel considered cases which have endorsed the power of the courts to intervene where constitutional rights have been violated.

5. Counsel, while accepting that mandatory orders are exceptional, submitted that the High Court was faced with such an exceptional case. Counsel submitted that the learned High Court Judge was addressing an acknowledged breach of constitutional rights in a person of unsound mind who had received only three years' education in 22 years; that the State had no facility to access or address the son's need, at that time. All were agreed that any further delay in commencing education would be very damaging. Counsel submitted that the State had consistently dragged its feet, no-one in Cope had any training to deal with the first plaintiff, yet Cope was the best available in Cork. The State had in one other case consented to a particular type of training, the Applied Behaviour Analysis envisaged in this case. It was submitted that during the trial the State had for the first time in 20 years produced an individual education plan for the first plaintiff. Counsel submitted that its inadequacy and incompetence had led to it being condemned and treated with dismay by all experts. At the conclusion of the trial the State were still arguing that the first plaintiff was not autistic. Counsel submitted that the home based Applied Behaviour Analysis recognised programme was the only viable programme presented to the court. Thus, he submitted, this was an exceptional case requiring a mandatory order such as that made.

6. Counsel addressed the second plaintiff's case. He referred to the summarisation of her position by the learned trial judge and he referred to the findings of the learned High Court Judge. Counsel for the plaintiffs submitted that the State now submitted that she had no constitutional rights. He submitted that this had not been pleaded, that her rights were not disputed in the High Court, that the case was made on duplicity in the High Court.

7. Counsel then drew conclusions and argued that the court should uphold the learned trial judge on the issue of the entitlement to have free primary education provided to adults, sought that the mandatory order be upheld in the exceptional circumstances and submitted that the appeal against the decision in the second plaintiff's case be dismissed.

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6. *The first plaintiff's case*

The State has conceded that the first plaintiff had a right to have the State provide for free primary education throughout childhood. The State has conceded that it has breached the first plaintiff's rights. The State has agreed to pay the general damages and education for the three years ordered for the first plaintiff by the High Court and has undertaken to pay all the costs of the proceedings in the High Court and Supreme Court.

The State submitted that the first plaintiff's right to free primary education exists only until he is an adult. The case was submitted that 18 is the age at which a child becomes an adult. Consequently, it was submitted, the right to free primary education ceases when a person achieves the age of 18. On the other hand counsel for the first plaintiff submitted that the right to free primary education is a promise open to all citizens with no time limitation.

Thus the issue for determination on this appeal is whether the right to the provision of free primary education under Article 42.4 of the Constitution of Ireland is a right given to children or to all citizens irrespective of age. If it is a right only for a child, then the question is at what age does the right cease.

The State shall provide for free primary education: Constitution of Ireland, Article 42.4. This is an obligation expressly stated in the Constitution. The nature of primary education has been the subject of previous cases: *In re the School Attendance Bill, 1942* [1943] I.R. 334; *Ryan v. Attorney General* [1965] I.R. 294; *Crowley v. Ireland* [1980] I.R. 102; *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20; *O'Shiel v. Minister for Education* [1999] 2 I.R. 321; *Director of Public Prosecutions v. Best* [2000] 2 I.R. 17. The nature of primary education is not in issue in this case. The State has conceded that the education which the first plaintiff is receiving is primary education. Whether or not the education is primary education is not a matter for analysis or decision.

The issue for determination is the age to which a person is entitled to the provision of free primary education, whether the entitlement is for life or for childhood. It is a matter of construing the Constitution to determine the age ambit for which free primary education is provided. Does it exist for children only? Does it exist for people of all ages?

Article 42.4 of the Constitution states that the State shall provide for free primary education. Article 42 comes under the heading"Education". The Constitution acknowledges that the primary and natural educator of the child is the family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children: Article 42.1. Parents are free to provide this education in their homes or in private

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schools or in schools recognised or established by the State: Article 42.2. The Constitution expressly provides that the State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State: Article 42.3.1. The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social: Article 42.3.2. Onto this bedrock comes Article 42.4, the article in issue, which provides:-

"The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

Article 42.5 provides that in exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State, as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

It is clear from the wording of Article 42 that education is grounded in the family sphere. The family consists of children and parents. The primary educator is the family, which is expressly protected. Both the parents and children have rights. A balance is created. Whilst the family remains the primary educator, the State, as guardian of the common good, shall require a certain standard. This standard is described as a certain minimum education, moral, intellectual and social. It is certainly not a high standard.

Into this formation the right to have provided free primary education is placed. I am satisfied that counsel for the first plaintiff was correct when he described it as a promise to the people. It is reflective of community values. It is reflective of the approach of the people of Ireland to education.

Article 42.4 is placed in an Article redolent of the family, where children are addressed as part of a family, where the primary educator is acknowledged as the family. It paints a picture of a family of two parents, mother and father, and children learning from their parents.

The term "child" falls to be construed in light of the plain language of Article 42. The word "child" in general use describes a young person. It is a term used in a context where the focus is on the family, parents and children. The Article anticipates the teaching of young children. The Article makes reference to schools - of different types. The Article specifically refers to children. The Article speaks of a certain minimum education. The Article addresses the rights of parents. The Article stresses

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education in a context of schools. The article is not addressing issues such as, for example, succession where the term "child" might be used in a different sense. It would be rewriting the Constitution to construe the term "child" as meaning a childish person. Consequently, the meaning of the words "child" and"children" is clear. There is no ambiguity. The child is described within a family where the parents are the educator. It is addressed to a young person. It is age related.

I am reinforced in this view by the fact that Article 42 follows Article 41 which relates to the family. The family is acknowledged as the natural primary and fundamental unit group of society. The words of Article 42, including those relating to the family, parents and children, continue the theme.

The essence of Article 42 is the concept of the family, and a child growing up in the heart of the family. Article 42 describes the situation of the education of a young person within the family unit, a young person who is growing and learning. It also makes provision for intervention for the common good to require that children receive a certain minimum education. A person who has achieved adulthood is no longer subject to parental authority or decisions such as are envisaged in Article 42.

For all these reasons I am satisfied that Article 42 does not relate to adults. It does not give to adults the right to free primary education. This right is reserved for children. This is not to limit in any way other rights which may be extant in the Constitution relating to adults, whether they be able bodied or disabled. Thus as the right provided for in Article 42.4 runs for children only, the next question is to what age the right runs.

In general primary school is completed when a child is under 14 years of age. This case deals with particular facts. It is conceded that the first plaintiff has the right until he is 18. The choice of 18 years of age is somewhat arbitrary. The choice is based on the fact that a young person becomes an adult in the eyes of the community in many aspects at the age of 18. He or she may vote, *inter alia*.

Most children finish primary education, as it is understood in a general sense, between the ages of 12 and 14 years of age. Thus on first impression it would appear that 14 is a more logical age than 18. However, the right to have free primary education provided is a fundamental and important right established by the Constitution. It is a right with which certain individuals or groups may encounter physical, mental or social difficulties in exercising. Therefore, the norm may not cover minorities. The right is given to all children. It is appropriate that the construction of the Article should ensure that all children may get the benefit of the right. Consequently, it is fitting that the age at which the right ceases to exist is when the person is no longer a child. Therefore it is reasonable to take the age at which society

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treats a young person as an adult as the age when the right ceases to exist. The State's case that the first plaintiff is recognised as an adult when he reaches 18 years of age is reasonable.

To sum up this issue: I am satisfied that the right that the State shall provide for free primary education is a right in relation to children. The term children is age related. Under society's*mores*, general practice and some laws it is appropriate to determine that a person is no longer a child at the age of 18. Thus the first plaintiff had a right to the provision of free primary education until he reached 18 years of age but he has not got the constitutional right to free primary education after that age. That is not to say that the first plaintiff will not require continuing support and training beyond the age of 18. Much of the first plaintiff's education at present, using the word in its broad sense, is not the teaching of anything new but rather continued practice so that he may retain the skills he has learnt. Such is not an Article 42.4 matter. However, the first plaintiff's other personal rights under the Constitution, including the right to dignity and bodily integrity, continue.

7. *Separation of powers*

The order of the High Court envisaged ongoing education and gave rise to legal argument in this court on the separation of powers. All powers of government derive from the people: Article 6.1. These powers are exercised by the organs of government established by the Constitution, being legislative, executive and judicial. The functions of government are divided between these three branches of government. The separation of powers involves not only rights - but duties also. It establishes areas of activity and boundaries: *Crotty v. An Taoiseach* [1987] I.R. 713, Finlay C.J. at p. 772. No one of the three organs is given a paramount place. In *Murphy v. Dublin Corporation* [1972] I.R. 215 at p. 234, Walsh J. stated:-

"As the legislative, executive, and judicial powers of government are all exercised under and on behalf of the State, the interest of the State, as such, is always involved. The division of powers does not give paramountcy in all circumstances to any one of the organs exercising the powers of government over the other."

In addition to recognising and applying the doctrine of the separation of powers it is important to afford respect to the decisions of each of the constitutional organs of State. It is from this basis that analysis of governmental decisions commences.

The doctrine of the separation of powers arose for debate only in relation to the issue of a mandatory order of the court as to the education of the first plaintiff. However, the State has conceded breach of the first plaintiff's right and has agreed to continue the first plaintiff's education as

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ordered by the High Court. Also, as the first plaintiff's constitutional right ceased when he became 18 years of age there is no question of a mandatory order for the future. It is no longer a matter for determination, thus there is no issue of separation of powers to be decided in this case.

In general the matter of a mandatory order will not arise. It is a practice for the executive, when an issue is being litigated that could give rise to a mandatory order, to indicate that should the decision be against the State a declaratory order would be sufficient. Similarly, the courts assume that decisions will be implemented and that mandatory orders are not necessary. Thus a declaratory order, if any order is necessary, is usually appropriate. However, I would not exclude the rare and exceptional case, where, to protect constitutional rights, the court may have a jurisdiction and even a duty to make a mandatory order.

8. *The second plaintiff's case*

8.1. *Noteworthy factors*

There are a number of noteworthy factors about the second plaintiff's case. It is unusual in a number of ways.

(a) As regards the course of the case itself it is unusual.

(i) The second plaintiff claimed a declaration that the State in failing to provide for free education for the first plaintiff appropriate to his needs as a profoundly mentally disabled child and in discriminating against her son, in respect of the provision of appropriate educational facilities *vis-Ã -vis* other children, has deprived her of her constitutional rights pursuant to Articles 40.1, 40.3.1 and 2, 41.1.2, 41.2, 42.1 to 4. The second plaintiff claimed damages for breach of her constitutional rights, negligence and breach of duty. Further, the second plaintiff claimed a mandatory injunction directing the State to provide for free education for the first plaintiff appropriate to his needs for as long as he is capable of benefiting from same. The State pleaded in defence that it had provided for free primary education for the first plaintiff; it denied that the State had deprived the second plaintiff of any of her constitutional rights pursuant to Article 40.1, 40.3.1 or 2, 41.1 or 2, 42.1 or 42.2 to 4, it denied that the State had been guilty of negligence or breach of duty; and it pleaded that the second plaintiff is not entitled to have her son provided with free education for as long as he is capable of benefiting from it; and it was pleaded that she was not entitled to the relief sought or any relief.

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(ii) In the High Court, the State opposed the claim of the second plaintiff largely on the ground that it duplicated the first plaintiff's claim.

(iii) However, on this appeal the State submitted that the second plaintiff has no cause of action in law. This was not pleaded in the High Court. The Supreme Court was asked to take this point of its own motion. Counsel for the second plaintiff pointed to this unusual situation, that aspects - not pleaded or advanced in submissions nor the subject of appeal - had been placed before the Supreme Court by counsel for the defendants with the request that they be taken into account. Counsel for the second plaintiff submitted that this should not be allowed and supported this argument by submitting that the State did not contest her rights in the High Court but argued a duplicity. Further, it was submitted that the Statute of Limitations was not pleaded, the learned trial judge took the point and it was not appealed.

(b) It is noteworthy also that the State has made considerable concessions in this case. The State has conceded the majority of the first plaintiff's case. The case took 29 days in the High Court. It was hard fought. Now the State has conceded the first plaintiff's right to free primary education to the age of 18 and has undertaken to pay damages and costs. Further, apparently the State has agreed to pay the Â£15,000 special damages awarded to the second plaintiff.

(c) The claim is noteworthy also in that, as regards the second plaintiff, it is grounded on aspects of the Constitution which have not been the subject of much attention in case law.

(d) An analogy was drawn between the position of the second plaintiff and the developing law on negligence and injury, such as post-traumatic stress disorder, where the plaintiff was not at the scene of the event yet suffered injury. Reference was made to *Mullally v. Bus Ã‰ireann*  [1992] 1 I.L.R.M. 722.

(e) The facts are not in issue. Thus the case is based on the facts as found by the learned High Court Judge. On the facts the High Court made a clear finding on fact and law in favour of the second plaintiff.

I bear these noteworthy factors in mind in reaching a decision in this case.

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8.2. *Remedies*

It has long been recognised that the courts have the power to remedy breaches of constitutional rights. This was described classically in *The State (Quinn) v. Ryan* [1965] I.R. 70 by Ã“ DÃ¡laigh C.J. at p. 122 where he stated:-

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and that the Courts were the custodians of these rights. As a necessary corollary, it follows that no one can with impunity set these rights at nought or circumvent them, and the Courts' powers in this regard are as ample as the defence of the Constitution requires."

Also, in *Byrne v. Ireland* [1972] I.R. 241 at p. 264, Walsh J. stated:-

"In several parts in the Constitution, duties to make certain provisions for the benefit of citizens are imposed on the State in terms which bestow rights upon the citizens and, unless some contrary provision appears in the Constitution, the Constitution must be deemed to have created a remedy for the enforcement of these rights."

He continued at p. 280:-

"In my view, that was clearly enforceable against SaorstÃ¡t Ã‰ireann if no provision had been made to implement that Article of its Constitution.

There are several instances in the Constitution of Ireland also where the State undertakes obligations towards the citizens. It is not the case that these are justiciable only when some law is being passed, which directly infringes these rights or when some law is passed to implement them. They are justiciable when there has been a failure on the part of the State to discharge the obligations or to perform the duties laid upon the State by the Constitution. It may well be that in particular cases it can be shown that some organ of the State already has adequate powers and may in fact have had imposed upon it the particular duty to carry out the obligation undertaken by the State, but that would not mean that the State was not vicariously liable for the non-performance by its various organs of their duties."

He also stated at p. 281:-

"Where the People by the Constitution create rights against the State or impose duties upon the State, a remedy to enforce these must be deemed to be also available."

Barrington J., in *McDonnell v. Ireland* [1998] 1 I.R. 134 at pp. 147 to 148, said:-

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"It is only when the legislature has failed in its constitutional duties to defend or vindicate a particular constitutional right, pursuant to the provisions of Article 40.3 of the Constitution, that this court, as the court of last resort, will feel obliged to fashion its own remedy."

Later, Barrington J. said at p. 148:-

"â€¦ constitutional rights do not need recognition by the legislature â€¦ to be effective. If necessary the courts will define them and fashion a remedy for their breach."

In *Boland v. An Taoiseach* [1974] I.R. 338, Fitzgerald C.J. said at pp. 361 to 362:-

"[Article 6] â€¦ [established] beyond question the separation of the executive, legislative and judicial powers of government â€¦ Consequently, in my opinion, the courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

In the same case, Griffin J., at pp. 370 and 371, having referred to Article 15.2.1, Article 28.2 and Articles 34.1, stated that:-

"In the event of the Government acting in a manner which is in contravention of some provisions of the Constitution, in my view it would be the duty and right of the courts, as guardians of the Constitution, to intervene when called upon to do so if a complaint of a breach of any of the provisions of the Constitution is substantiated in proceedings brought before the courts."

And in *D.G. v. Eastern Health Board* [1997] 3 I.R. 511 at p. 522 Hamilton C.J. stated:-

"If the courts are under an obligation to defend and vindicate the personal rights of the citizen, it inevitably follows that the courts have the jurisdiction to do all things necessary to vindicate such rights."

The second plaintiff seeks a declaration and damages. It is not a case where a mandatory order against the State is in issue. The question is whether the cause of action or the right or rights contested exist and were breached. The issue is whether the second plaintiff has rights which have been breached or another cause of action. If she has, the court has jurisdiction to make the relevant orders.

8.3. *Articles of the Constitution*

The major contention on behalf of the second plaintiff rests on a number of Articles and rights thereunder. These rights are the rights and duties arising in relation to the right to equality: Article 40.1; rights in relation to the family: Article 41; and the rights and duties arising under Article 42.

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8.3.a. *Equality*

Article 40.1 provides that all citizens as human persons shall be held equal before the law. This does not mean uniformity. Due regard may be had to differences of capacity, physical and moral, and of social function.

Article 40.1 forbids discrimination or distinctions which are unjust, unreasonable or arbitrary: *O'B. v. S.* [1984] I.R. 316, Walsh J. at p. 335. The mere fact of discrimination or distinction as between persons or groups does not make the difference unconstitutional. Invidious discrimination is unconstitutional: *People (Director of Public Prosecutions) v. Quilligan and O'Reilly (No. 3)* [1993] 2 I.R. 305 at p. 321.

There is no question but that the treatment of the first plaintiff by the State would not be as an able bodied child. However, he was entitled to be held equal - to be provided with free primary education. Similarly the second plaintiff was entitled to be held equal before the law as a parent and a mother.

The second plaintiff had duties in relation to all her children - including those duties related to education. In her role as mother of the first plaintiff, the second plaintiff was subjected to discrimination as between herself and another mother of a child with no handicap and as between herself as mother to her other children and as mother to the first plaintiff. Distinctions of themselves would not be invalid; indeed they would be valid in that the education of the first plaintiff would follow a different pattern. But an absence of provision of free primary education for the first plaintiff, which the State has conceded breached the first plaintiff's rights, also discriminated against the second plaintiff's duty and role, as opposed to that of the mother of a child of average intelligence, in a manner that was unjust and invidious. Thus the second plaintiff's rights were breached and she was discriminated against invidiously.

There were facts found as to the position of the second plaintiff by the learned trial judge. These included the additional burden of work, the additional time and effort required to attend to the first plaintiff, the fact that this left the second plaintiff worn out, and gave rise to anguish and distress because of the State's attitude. These facts were not appealed.

As a parent and mother, the second plaintiff was entitled to be held equal before the law. In accordance with her rights and duties as a parent and mother she sought that free primary education be provided for the first plaintiff. This was not done. The State did not provide for her disabled son. As a consequence she had to shoulder additional burdens. This lack of provision is now recognised as a breach of the first plaintiff's rights by the State. However, it is also a breach of the second plaintiff's right to be held equal. The second plaintiff was not held equal to a parent of a normal child in that no provision was made for her son's education.

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This is an invidious discrimination. This is not to say that the second plaintiff is to be treated identically to a parent of a child who is able bodied. Nor is it to say that provision must be made for education to optimum levels in all circumstances. Matters of policy and finance are relevant factors for the policy makers. However, in this case, where the breach of the first plaintiff's right is acknowledged by the State, a consequence is that the rights and duties of the parents were also affected and breached. The second plaintiff's rights in relation to her child were not held equal. The second plaintiff suffered invidious discrimination. Non-parental family members do not have such rights and no claim of discrimination would be sustainable.

8.3.b. *The family*

Article 41 comes under the heading "The Family". It states:-

"41.1.1 The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

41.1.2 The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State."

The family of the Constitution, which has rights and duties, is based on a valid marriage. In *The State (Nicolaou) v. An Bord UchtÃ¡la* [1966] I.R. 567, at p. 643, Walsh J. pointed out that the family referred to in Article 41:-

"â€¦ is the family which is founded on the institution of marriage and, in the context of the Article, marriage means valid marriage under the law for the time being in force in the State."

The fact that the family under the Constitution is based on a valid marriage has been a matter for discussion. Recommendations for some alterations in the Article were made by the Constitution Review Group, 1995. However, any such controversy is irrelevant to this case. The plaintiffs are a family for the purpose of Article 41.

The second plaintiff was married to the first plaintiff's father. Whilst the second plaintiff has been separated from her husband for a number of years and she is the sole carer for the first plaintiff, they are still a family in accordance with the Constitution. Consequently the benefits, rights and duties of the Constitution are attached to the second plaintiff.

Article 41.1 recognises the family as a unit. It is the building block of our society. This unit has rights. In *Murray v. Ireland* [1985] I.R. 532, at pp. 537 and 538, Costello J. said:-

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"â€¦ the rights, in Article 41, s. 1, sub-s. 1 are those which can properly be said to belong to the institution itself as distinct from the personal rights, which each individual member may enjoy by virtue of membership of the family."

The rights recognised by Article 41 are those of the family and they may be protected by a member of the unit. The member *qua* member of the unit also has rights which he or she may defend. The parents have a duty to the children of the family which they may defend.

Thus the second plaintiff has rights as part of the unit of the family and duties as a parent within that unit. If there is a breach by the State of a right of one of the members of the unit, as, for example, here the child the first plaintiff, then because of the nature of the right breached this may have an impact on the family as a unit and the parent in the family. The negative impact on the family and the second plaintiff of the breach by the State was fully documented by the learned High Court judge.

Article 41 does not mention the child. It has been inferred that this may be interpreted as giving to parents more value than children. Even taking this interpretation at face value it strengthens the position of the second plaintiff.

The Constitution does not recognise a special role for fathers. However, at the time when the Constitution was enacted, as case law illustrates, the father had a dominant authority in the family. It was taken for granted that he would provide for the family and lead the family.

The mother is specifically mentioned in Article 41.2. which states:-

"41.2.1 In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

41.2.2 The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."

And Article 41.3.1 further emphasises the special position of the family by stating:-

"The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."

The position afforded to women and mothers by Article 41 has been described in a negative fashion. Thus the Constitution Review Group, at p. 333, stated:-

"Article 41.2 assigns to women a domestic role as wives and mothers. It is a dated provision much criticised in recent years. Notwithstanding its terms, it has not been of any particular assistance even to women working exclusively within the home."

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It is true that the Article has not been of assistance even to women working exclusively within the home. In *L v. L.* [1992] 2 I.R. 77, the High Court (Barr J.) held that a wife who had not worked outside the home could derive rights from Article 41. Barr J. stated at pp. 98 and 99:-

"In my view the judiciary has a positive obligation to interpret and develop the law in a way which is in harmony with the philosophy of Article 41 as to the status of woman in the home. It is also in harmony with that philosophy to regard marriage as an equal partnership in which a woman who elects to adopt the full-time role of wife and mother in the home may be obliged to make a sacrifice, both economic and emotional, in doing so. In return for that voluntary sacrifice, which the Constitution recognises as being in the interest of the common good, she should receive some reasonable economic security within the marriage. That concept can be achieved, at least in part, by recognising that as her role as full-time wife and mother precludes her from contributing, directly or indirectly, in money or money's worth from independent employment or avocation towards the acquisition by the husband of the family home and contents, her work as home-maker and in caring for the family should be taken into account in calculating her contribution towards that acquisition - particularly as such work is of real monetary value."

Barr J. held that the wife and mother had a 50% beneficial ownership in the family home. This was reversed on appeal by the Supreme Court. However, by inference it raised the possibility of joint ownership of the home. There followed the Matrimonial Home Bill, 1993, which was referred to the Supreme Court under Article 26 by the President. In *In re the Matrimonial Home Bill, 1993* [1994] 1 I.R. 305, under the provisions as provided in the Constitution for such references, the judgment of the court, determining that the bill was unconstitutional, was given by Finlay C.J. who stated at p. 326:-

"Having regard to the extreme importance of the authority of the family as acknowledged in Article 41 of the Constitution and to the acceptance in that Article of the fact that the rights which attach to the family including its right to make decisions within its authority are inalienable and imprescriptible and antecedent and superior to all positive law, the court is satisfied that such provisions do not constitute reasonably proportionate intervention by the State with the rights of the family and constitute a failure by the State to protect the authority of the family."

Both *L. v. L.* [1992] 2 I.R. 77, 101 and *In re the Matrimonial Home Bill, 1993* [1994] 1 I.R. 305 related to property (the home). They also related to rights as between spouses - a balance involving property

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ownership. Neither case related to rights of a parent or parents or of the family as against others outside the family unit.

When Article 41 was being drafted and included in the Constitution there was a negative view expressed of the role apparently consigned to women. It has been considered by some that the Article was rooted in a particular Christian philosophy. It was queried as to whether it placed the woman in the home to the detriment of other areas.

Whatever historical concepts and byways may be traced the reality is that the Constitution sets out constitutional rights, duties and powers. The Constitution is a living document. It must be construed as a document of its time. In *McGee v. Attorney General* [1974] I.R. 284 at p. 319 Walsh J. stated:-

"â€¦ no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

Thus Article 41 is an Article of the 21st century, an Article of our times. In this century the family remains the core unit of our society. While the nature of family is evolving in society, as a constitutional unit the family remains grounded on marriage.

The Constitution is a constitution of the people expressing principles for its society. It sets the norms for the community. It is a document for the people of Ireland, not an economy or a commercial company. The first of the cases in this judgment illustrates the promise given by the people of Ireland to future generations that the State would provide for free primary education for its children. The promise is an acknowledgement of the great importance placed by the people of Ireland on the education of children.

Equally, the second case in this appeal is grounded on a fundamental concept - even more so perhaps - that our society is built on the family. Further, that within the family the special benefit given by women in the home, is recognised. It is acknowledged that that benefit is not just for the particular home, family and children, but for the common good.

This special recognition is of the 21st century and belongs to the whole of society. It is not to be construed as representing a norm of a society long changed utterly. Rather it is to be construed in the Ireland of the Celtic Tiger. As important now as ever, is the recognition given. It is a recognition for all families - of whatever religion or none.

Thus, in Ireland, in relation to the family and the home, women have a constitutionally recognised role which is acknowledged as being for the common good. This gives to women an acknowledged status in recognition not merely of the physical aspect of home making and family building, but of the emotional, social, physical, intellectual and spiritual work of women and mothers. The undefined and valuable role of the father was presumed and remained unenumerated by the drafters of the Constitution.

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Article 41.2 does not assign women to a domestic role. Article 41.2 recognises the significant role played by wives and mothers in the home. This recognition and acknowledgement does not exclude women and mothers from other roles and activities. It is a recognition of the work performed by women in the home. The work is recognised because it has immense benefit for society. This recognition must be construed harmoniously with other Articles of the Constitution when a combination of Articles fall to be analysed.

8.3.c. *Education*

Article 42 comes under the heading "Education". It acknowledges the primary role of the family as the educator of the child and guarantees protection of the role of the parents in providing, according to their means, for the religious and moral, intellectual, physical and social education of their children. Parents are given a choice as to where they give the education to their children provided that the children receive a certain minimum education, moral, intellectual and social. The requirement for free primary education is provided for and the rights of parents is expressed. It is only in exceptional cases where the parents fail in their duty towards their children that the State as guardian of the common good shall endeavour to supply the place of parents, but this has to be with due regard to the rights of the child.

Consequently, educational rights are interwoven with the family, parental rights and duties, and the rights of the children. Article 42.4 creates rights. The provision in Article 42.4 is not created in a vacuum. It imposes a duty to provide the right and a right to receive it.

Thus O'Higgins C.J. stated in *Crowley v. Ireland* [1980] I.R. 102 at p. 122:-

"â€¦ the imposition of the duty under Article 42, s. 4 creates a corresponding right on those in whose behalf it is imposed to receive what must be provided â€¦ it cannot be doubted that citizens have the right to receive what it is the State's duty to provide for under Article 42, s. 4."

I adopt this approach. It applies to all who have a right to receive the provision of the education - the family, the parents, the child. Thus the first plaintiff had the right to have free primary education provided for him. So too did the second plaintiff have the right to have free primary education provided for the first plaintiff.

The second plaintiff had a constitutional right as part of the family and as mother in relation to her son's education. As a parent she had rights and duties. The duty included the education of the first plaintiff. This duty was breached in that she could not afford private education and needed to rely

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on the constitutional right to have free primary education provided. This was not done. Thus her rights as a parent were breached. The second plaintiff's rights under Article 42, and especially under Article 42.4 were breached. Indeed, as the case law over the last 60 years shows most cases relating to children's education are brought by parents - not children - as a breach of their rights as well as the children's rights.

8.3.d. *Duty of care*

Counsel on behalf of the second plaintiff also raised the issue of duty of care, and negligence was pleaded in the pleadings. The analogy was drawn and reference made to *Mullally v. Bus Ã‰ireann*  [1992] 1 I.L.R.M. 722. I took a similar approach in *Kelly v. Hennessy* [1995] 3 I.R. 253 where at p. 274, I stated:-

"I am satisfied that a person with a close proximate relationship to an injured person, such as the plaintiff, who, while not a participant in an accident, hears of it very soon after and who visits the injured person as soon as is practicable, and who is exposed to serious injuries of the primary victims in such a way as to cause a psychiatric illness, then she becomes a secondary victim to the accident. In reaching these determinations it is necessary to review the accident and immediate aftermath in an *ex post facto* way to test the situation."

The nexus between the plaintiffs could not be closer, nor is there any appeal against the findings of fact of injury to the second plaintiff. As to whether the State can breach with impunity the constitutional rights of a person and thereby injure a person in close proximity is an issue that need not be determined in light of the breach of the second plaintiff's constitutional rights. I make no decision on the civil issue of duty of care in this case.

9. *Conclusion*

The Constitution of Ireland is a constitution for the people of Ireland not an economy. The Constitution is a constitution for Irish society. The Constitution establishes the principles by which the community wish to live. It places the family as the primary unit group of society. It sets out the rights of the members of the society. At issue in this case are fundamental concepts of the Constitution, the right to have free primary education provided, the role of the family in education, equality and the recognition of the work done by women and mothers in the home for the common good.

There were facts found as to the additional burden of work, additional time, worry and anguish placed on the second plaintiff in her duties in

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relation to the first plaintiff by the State's acknowledged breach of its duties. The High Court held at p. 594 that:-

"The second plaintiff has also suffered harm, loss and damage by reason of the failure of the State to honour its constitutional obligation to provide adequately for her son's education and training, all of which was a reasonably foreseeable consequence of the State's conduct in that regard."

Upon the facts found it was open to the learned trial judge to come to such a conclusion. There was no appeal on the facts.

As to the law and the Constitution I am satisfied that:-

(a) There are a number of noteworthy factors about the second plaintiff's case, see para. 8.1.

(b) The courts have the power to remedy breaches of constitutional rights.

(c) The second plaintiff as a parent with duties to her child was not held equal and suffered invidious discrimination from the State, see para. 8.3.

(d) The second plaintiff as a parent of a family had a duty to her child of the family and she was entitled to defend the institution of the family which suffered as a consequence of the State's breach, see para. 8.3.

(e) The special recognition given to the role of women and mothers within the home by the Constitution must be read harmoniously with other articles of the Constitution, see para. 8.3.

(f) The second plaintiff had the right as a parent to the benefit of the provision of free primary education for her child and this right was breached by the State.

In light of these and the other matters herein relating to Article 40.1, Article 41 and Article 42.4 of the Constitution, the learned High Court Judge had a constitutional basis for his decision which I would uphold.

In relation to the five issues submitted as needing to be determined by counsel for the defendants, I would answer as follows:-

1. Article 42.4 of the Constitution of Ireland does not afford a constitutional right to free primary education to adults.

2. The right to free primary education established in Article 42.4 of the Constitution does not envisage a right to education for life.

3. The matter of a mandatory order does not arise, it is not an issue in the appeal as a consequence of the decisions at paras. numbers 1 and 2 above.

4. Question 4 presupposes that there is only one cause of action. This is an error. The second plaintiff has a cause of action. Damages may be awarded to separate persons arising out of the same set of

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facts, for example victims of a road traffic accident; and where persons have suffered a breach of a constitutional right by the State.

5. Question 5 presupposes, in error, that there was no breach of the constitutional rights of the second plaintiff.

Counsel for the plaintiffs raised six points. I would answer them as follows:-

1. The matter of a breach of the first plaintiff's constitutional rights was conceded by the State. The first plaintiff is entitled as a matter of law to an order for damages; an *ex gratia* payment does not reflect the (conceded) breach of his constitutional rights.

2. Article 42 requires the provision of free primary education for children. The State has a duty to provide for free primary education to all children. It is reasonable to construe the Constitution as granting this childhood right as including persons up to the age of 18. This is a broad interpretation in light of the more usual age when free primary education ceases but is consistent with recognising the special needs of some children and cherishing all children.

3. The nature of primary education was not an issue. The State conceded that the first plaintiff was now receiving primary education.

4. The courts have the power and, in certain circumstances, the duty to intervene in circumstances where constitutional rights have been violated or to protect constitutional rights. I would not exclude the possibility of a mandatory order against the State in the rare and exceptional case where it may be necessary in the circumstances to protect constitutional rights.

5. The matter of mandatory orders does not arise in this case in light of the decision that the right to the provision of free primary education ceases when a child reaches 18 years of age. There is no question of a mandatory order as the first plaintiff is now an adult.

6. The State case argued in the Supreme Court against the second plaintiff was different from that argued in the High Court. As a matter of proceedings and law this approach is inappropriate. I am satisfied that the second plaintiff has a constitutional status, rights and duties as a mother which should be upheld and were not.

Thus in relation to the three kernel issues of this case I conclude:-

1. The breach of the first plaintiff's constitutional right that the State provide for free primary education was conceded. The first plaintiff's constitutional right to the provision of free primary education existed during his childhood and ceased when he reached adulthood

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which, it is reasonable to construe, commenced at the age of 18.

The first plaintiff is entitled to a declaration that the first defendant in failing to provide for free primary education for him up to the age of 18 years of age, appropriate to his needs as a severely autistic child with related profound mental handicap, has deprived him of his constitutional rights under Article 42.4 of the Constitution. He is also entitled to the damages awarded as a matter of law.

Nothing in this judgment should be regarded as negating any other constitutional rights which the first plaintiff might have.

2. The matter of mandatory orders does not arise for decision as the first plaintiff has passed his 18th birthday. Also, the issue does not arise for consideration as the State has agreed to pay the damages and to pay for the education ordered by the High Court for the first plaintiff to 2003.

In light of the determination that the right to the provision of free primary education exists only for children and ceases at the age of 18, and that provision is made for education for the first plaintiff to an age in excess of 18 years, I am satisfied that the damages need not be reassessed. In coming to this conclusion, while I am conscious of the loss afforded to the first plaintiff by the absence of education in his youth, I balance this against the conceded future education as ordered by the High Court and the fact that the State informed this court that it accepted the first plaintiff would need further training and that provision would be made for that.

3. For the reasons stated, I would dismiss the appeal of the State against the judgment and order of the High Court in relation to the second plaintiff. The second plaintiff is entitled to a declaration that her constitutional rights under Article 42.4, Article 41 and Article 40.1 were breached and to the award of damages made by the learned High Court Judge.

**Murphy J.**

The first plaintiff was born on the 11th October, 1977. Within some months of his birth he began to display the symptoms of the autism with which he is afflicted. The heroic efforts made by his mother, the second plaintiff, to have his condition assessed, treated and managed both in the United States and this country have been set out in the judgment of Barr J. and summarised in the judgment of Keane C.J. It is unnecessary for me to repeat them. Suffice it to say that it has been difficult, and it will be

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impossible, for this devoted mother to meet unaided the very special needs of her autistic son.

The extent of the first plaintiff's disability or the consequences of it were summarised by his counsel in this court in the following terms:-

"The first plaintiff is not capable of learning much more than toilet training, preserving his mobility and responding to simple instructions, and perhaps a few words."

It was in those tragic circumstances that the proceedings on behalf of the first plaintiff were instituted. It was contended that the State failed to afford him certain specific constitutional rights to which he was entitled. Article 42.4 of the Constitution imposes a mandatory obligation on the State to "provide for free primary education". The same sub-article requires the State to "endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions". An absolute duty exists in relation to what is described as "primary education". The qualified duty exists in respect of the provision of any other form of education or facilities for it. The Constitution significantly imposes no obligation on the State to provide health care of any description for its citizens.

The first plaintiff was and is educable. In the most favourable phases of his young life when he attended schools managed by skilled therapists and operated on the basis of a low ratio of students to teachers considerable progress was made. However, the goals attainable are limited and, tragically, there is the further complication that progress when achieved cannot be maintained without continuous support. In the High Court it was argued that the help and assistance which the first plaintiff required (and continues to require) consisted in whole or in part of what is described as "primary education" in Article 42 of the Constitution. The argument advanced was similar to that which had been made successfully to the High Court in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. In his analysis of the words"primary education" at p. 62, O'Hanlon J. referred to the observations of Ã“ DÃ¡laigh C.J., in *Ryan v. Attorney General* [1965] I.R. 294 where he explained, at p. 350 what constituted education and, more particularly, what did not:-

"Education essentially is the teaching and training of a child to make the best possible use of his inherent and potential capacities, physical, mental and moral. To teach a child to minimise the dangers of dental caries by adequate brushing of his teeth is physical education for it induces him to use his own resources. To give him water of a nature calculated to minimise the danger of dental caries is in no way

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to educate him, physically or otherwise for it does not develop his resources."

In *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, O'Hanlon J. not merely extended that definition of education but, unlike Ã“ DÃ¡laigh C.J., expressly related, at pp. 65 to 67, his definition to Article 42.4 of the Constitution in the following terms:-

"I conclude, having regard to what has gone before, that there is a constitutional obligation on the State by the provisions of Article 42.4 of the Constitution to provide for free basic elementary education of all children that this involves giving each child such advice, instruction and teaching as will enable him or her to make the best possible use of his/her inherent and potential capacities, physical, mental and moral, however limited these capacities may be. Or to borrow the language of the United National Convention and Resolution of the General Assembly - 'such education as will be conducive to the child's achieving the fullest possible social integration and individual development; such education as will enable the child to develop his or her capabilities and skills to the maximum and will hasten the process of social integration and reintegration."

The decision of O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 was appealed to this court but the appeal was withdrawn on terms which are recorded in a footnote (at p. 72) to the report of the High Court decision in the following terms:-

"The appeal on the part of the respondents pursuant to notice of appeal dated the 23rd July, 1993, from the judgment and order of the High Court (Mr. Justice O'Hanlon) given and made on the 27th May, 1993, coming on for hearing this day

Whereupon and upon opening and debate of the matter, this Court being informed by counsel for the applicant and by counsel for the respondents that the State is now providing for the infant applicant education appropriate to his current condition, this Court substitutes for the declaration in the High Court a declaration that the infant applicant is entitled to free primary education in accordance with Article 42, s. 4 of the Constitution and the State is under an obligation to provide for such education

And this Court notes the statement of counsel for the respondents that the said respondents are not to be taken as accepting the manner in which the learned trial judge interpreted the said obligation

And this Court notes the statement of counsel for the applicant that he is not to be taken as acknowledging any error in the matter in which the learned trial judge interpreted the said obligation

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IT IS ORDERED that the order of the High Court do otherwise stand affirmed and that the respondents do pay the applicant the costs of this appeal, the said costs to be taxed in default of agreement."

I believe that the judgment in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 was erroneous and that Barr J. likewise erred in the conclusion which he reached as to the meaning of the crucial words "primary education".

There is no question of setting aside the judgment of the learned trial judge in that respect or the orders consequent upon it. No appeal has been taken from that finding. The State deliberately conceded that the needs of the first plaintiff must be met within the context of the system of primary education. The main thrust of the argument addressed to this court on behalf of the State concerned the period for which this obligation would persist. On behalf of the State it was argued that the obligation to provide primary education for the first plaintiff ceased when he attained the age of 18 years. On the first plaintiff's behalf it was argued that the right to primary education endured as long as the student could benefit from it and, in the first plaintiff's case, that would be for the remainder of his life.

It seems to me, however, that it is not possible to isolate this debate from the more fundamental issue as to the nature and meaning of"primary education" as used in Article 42 of the Constitution. This is a matter of legal interpretation for the court and cannot be founded upon the agreement of the parties or any concession made by either of them. Furthermore, to require the court to decide what is a derivative or consequential issue on the footing that the substantive issue had been correctly determined would be to invite the court to engage upon a moot. I do not see how this court could purport to determine the duration or possible duration of primary education without first satisfying itself as to the meaning of that expression.

The nature, basis and purpose of the fundamental rights recognised by the Constitution must be distinguished from the purpose and character of not dissimilar rights inscribed in other constitutions and the charters of distinguished international organisations. The preamble to the Constitution, which is frequently cited in identifying and construing the rights and duties which it confers or recognises, contains the following assertion:-

"In the Name of the Most Holy Trinity, from Whom is all authority and to Whom, *as our final end*, all actions both of men and States must be referred â€¦"

It is that destiny which provides the logical basis for the constitutionally recognised rights of the individual. They exist, and are exercisable primarily, as a means of achieving the goal identified in the preamble. However desirable it may appear economically or practically to permit or

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require the State to engage in activities, or provide facilities or services, the Constitution is careful to restrain the State and any other organisation from usurping the functions of the individual in his or her right and duty to achieve his purpose and fulfill his destiny to the best of his ability. Nowhere is this philosophy more clearly identified than in Article 42 of the Constitution.

Having established the importance of "The Family" in Article 41.1.1 in the following terms:-

"The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law."

Article 42.1 then goes on to provide as follows:-

"The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children."

The scheme of the article is best appreciated by passing then to Article 42.5 which provides as follows:-

"In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavor to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child."

Article 42 is unique: alone among all the fundamental rights expressly or impliedly recognised by the Constitution it refers to a*duty* imposed on the person upon whom the right is conferred. The scheme of the Article is helpful for the manner in which it recognises where the right and duty lies and the circumstances in which the State may supplement the performance of that duty. Whilst Article 42 does impose significant duties on the State in relation to education the article repeatedly expresses limitations on the right of power of the State to intervene. In Article 42.3.1 it is provided that:-

"The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State."

In Article 42.4 having empowered the State to provide certain"educational facilities or institutions". This is limited to circumstances where it can be done:-

"â€¦ with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

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Similarly in Article 42.5 the right of the State to endeavour to supply the place of parents who have failed in their duties to their children can also be exercised only:-

"â€¦ with due regard for the natural and imprescriptible rights of the child."

In those circumstances it is perhaps surprising to find two Articles expressly requiring the State to provide, or to provide for, or to insist upon certain levels of education or educational facilities. Article 42.3.2 provides as follows:-

"The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social."

And then the crucial provision with regard to primary education at Article 42.4 in the following terms:-

"The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

The learned trial judge in the present case interpreted, as O'Hanlon J. had done in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, the words "primary education" by adopting the definition of education as provided by Ã“ DÃ¡laigh C.J. in *Ryan v. Attorney General* [1965] I.R. 294, and equating the word "primary" as used in the Article as meaning basic or fundamental and in that way concluded that this was education suitable to meet the very pressing needs of the first plaintiff. Whilst I would have no difficulty in accepting that the first plaintiff is in need of what would fall within the general ambit of education and has a proven ability of responding, albeit at a modest level, to such education I could not accept that the needs which the first plaintiff had, and has, for assistance from therapists, teaching staff, paediatricians, consultant psychiatrists, social workers, family therapists and psycho therapists could be equated with primary education as that term was used in the Constitution and understood by anybody familiar with the system which existed when the Constitution was adopted or indeed the philosophy lying behind the enactment of the particular constitutional rights in respect of education. The imposition of an express obligation on the State to provide for primary education might, as I say, seem surprising but it was not revolutionary. When the Constitution was adopted such an obligation was already in existence as Murnaghan J. explained in *McEneaney v. Minister for Education* [1941] I.R. 430 at p. 438 as follows:-

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"For now more than a century it has been recognised that the provision of primary education is a national obligation; and for very many years this duty was entrusted to a corporate body created by Royal Charter called the Commissioners of National Education in Ireland."

The nature of that education and the children for whom it was provided is well understood by the people who adopted the Constitution. Its meaning is not to be found by reference to experts however distinguished. No doubt improvements have been made in the buildings in which such education is provided and hopefully the facilities are better now than they were 60 years ago but these are changes in detail and in style. In my view primary education as identified in the Constitution is education provided for children the age limits of which were determined historically by the Education (Ireland) Act, 1892, which required parents to send their children between the ages of 6 and 14 years to receive certain schooling. Primary education is provided by teachers in classrooms. It was and is a basic scholastic education in the sense that it is a first stepping stone on a career which may lead to secondary level and ideally graduate to the third level. It is distinguishable from secondary level education on the one hand and nursery schools, or any other form of pre-primary education, on the other.

If such needs as toilet training fell within the ambit of "primary education" at all, it seems to me that they would also necessarily come within the scope of the "minimum education, moral, intellectual and social" which every child is bound to receive. Having regard to the structure of the Constitution it is extremely unlikely that those who framed it or the people by whom it was adopted would have authorised the State to intervene in such intimate matters.

I have no doubt that the State has ample powers under Article 42.4 to supplement available educational facilities and to provide others. Perhaps more should have been done. Hopefully more will be done. The constitutional power was always there. It was a matter for politicians and the People as their ultimate masters with, perhaps, the assistance of the media and dedicated campaigners like the second plaintiff to ensure that resources are in fact made available to meet the needs of such people as the first plaintiff and other persons with disabilities or disadvantages. Regretfully I do not accept that the obligation was there or could be found under the heading "Primary Education". It follows that in my view that such obligation as the State has to provide education for any person ceases when that person attains the age of 12 years. *A fortiori* no obligation in respect of such education exists in respect of a student over the age of 18 years. Accordingly, I would allow the appeal insofar as it relates to that issue but of course without prejudice to any concession which has been made or may

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be made by the Minister to the first plaintiff whether in respect of damages, costs or otherwise.

If there had been a failure by the defendants to meet their obligations in respect of primary education it would be the first plaintiff and not the second plaintiff who would have a cause of action. As there was no such failure neither the first plaintiff nor his mother can sustain any action. Accordingly, I would allow the appeal against the award of general damages to the second plaintiff.

**Murray J.**

The first of the two above named cases, which have been heard together, concerns the first plaintiff who was born on the 11th October, 1977, and who, a few months after his birth, was diagnosed as suffering from a severe form of autism.

The facts of the case, and in particular the history concerning the first plaintiff's upbringing and education are clearly and extensively set out in the judgment of Keane C.J. as well as in the judgment of the High Court of Barr J. The present appeal before this court could perhaps be said to be the ultimate point of an arduous odyssey pursued with remarkable perseverance and fortitude by his mother, the second plaintiff, with a view to establishing his rights in law to an education appropriate to his needs as a person suffering from severe intellectual and physical handicap.

The findings of fact made by the learned High Court Judge are not in issue in this appeal. More significantly not all the matters comprised in the order of the learned High Court Judge are in issue, largely as a result of concessions made by the State. Accordingly, I think it is important to identify the constitutional issue or issues with which this appeal is concerned and those with which it is not.

As Geoghegan J. correctly points out in his judgment the decision and order of the High Court was based exclusively on the first part of Article 42.4. This was also the basis of the first plaintiff's arguments in this court.

In summary the High Court order made the following findings in favour of the first plaintiff:-

(a) he has had at all material times a constitutional right to free primary education appropriate to his needs as a severely autistic child;

(b) he has a right to be provided with free primary education - not only as a child but as a constitutional entitlement from the point when he reached adulthood into the future for as long as he is capable of benefiting from it;

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(c) he is entitled to general damages to date and in the future against the State for breach of its constitutional duty to provide for his primary education;

(d) a mandatory order directing the defendants to forthwith provide free primary education in the future appropriate to his needs for as long as he is capable of benefiting from same.

There was also provision for damages to cater for special damages for his educational and ancillary needs for a 30 month period following the making of the High Court order with provision for a review by the High Court of the mandatory order and the damages awarded at the end of that period. The State is not appealing against the finding of the learned High Court Judge that it was in breach of its constitutional obligations in failing to provide for free primary education for the first plaintiff in the years before he reached the age of an adult. As an integral part of this concession, it concedes that this right continued to the age of 18 but not beyond. Neither does the State contest the learned High Court Judge's findings as to the content or nature of the care, training and education which was appropriate to his needs and which constituted primary education within the meaning of Article 42.4. The State also does not contest the damages awarded to the first plaintiff in particular the general damages to date which were calculated on the basis that he has suffered a breach of his constitutional rights up to the age of 23 (his age at the time of the hearing of the High Court action), beyond the age limit of 18 years notwithstanding that the State submits that its constitutional obligations end at that latter age. This was stated to be an *ex gratia* stance taken by the State. It has also been indicated that as a matter of policy the first plaintiff will continue to receive care, training and education in accordance with his mother's wishes. Since this is a matter of policy only we are not concerned with that here.

In my view the case is not concerned with the content or quality of what constitutes primary education within the meaning of Article 42.4 since this point was not appealed and must be considered as moot for present purposes. Nor is it concerned with the constitutional right of the first plaintiff to free primary education as a child. Neither is it in issue in this appeal whether, in the future, the first plaintiff will or ought, solely as a matter of policy or legal right pursuant to statute, receive a form of care and education.

The primary issue in this appeal is whether Article 42.4 in requiring the State to "provide for free primary education" should be interpreted as creating a constitutional obligation on the State to provide such education to all persons, that is to say children and adults, at any stage of their life should an individual be in need of such education.

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In their appeal the defendants have also put in issue certain parts of the order made by the learned High Court Judge which are consequent upon his declaration that the first plaintiff is entitled to be provided with free primary education into the future so long as he is in need of it, in particular, that part of the order which is mandatory as against the State and which involves the High Court in a supervisory role on the post trial implementation of its order by the State. These latter issues only arise if the defendants are unsuccessful on the primary issue.

*The primary issue*

The primary issue in this appeal is whether Article 42.4 of the Constitution is to be interpreted, as found by the learned High Court Judge, as requiring the State to provide free primary education "as an open-ended obligation, based on need rather than age." The implications of this order go beyond the circumstances of a handicapped person in the tragic situation of the first plaintiff. The consequence of the High Court finding, and it was so argued by counsel for the first plaintiff, is that the duty of the State is to provide free primary education not only to children but to adults at any stage of their life according to their need. Counsel for the first plaintiff argued that the right would extend to a 65 year old who was in need of primary education. He also submitted that the constitutional obligation on the State to provide for free primary education pursuant to Article 42.4 was of a unique character and embraced a constitutional commitment of the highest order. Article 42.4 elevated the State's obligation to commit a proportion of national resources to the provision of free primary education to a plane above the vast range of decisions concerning the allocation of the national budget which are normally a matter of political choice. In this he is correct.

This issue is one of fundamental importance to both parties and has important constitutional ramifications for the organs of State, including the extent to which the powers of the Oireachtas should be limited in the choices it makes in the spending of the public purse in the interests of the community as a whole. In these circumstances it is clearly a constitutional issue which merits, if not requires, in the public interest a final determination and clarification on appeal to this court as the court of final instance. For this reason and the reasons given by both Hardiman and Geoghegan JJ., I am of the view that the apparent inconsistency between the State accepting liability for the damages awarded to the first plaintiff up to the age of 23 and its contention that the constitutional obligation to provide for free primary education does not extend beyond the age of 18 years is not such as to preclude it from raising this issue on appeal.

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*Article 42.4:*

Article 42.4 states:-

"The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation."

It is axiomatic that the point of departure in the interpretation of a legal instrument, be it a constitution or otherwise, is the text of that instrument, albeit having regard to the nature of the instrument and in the context of the instrument as a whole.

In *The State (Browne) v. Feran* [1967] I.R. 147 in a unanimous decision of this court, Walsh J. at p. 159, while differentiating between the application of canons of construction to a statute and a written constitution stated "In the construction of a Constitution words, which in their ordinary meaning import inclusion or exclusion, cannot be given a meaning other than their ordinary literal meaning save where the authority for so doing can be found within the Constitution itself."

Relying on that *dictum*, O'Higgins C.J., in *The People v. O'Shea* [1982] I.R. 384 at p. 397 stated:-

"The Constitution, as the fundamental law of the State, must be accepted, interpreted and construed according to the words which are used; and these words, where the meaning is plain and unambiguous, must be given their literal meaning. Of course the Constitution must be looked at as a whole and not merely in parts and, where doubt or ambiguity exists, regard may be had to other provisions of the Constitution and to the situation which obtained and the laws which were in force when it was enacted. Plain words, must however be given plain meaning unless qualified or restricted by the Constitution itself."

As Walsh J. was known to say, both judicially and extra-judicially, the Constitution is written in the present tense. In *McGee v. Attorney General* [1974] I.R. 284 he stated, at p. 319:-

"It is but natural that from time to time the prevailing ideas of [prudence, justice and charity] may be conditioned by the passage of time; no interpretation of the Constitution is intended to be final for all time."

O'Higgins C.J. in *The State (Healy) v. Donoghue* [1976] I.R. 325 similarly observed at p. 347 that "â€¦ rights given by the Constitution must be considered in accordance with the concepts of prudence, justice and charity which may gradually change or develop as society changes and

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develops and which fall to be interpreted from time to time in accordance with prevailing ideas".

Agreeing as I do with the view that the Constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been so suggested, that it can be divorced from its historical context. Indeed, by definition that which is contemporary is determined by reference to its historical context.

What is understood by "primary education" in Article 42.4? It was not in contention in this appeal that historically primary education has always been understood as the basic education given to children in primary schools by primary teachers up to the age of 12 or 14 years. For immediate purposes I don't think it is necessary to review the definition given to primary education by reference to its content in a number of judicial authorities. However education as a concept is defined, primary education has always been understood to be a form of basic education given to children in the primary school cycle. It stands in contrast with secondary education and third level education as well as, nowadays, pre-school attendance of infants. The precise age at which the primary cycle begins and ends may be a variant of history, culture and policy in any given country but in the end it has been traditionally understood as referring to that primary cycle in which children, as opposed to adults, are taught.

Primary education has been part of the education system in this country since the nineteenth century. As Murnaghan J. observed in *McEneaney v. Minister for Education* [1941] I.R. 430 at p. 438: "For now more than a century it has been recognised that the provision of primary education is a national obligation; and for very many years this duty was entrusted to a corporate body created by Royal Charter called to the Commissioners of National Education in Ireland". The Constitution of 1922 made express provision for the availability of primary education.

In short, primary education in the pre-1922 and post-1922 education system was understood as ordinarily and naturally referring to the education of children. This was the system in place when the Constitution of 1937 was adopted. Counsel for the first plaintiff argued that in adopting the Constitution of 1937, Article 42.4 represented a dramatic decision of the people to ensure that there was a financial commitment of constitutional status to the provision of free primary education. It certainly was a fundamentally important statement in the Constitution of the State's obligation to provide free primary education but there is nothing to indicate that it had any dramatic or any material effect on the existing structure. In fact the Constitution was not a catalyst for change in that regard. Primary education

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as naturally and generally understood, continues to be afforded to children to the present day.

In my view even today the generally understood meaning of primary education, (and primary school and primary teacher) is the teaching of children and contemporary English dictionaries define it in such a way.

The late Professor John Kelly, writing in *The Constitution of Ireland 1937-1987* (Institute of Public Administration, 1988) suggested guidelines to achieve a balance as between possible competing claims of the historical approach to constitutional interpretation and the contemporary or "present-tense" approach. The"present-tense" or contemporary approach, he suggested is appropriate to standards and values. "Thus elements like 'personal rights', 'common good', 'social justice', 'equality', and so on, can (indeed can only be) interpreted according to the lights of today as judges perceive and share them." He felt that on the other hand the historical approach was appropriate "where some law-based system is in issue, like jury trial, county councils, the census." This he said was not to suggest that the "shape of such systems is in every respect fixed in the permafrost of 1937. The courts ought to have some leeway for considering which dimensions of the system are secondary, and, which are so material to traditional constitutional values that a willingness to see them diluted or substantially abolished without a referendum could not be imputed to the enacting electorate".

There is undoubted value in such an approach which Professor Kelly clearly had in mind as a *guide* to, rather than formal canons of, interpretation.

As correctly emphasised by counsel for the first plaintiff, the obligation to provide for free primary education in Article 42.4 is unique in the extent to which it circumscribes the discretion which the organs of State, government and Oireachtas, normally enjoy under the Constitution as to the allocation of national resources. That particular obligation is limited to primary education. It excludes other forms of education. If Article 42.4 was intended to extend that constitutional obligation to the provision of free primary education to all adults, irrespective of their age, according to their need, I think it can fairly said that one would have expected that such a far reaching limitation on the powers of the Oireachtas to have been expressly stated in the provision.

That is not to say that the content or nature of the education to be provided for cannot be interpreted in the light of present day circumstances. The nature and quality of the primary education to be provided is a more abstract concept with connotations of standards and values. Historically there is no doubt that many persons who suffered from mental or physical handicap were not capable of benefiting from the kind of education that

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was traditionally available. However, with greater insight into the nature of people's handicaps, the evolution of teaching methods, new *curricula* as well as new tools of education there is no doubt that the nature and content of primary education must be defined in contemporary circumstances. That means where children are capable of benefiting from primary education (however its content is defined) the State have an obligation to ensure that it is provided free to children who can benefit from it including those who suffer from severe mental or physical handicap.

In my view, primary education taken in its ordinary and natural meaning is at once both inclusive and exclusive. It relates to the teaching of children only. It includes children but excludes adults. I do not find in the Constitution authority for interpreting it otherwise.

The question remains as to the age to which a child is entitled to benefit from the constitutional obligation of the State to provide for primary education. The obligation to ensure that the constitutional duty of the State is fulfilled lies in the first instance with the relevant organs of government referred to in Article 6 of the Constitution, the executive and the legislature. Thus this question in my view is a secondary matter which is in the first instance one of judgment by government and the Oireachtas subject to judicial review by the courts should such judgment fail to fully respect the obligation concerned. Whether the obligation to provide for free primary education begins to take effect in respect of children aged four or five, for example, must in the first instance be a matter for such judgment. Similarly, like Geoghegan J., I am of the view that the State must have a margin of appreciation as to the age up to which primary education should be provided for pursuant to Article 42.4. In judging that age as 18 years, the age at which children legally achieve adulthood, the State is not acting inconsistently with its obligations under Article 42.4 and I agree fully with the reasons given by Geoghegan J. in his judgment in this regard.

*Article 42 generally*

As already indicated, Article 42.4 also falls to be interpreted within the context of Article 42 as a whole and indeed the Constitution itself. In examining whether the obligation of the State to provide for free primary education is confined to children rather than extending to adults in the context of that article as a whole I find that my earlier conclusions are confirmed. Article 42 commences with the provision:-

"1. The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children".

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In my view this introductory paragraph to Article 42 sets the tenor and ambit of the article, focusing as it does on the family as the natural educator of the child with a corresponding rights and duties of parents to provide, *inter alia*, for the education of their children. Articles 42.2, 42.3 and 42.5 set certain parameters to the exercise of parents of their rights and duties providing for the State to intrude upon those rights, "as guardian of the common good," so as to require that children receive a certain minimum education, moral, intellectual and social. The State may also intrude where the parents fail in their duty but this in turn is circumscribed, in Article 42.5 by the requirement that the State must have "due regard for the natural and imprescriptible rights of the child."

In my view Article 42 taken as a whole is child centred and Article 42.4 as relied on in this case is an obligation imposed on the State to provide for free primary education with a view to facilitating parents in the exercise of their duties towards their children or, should the parents fail to do so, to give effect to children's right to primary education. Neither do I find that there is any other provision of the Constitution which would authorise any other interpretation.

For the foregoing reasons I conclude that the obligation of the State to provide for free primary education pursuant to Article 42.4 of the Constitution extends to children only.

As regards other arguments relied on by the first plaintiff and on this issue generally I agree with the judgments of Denham, Geoghegan and Hardiman JJ. and in particular Hardiman J.'s analysis of the use of the words child or children in the English and Irish text of the Constitution.

In these circumstances I do not consider it necessary to consider for the purposes of this appeal the other issues which have arisen concerning the making of a mandatory order against the State, its supervisory nature and the question concerning the separation of powers.

I would allow this appeal and agree that the declaration proposed by Geoghegan J. in his judgment be made.

With regard to the action brought by the second plaintiff, I agree with the judgment of Keane C.J. and that appeal should be allowed.

**Hardiman J.**

The first of these cases arises from the tragic handicap which has blighted the life of the first plaintiff and from the response of the State to it. The learned trial judge made declarations and mandatory orders, awarded damages, and adjourned the case for further consideration in 2003. He did so in a manner wholly satisfactory to the first plaintiff's advisers who seek no alteration in his orders. We have been told that these orders have

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brought about considerable benefit to the first plaintiff: his condition has improved and the improvement has been maintained. We have also been told that, regardless of the outcome of the appeal, the sums awarded will be paid and the regime available to the first plaintiff under the terms of the learned trial judge's order will continue to be available.

If the result of the appeal depended on whether the regime mandated by the trial judge's order was, on the evidence, the best prescription for the first plaintiff, I would agree that it is. But that is not the issue, nor does it form any part of the questions raised by this appeal. Equally, the appeal is not concerned with the general rights of the first plaintiff or of handicapped persons as a class. As argued in this court, the appeal raises narrower, but important, issues which may be summarised as follows:-

(1) Whether Article 42.4 of the Constitution confers the right claimed in the circumstances of this case to lifelong free primary education?

(2) What order, if any should be made in respect of the first plaintiff's education? In particular, has the court power to make orders, including mandatory orders, formulating the policy to be followed in the education of the first plaintiff, directing in some detail the application of that policy to him and ordering the State to provide, or pay for the provision of services along these lines? If such powers exist in principle, is the present an appropriate case for the making of such orders?

*Specific issues not arising*

Each party has by deliberate steps arranged that specific issues do not arise on this appeal.

The State has conceded that the first plaintiff's right to free primary education as a child were breached, at least for long periods of time.

Accordingly no question arises as to whether the highly specialised services determined by the learned trial judge to be required by the first plaintiff fall within the scope of "primary education" as those words are used in Article 42. The court approaches the present case on the basis of this concession. But a concession is not a proper basis for an authoritative construction of a constitutional provision. See *The State (Quinn) v. Ryan* [1965] I.R. 70 at p. 120.

Still more significantly, the first plaintiff's advisers have very consciously based their claims exclusively on the first line of Article 42.4:-

"The State shall provide for free primary education â€¦"

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Although other Articles of the Constitution are referred to in the pleadings and the judgment, this provision emerged clearly as the sole basis of the first plaintiff's contentions on the appeal.

This decision has the consequence that the first plaintiff's case rescinds, not only from any alternative constitutional basis, but from any basis at all in the very significant and specific statutory provisions in relation to education and otherwise, and notably from the Education Act, 1998. In answer to a specific question, counsel for the first plaintiff stated that he did not rely at all on the provisions of this Act, even as an alternative to his preferred argument. He also confirmed that this reluctance did not arise from a view that any of the Act's provisions were repugnant to the Constitution.

The case was argued as well as a case could be, and the express narrowing of the first plaintiff's claim was done in pursuance of a very deliberate strategy. This strategy, in turn, is based on a very precisely articulated view of Article 42.4. This is that the right conferred by that provision, unique amongst all the constitutional provisions securing rights to citizens, is a wholly unqualified one*and* extends throughout life if needed. No consideration of expense, or of competing values, alternative claims on State expenditure or of debatable policy, on this view, can interfere with the State's obligation in relation to primary education. This obligation was contended to be "a constitutional transaction of the very highest order"; "one of a very small number of mandatory expenditures in the Constitution"; a right ranking in priority to any other; the consequence of a decision by the People in 1937 that "we will splash out on this one thing only". It was contended that Article 42.4 "puts this item of national expenditure on a plane apart from and above all other expenditure". The reason expressly given for the decision not to rely on the terms of the Education Act, 1998, was that, even though the statutory rights in relation to education might be broader than the Constitution provides for (and certainly makes specific reference to persons with disabilities) yet those rights are subject to constraints in terms of available resources which, it is contended, Article 42 is entirely independent of.

This drastic and deliberate limitation of the basis of the first plaintiff's claim has obvious consequences. In order to achieve the claimed unqualified and limitless access, on a lifelong basis, to primary education the first plaintiff's case must establish that Article 42.4 indeed bears the unique construction which is claimed for it. The strategy of the first plaintiff's advisers involve the rejection of any easier routes to public provision for his needs. These remain wholly unexplored. I think this is unfortunate as it runs the risk of making the best the enemy of the good. And if either of the issues identified is resolved unfavourably to the first plaintiff, fresh

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proceedings may become necessary to deal with issues which, one might think, could have been agitated here. I will return to the statutory provisions, however, later in this judgment since, although they are not relied upon on behalf of the first plaintiff, I consider their existence to be of relevance at least in so far as remedies are concerned.

*Article 42 of the Constitution*

The first question that arises is as to whether Article 42 of the Constitution confers the right claimed for the first plaintiff to lifelong free primary education. The learned High Court Judge found that it did, and this finding is strongly challenged by the defendants.

It is important to point out, and it follows from what has been said in the preceding section of this judgment, that the defendants are not, as I understand it, denying the first plaintiff's entitlement to services appropriate to his condition. They are denying, however, an entitlement to the only type of service specifically claimed*i.e.* free primary education on a lifelong basis. The court is solely concerned with the first plaintiff's claim as so formulated.

*The High Court Judge's findings*

At p. 583 of his judgment, the learned High Court Judge considered this topic. He held:-

"There is nothing in Article 42.4 which supports the contention that there is an age limitation on a citizen's right to on-going primary education provided by or on behalf of the State â€¦ It has been conceded on behalf of the Minister for Education that the first plaintiff at 23 years of age requires on-going primary education and training and that he will probably continue to do so indefinitely. However, it is submitted that his entitlement in that regard is not derived from Article 42.4 but, it seems, is an undefined 'right' which is likely to be granted to him only by way of ministerial grace and favour."

On the hearing of this appeal it was strongly contended on behalf of the defendants that they had not conceded that the first plaintiff required ongoing primary education or training. They had however contended that the duty to provide primary education under Article 42.4 existed exclusively in relation to children. This appears to be a correct summary of what was contended in the High Court.

The learned trial judge found, at p. 584:-

"In my opinion, in the absence of a specific provision in terms, it would be wrong to imply any age limitation on the constitutional

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obligation of the State to provide for the primary education of those who suffer from severe or profound mental handicap. In the light of the foregoing I am satisfied that the constitutional obligation of the State under Article 42.4 to provide and continue to provide for primary education and related ancillary services for the first plaintiff is open-ended and will continue as long as such education and services are reasonably required by him."

The rationale for the foregoing is perhaps to be gleaned from the following passage at p. 584 of the judgment:-

"In my opinion the ultimate criteria in interpreting the State's constitutional obligation to provide for primary education of the grievously disabled is 'need' and not 'age'. If a child's disability is such that he/she requires ongoing specialist primary education and training for life, then the obligation of the State to provide for that service will continue into adulthood for the lifetime of the child. To cut off a crucial educational life-line because a child has reached his or her majority and it thereby condemn the sufferer to the risk of regression in hard earned gains which have enhanced his/her life would amount to an appalling loss, the effect of which might be to negative the advantages of the constitutional right to education (if provided) enjoyed by the sufferer for many years during infancy."

It can be seen, therefore, that the learned trial judge, noting the absence in Article 42.4, of an age at which the State's obligation to provide free primary education ended, inferred that such education was to end only when the need for it ended. On this basis, the right to have free primary education provided might, depending on individual circumstances, subsist on a lifelong basis, to pension age and beyond.

In this case, the first plaintiff commenced his proceedings when he was 19 years of age and he was 22 at the time judgment was given. He was thus obviously beyond the age at which primary education normally terminates on both dates. Furthermore, the learned High Court Judge was careful to stress (at p. 40 of the judgment) that he was grounding the right he found the first plaintiff to possess to lifelong free primary education exclusively on Article 42.4 of the Constitution and not on the basis that it derived from any other Article of the Constitution, or from or through an unenumerated constitutional right.

*Construing Article 42.4 Construction*

There has been considerable academic debate, some reflected in the arguments in the hearing of this appeal, as to the correct approach to the

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construction of a constitutional provision. Tensions are said to exist between the methods of construction summarised in the use of adjectives such as "historical", "harmonious" and "purposive".In my view, much of this debate is otiose, because each of these words connotes an aspect of interpretation which legitimately forms part, but only part, of every exercise in constitutional construction.

The strongest case for the limited use of a historical approach to construction is perhaps that set out by the late Professor Kelly in his contribution to *The Constitution of Ireland 1937-1987*,(Litton ed., Dublin 1988). It is I think beyond dispute that the concept of primary education as something which might extend throughout life was entirely outside the contemplation of the framers of the Constitution. No argument to the contrary was addressed to the court.

More significant, however, is the question of duration of education under Article 42, as discerned from a construction of that Article in its own terms, and in its constitutional context. Here, the approach to construction outlined by Costello J. in *Attorney General v. Paperlink Ltd.* [1984] I.L.R.M. 373 seems to me appropriate. He said at p. 385:-

"The Constitution is a political instrument as well as a legal document and in its interpretation the courts should not place the same significance on differences of language used in two succeeding subparagraphs as would, for example be placed on differently drafted sub-sections of a Finance Act. A purposive, rather than a strictly literal approach to the interpretation of the subparagraphs is appropriate."

Similarly, Dixon J. in *O'Byrne v. Minister for Finance* [1959] I.R. 1 said at p. 21:-

"â€¦ It may be that the literal meaning rather than the intention should prevail, although, in the case of a Constitution, which is a unique, fundamental document, concerned primarily with the statement of broad principles in general language, I am inclined to the view that it is not to be parsed with the particularity appropriate to ordinary legislation and that the intention, if it can be reasonably be gathered, should prevail."

These two statements, I think, illustrate and expand what was aphoristically expressed by Marshall C.J. in *McCulloch v. Maryland* (1819) 17 U.S. 316:-

"â€¦ we must never forget, that it is a constitution we are expounding."

Approaching Article 42 with these things in mind, one notes first its organic link with the preceding Article dealing with the family. This linkage is accomplished in the opening words of Article 42.1 where:-

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"The State acknowledges that the primary and natural educator *of the child* is the Family and guarantees to respect the inalienable right and duty of *parents* to provide, according to their means, for the religious and moral, intellectual, physical and social education of their *children*." [Emphasis added].

The next sub-article guarantees to parents the right to provide this education in their homes, in private schools or in schools recognised or established by the State. Even a superficial examination of the remainder of the Article shows that, throughout, parents are seen as the providers of education either directly, through private schools, or through schools established by the State. Even if they avail wholly of State provided educational facilities a regard must be had for their rights (Article 42.4). Even if they fail in their duty in this respect towards their children, so that the State has to discharge their function, it must do so "with due regard for the natural and imprescriptible rights of the child".

Accordingly, I would respectfully endorse the conclusion of Laffoy J. in *O'Shiel v. Minister for Education* [1999] 2 I.R. 321. Having adopted "a global approach to the interpretation of Article 42" she concluded at p. 347:-

"In its entirety it is imbued with the concept of parental freedom of choice. While parents do not have the choice not to educate their children it recognises that all parents do not have the same financial capacity to educate their children. It is in this overall context that the obligation is imposed on the State to 'provide for free primary education'."

I would digress slightly to emphasise an aspect of the significance of this emphasis on parental freedom of choice. Since a child will not himself or herself be capable of making and acting upon decisions as to its own education, these decisions must be made by some person or agency on its behalf. In practice, this could only be a parent or a public body of some sort. The Article accords a primacy to the parent to make his own provision according to his means, to join with others for the purpose of providing private or corporate education, or to avail of State services. Even if the latter option is taken, parental rights must be given "due regard".

It is undoubtedly true that only very few parents themselves directly provide education; the reasons for this are indicated in the judgment of Keane C.J. I consider, however, that parents taking other options retain a position of primacy to be exercised according to their"conscience and lawful preference". The Article envisages this, and the diversity which must follow from it. Though it is the child who is to be educated, the family is the "primary and natural educator".

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It is thus manifest that, whether one reads the Constitution in its Irish or English text, the primary provider of education is seen as the parent, and the recipient as a child of such parent. This appears to me plainly to involve the consequence that the recipient of primary education would be a person who is not an adult and in respect of whom the primary educator, according to the natural order, is his family.

In making the contrary case, counsel for the first plaintiff suggested that the word "child" where it occurs in Article 42 should be interpreted as meaning merely "offspring" or "descendant", terms which, they said, might apply to a person of any age. This view does not appear to me to be tenable. Firstly, it entirely ignores the language and structure of the Article, where the term "child" is never used in isolation but always with a correlative of "parent" or"family". Secondly, it is even more difficult to maintain the construction contended for if one has regard to the primary (Irish) text, where that connotation would be expressed in a term such as"sliocht" rather than "leanbh".

The correlatives used for the term "child" ("leanbh") are"Family" ("Teaghlach"), and "parents" ("tuistÃ­"). Moreover, the word "clann" is used as a synonym for the recipients of education, meaning the children of a family.

Accordingly, I cannot accept the artificial construction advanced on behalf of the first plaintiff: that the word "child" or its equivalent in the national language should be interpreted as extending to a person of any age who has an ongoing need for education. Apart altogether from the analysis of the language and of the structure of the Article offered above, the first plaintiff's contention simply does violence to the ordinary meaning of the word.

The same result follows from a consideration of the decided cases in which this Article has been considered. Apart from *O'Shiel v. Minister for Education* [1999] 2 I.R. 321, these include, most relevantly, *Ryan v. Attorney General* [1965] I.R. 294, *Crowley v. Ireland* [1980] I.R. 102, *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 and *F.N. v. Minister for Education* [1995] 1 I.R. 409.

It is not disputed that, in each of these cases the recipient of education was regarded as being a child. While the precise line of demarcation of childhood may vary from time to time, and from context to context, it seems safe to say that all legal uses of the term connotes the meaning of a person other than an adult. This is so even where, as in context of criminal law, there is an intermediate status of "young person" created for certain purposes. For the purposes of the Education (Welfare) Act, 2000, a person is regarded as a "child" up to the age of 16 (the minimum permissible school leaving age) and as a "young person" from 16 to 18. And the United

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Nations Convention on the Rights of the Child defines a child as a person under the age of eighteen,"unless under the law applicable to the child, majority is attained earlier" (article 1).

To this the first plaintiff's counsel responded that, in the cases cited, the person or class of persons being considered was in fact a child as that term is normally used, so that it was unnecessary to consider whether the position would be different if he or they had passed beyond that stage of life. The cases cited, they say, may have adopted the usage "child" uncritically: or at the very least, they do not actually preclude a broader meaning being given to the word.

Equally, it is submitted, there is no age specified in the Article at which the condition of being a child ceases. This point appears to have weighed particularly heavily with the learned trial judge who referred to it on several occasions. On the basis of the omission to specify an end to the status of childhood, he equated the term"child" to"citizen" (at p. 40) and envisage that "a child" might require education into adulthood.

This appears to me to empty the term "child" or its Irish equivalent of all meaning and treat it as synonymous with "person" or "citizen".Indeed, counsel for the first plaintiff specifically submitted that Article 42.4 should be read "as though primary education were guaranteed to the *citizen*". This is plainly not the intention of the Constitution. Both of these terms are used elsewhere in the text of the Constitution; the use of the term "child", rather than either of them in Article 42 must therefore be given significance. For example, the term "citizen" is widely used in Article 40 and, in Article 40.1., emphasis is laid on the status of each "citizen" as human persons. Article 40.4, in providing a procedure for the challenging of unlawful deprivation of liberty extends its protection to "persons" in Article 40.4.2:-

"Upon complaint being made by or on behalf of any person: â€¦"

More restricted categories are envisaged in Article 41.2.1 and 2, which respectively refer to "woman" and "mothers". It would be idle, I believe, to suggest that these provisions referred to a person who was neither a mother nor a woman on the basis that he devoted himself entirely to household duties and was therefore entitled to invoke their provisions. Similarly, Article 41.3.2.iii, in the context of dissolution of marriage, envisages proper provision being made for"the spouses, any children of either or both of them and any other person prescribed by law". It would clearly not be possible, in the absence of statutory provision, to import into this wording a constitutional obligation to make proper provision for a person who is neither a spouse nor the child of a spouse.

It is clear that the recipients of education under Article 42 fall into the restricted category of "children" and not the broader category of "citizens"

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or "persons". I believe that in equating children with "citizens" the learned trial judge fell into error and unwarrantedly extended the category of recipients of that form of education which is required by the Constitution. Article 42.1 to Article 42.5 have to be read together: it is clear on such a reading that those for whom the State provides for free primary education and/or supplements and gives aid to private and corporate educational initiative, or, when the public good provides it provides other educational facilities or institutions, are the children of the parents whose right and duty is preserved in the last phrase of Article 42.4 having been earlier recognised as "inalienable". Article 42.4 is a single sentence requiring due regard for the rights of parents in the doing of any of the things required or permitted to be done in the same sub-article. It cannot in my view be read otherwise without doing violence to the ordinary meaning of words, and ignoring its context in Article 42, and in the Constitution generally. It is not permissible, in my view, to read the final words of Article 42.4, referring to "the rights of parents" as qualifying only the obligation of the State to give aid to non-State educational initiatives and to provide educational facilities themselves in certain circumstances. If regard is to be had for the rights of parents "especially in the matter of religious and moral formation" in relation to these obligations, it would be strange indeed if there was no obligation to have regard to those rights in relation to free primary education. This is the educational service availed of by the great majority of children, both at the present time and in 1937. To construe Article 42.4 as meaning that the State had to have regard for the rights of the parents in the matter of assisting private educational initiative (which at primary school level only ever served the minority of children), but not in providing for free primary education (which was always availed of by the great majority) would require one to ignore the spirit and historical context of the Constitution. An obligation to have regard to the rights of parents is consistent only with a view of the recipients of primary education as children. The fact that some children are unfortunately without parental guidance does not in any way detract from this analysis: their position is specifically envisaged in Article 42.5 and they are still persons in respect of whom the primary educator, according to the natural order, would be their family.

Obviously, the obligation to provide for free primary education, does not restrict the State to that provision. By statute, the State has provided for free secondary education for the last 34 years and more recently has provided for free undergraduate university education as well. It is clear from the terms of Article 42.4 that the State may also provide "other educational facilities or institutions"; other, that is, than primary schools or institutions provided by "private and corporate educational initiative".

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If the term "primary education" is construed on a historic basis it is clear that what was in the mind of the drafters of the Constitution was the ordinary, scholastically oriented primary education represented by the ministerially prescribed National School curriculum. The contrary was not submitted. The highly specialised services which, according to the witnesses called on behalf of the first plaintiff at the trial he stands in need seem quite different from the ordinary content of "primary education" either in 1937 or today. Apart from anything else, conventional primary education is progressive and teleological in the sense of leading a child through a predetermined course to the end of one level of education and the beginning of the next. It is painfully clear that the services required by the first plaintiff are at a much more basic level. This is a level which the normal child achieves before starting the ordinary process of primary education and include such very basic features as continence, mobility and the ability to talk. Moreover, it is clear from the evidence that, in so far as the first plaintiff can achieve any of the things it would be at a modest level, requiring constant reinforcement because of the ever present risk of"unlearning". The first plaintiff's counsel expressed with great clarity his client's needs. He said:-

"The first plaintiff is not capable of learning much more than toilet training, preserving his mobility and responding to simple instructions, and perhaps a few words."

It must be doubted whether a child who was immobile or largely so, incontinent and almost unable to talk or communicate would be likely to benefit from primary education in the ordinary sense of that term, or whether indeed he would be accepted into the primary education system. It may be, therefore, that facilities for such a child might be provided in "other education facilities or institutions", to use the wording of Article 42.4. But this case was not made, even as an alternative. This, presumably, was on the basis that the duty to provide such institutions was qualified by the words "when the public good requires it". These words, it may be thought, import a level of executive discretion, which the first plaintiff says is entirely absent from the first eight words of the sub-article. In any event, no case was made based on any other part of the sentence which constitutes Article 42.4.

*Possible preclusion*

I have considered whether the judgment of the learned High Court Judge and the omission of the State to pursue an appeal against the award of damages for breach of the first plaintiff's right to education up to the date of the order, preclude the State from arguing that the first plaintiff's

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right to free primary education does not extend beyond the age of 18. I do not believe that the State is so precluded, substantially for the reasons given by Geoghegan J. in his judgment in this case. The claim that the State has an ongoing liability to provide the first plaintiff with free primary education on an indefinite basis will clearly have implications into the future. Though the State's position is not fully consistent, perhaps wholly or partly for the reasons discussed later in this judgment, I consider that its omission to focus a ground of appeal specifically on the period between his 18th birthday and the present time is in ease of the first plaintiff and does not, logically or in law, preclude them from maintaining what has always been their position i.e. that the State is obliged to provide for free primary education, as a matter of constitutional duty under Article 42.4, only to children.

*An unqualified duty?*

It was strongly contended on behalf of the first plaintiff that the opening words of Article 42.4, impose an absolutely unqualified duty on the State. No consideration of limitation of means, policy choices, competing demands, or alternative priorities can arise, it was submitted. These words, they said, imposed a duty on the State of a sort which is almost unique. On a consideration of the Constitution, it was submitted on behalf of the first plaintiff, the only similarly unqualified duties were the duty to provide a residence for the President in or near Dublin and the duty to hold elections at the constitutionally required intervals, unless a shorter interval is prescribed by law. In the course of later argument, it was submitted that the duty, arising under Article 25.4, to provide an official translation of a bill signed by the President in one only of the official languages, was the only other example of such an imperative, unqualified duty.

It will be observed that each of the other three alleged examples of an unqualified duty is infinitely more specific, and limited, than the alleged duty in relation to education. A translation of the statutes is a simple and specific requirement: it can be seen at a glance whether it has been done or not. No question of policy is involved in complying with this requirement: the only policy decision that arises has already been taken and expressed in a constitutional provision. The expense of complying with this provision is, certainly considered as a percentage of the education budget, tiny. The other examples may be somewhat more expensive but are of the same general sort.

By comparison, the duty to provide for free primary education is a complex one, involving enormous annual expense, and requiring for its implementation the taking and constant reviewing of decisions on policy

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both by the legislature and by the executive. The content of the education provided for, the standard to which that content is to be taught, the mode of teaching, the age at which it is to commence and end, and many other matters must be decided upon and provided for.

Moreover, the enormous expense of educational provision must be provided in the manner laid down by the Constitution. That is to say, monies must be provided under legislation giving effect to the annual financial resolutions. The appropriation of such monies to publicly provided or supported education can only be secured in accordance with Article 17.2 of the Constitution which provides:-

"DÃ¡il Ã‰ireann shall not pass any vote or resolution, and no law shall be enacted, for the appropriation of revenue or other public moneys unless the purpose of the appropriation shall have been recommended to DÃ¡il Ã‰ireann by a message from the Government signed by the Taoiseach."

It seems to me that the constitutional requirements for the conduct of public business, and in particular the expenditure of public monies, as exemplified in this Article and other provisions to be considered later, emphasise that the duty imposed by Article 42 must be discharged in a manner approved by the legislature on the recommendation of the executive. It is true that neither of these organs of government are in a position to disregard a constitutional duty and that the courts have powers and duties in the unlikely event of such disregard. But, excepting that extreme situation, the duty imposed by Article 42 is a duty to be discharged in the manner endorsed by the legislature and executive who must necessarily have a wide measure of discretion having regard to available resources and having regard to policy considerations of which they must be the judges.

This, in my view, is inconsistent with a concept of the duty imposed by the first eight words of Article 42.4 as a simple one, or as one different in kind from all other obligations imposed on the State or its organs. Nor can the duty be regarded as existing, as it was contended, on a higher plane than any other such duty. The right to education is undoubtedly a central and important one but it cannot logically be regarded as in some way outranking the right to life, or to bodily integrity, without which a right to education may be redundant. In this context, it is appropriate to recall what is said by Henchy J. in *The People v. O'Shea* [1982] I.R. 384 at p. 426:-

"Any single constitutional right or power is but a component in an ensemble of interconnected and interacting provisions which must be brought into play as part of a larger composition, and which must be given such an integrated interpretation as will fit it harmoniously into the general constitutional order and modulation. It may be said of a constitution, more than of any other legal instrument, that 'the letter

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killeth, but the spirit giveth life'. No single constitutional provision â€¦ may be isolated and construed with undeviating literalness".

I would therefore reject two central planks of the first plaintiff's case, *viz*. that the duty on the State, under Article 42, in relation to primary education is of a qualitatively different sort to any other duty (including, for example the duty to vindicate the citizen's right to life). I would also reject, for the reasons already given, the proposition that the duty to provide for primary education is open ended and may extend throughout a person's life, or into old age. Any terminal point would be to some extent arbitrary, but the age of 18 as advanced by the State has the merit of being the latest at which a person could, with any element of reality, be regarded as a child.

This is not to say that a person, such as the first plaintiff, with profound and obvious needs, is not entitled to have them appropriately met after this age, but simply that they cannot be compulsorily met thereafter (whatever about before) on the basis of the single part of the single constitutional Article on which this appeal was argued.

*Statutory provisions*

Accepting for the purposes of the case, and on the basis of the concessions referred to earlier in this judgment, that the first plaintiff's needs or any of them are to be met through a service properly described as primary education, as used in the Constitution, the first plaintiff's claim in respect of future services might be put in other ways. The Education Act, 1998, has a long title which begins as follows:-

"An Act to make provision in the interests of the common good for the education of every person in the State, including any person with a disability or who has other special educational needs â€¦"

Section 6 of the Act requires every person concerned with the implementation of the Act to "have regard to the following objects in pursuance of which the Oireachtas has enacted this Act": these include:-

"(a) To give practical effect to the constitutional rights of children, including children who have a disability or who have other special educational needs â€¦

(d) To promote opportunities for adults, in particular adults who as children did not avail of or benefit from education in schools, to avail of educational opportunities through adult and continuing education."

Section 7 confirms as a function of the Minister under the Act:-

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"(a) to ensure, subject to the provisions of this Act, that there is made available to each person resident in the State, including a person with a disability or who has other special educational needs, support services and a level and quality of education appropriate to meeting the needs and abilities of that person."

Section 32 of the Act provides for the establishment of an"educational disadvantage committee" whose functions are described in the Act. Section 38 provides for the establishment of the National Council for Curriculum and Assessment. Section 41(2) continues "â€¦It shall be the function of the Council:-

â€¦ (f) to advise the Minister on the requirements, as regards curriculum and syllabuses, of students with a disability or other special educational needs."

It appears that these provisions, together with those of the Equal Status Act, 2000, and the Education (Welfare) Act, 2000, impose duties on public authorities which may be relevant to a person in the position of the first plaintiff, or to a child afflicted with the disabilities which have afflicted the first plaintiff in one degree or another.

It must be perfectly clear that these provisions are, as one would expect, at least in some respects considerably broader than the constitutionally laid down *minima*. Section 7 of the Act came into operation during the hearing of the present case, which continued over a period of months thereafter. It is a striking feature that no attempt was made to utilise the new provision in relation to the first plaintiff's future treatment.

*The reliefs granted*

The reliefs granted in this case are unusual and far reaching. They include damages for breach of constitutional rights and mandatory orders the effect of which is to lay down, in detail, the regime of treatment or instruction which the first plaintiff is to undergo until the year 2003 at which time the judgment envisages that the court may make further orders of the same sort. These orders, clearly, are in the nature of instructions to the defendants and amount to total acquiescence by the trial judge in the demand advanced on behalf of the first plaintiff for a home based programme of a sort being developed in England. It is however to be noted that when issues of this sort have been litigated in that jurisdiction, as in *Bromley B.C. v. Needs Tribunal* [1999] 3 All E.R. 587, this has occurred against the background of a detailed statutory structure to deal with cases of educational disadvantage. This structure has, as an integral part of it, procedures

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for the resolution of disputes arising as to how individual students are to be treated. This structure has no direct counterpart here and, as noted above, no attempt was made to rely upon our statutory provisions.

A number of cases from other jurisdictions were cited on the hearing of this appeal, and in the similar case of *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. In relation to the cases from the United States and the United Kingdom, it is important to stress that each of these jurisdictions has an elaborate statutory scheme relating to the education of handicapped persons. Of particular relevance are the United States Education of the Handicapped Act, 1975, and a number of the British statutes now most relevantly the Education Act, 1996. These laid down in considerable detail how an individual handicapped child is to be assessed and what services are to be provided to him or her. This is done by the making, under statutory authority, of an"individualised education programme" in the United States and a "a statement of special educational needs" in the United Kingdom. In the latter jurisdiction, at least, there is a statutory right of appeal to a special educational needs tribunal and perhaps a further review in the High Court and beyond. Decisions of the tribunal and the bodies below it which feed into it may, if the usual conditions are met, be subject to judicial review. But the basis of the existing scheme, in each case, is statutory and the procedures whereby the needs of a handicapped child are assessed and met is a precise one, drawing heavily on the evidence of experts. Indeed, one of the witnesses who gave evidence in this case was an educational psychologist in private practice whose work, to a significant degree, consisted of advising one party or other in the statutory decision making schemes.

Accordingly, it seems a fair observation that without any legislative authority, and based wholly on the first eight words of Article 42.4, the learned High Court Judge has derived a power to make highly specific, and binding, prescriptions for how the first plaintiff is to be treated by the State authorities. The next question that arises is whether a court has jurisdiction to do this where it relies on no statutory authority.

Since the order made by the learned judge depends wholly on the correctness of his interpretation of Article 42.4, it may be unnecessary to consider its form further if it is held that persons other than children cannot be beneficiaries of a duty to provide for free primary education. But even if the learned judge were correct in his interpretation on that Article, I would still have grave reservations about a court's jurisdiction to grant the reliefs actually granted, other than the declarations, for the reasons set out below.

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*Jurisdiction to make orders of this sort*

An order of this nature is a most unusual one for a court to make. It appears, on the face of it, to make a decision, and to enforce it on the executive authorities, in relation to a matter normally within the discretion of the executive. This is the matter of the services to be provided to the first plaintiff, the recruitment of persons to provide services, the mode of assessing the result of the provision of these services and the costs of the services. The court has in effect taken these decisions *in lieu* of any other body.

Decisions of this sort are normally a matter for the legislative and executive arms of government. This is not merely a matter of demarcation or administrative convenience. It is a reflection of the constitutionally mandated division of the general powers of government, set out in Article 6 of the Constitution. A system of separation of powers of this sort is a part of the constitutional arrangements of all free societies. In the leading case of *Buckley and Others (Sinn FÃ©in) v. Attorney General* [1950] I.R. 67, the Supreme Court addressed this topic as follows at p. 81:-

"The manifest object of [Article 6] was to recognise and ordain that, in the State, all powers of government should be exercised in accordance with the well recognised principle of the distribution of powers between the legislative, executive and judicial organs of the State and to require that these powers should not be exercised otherwise. The subsequent articles are designed to carry into effect this distribution of powers."

Both the basis of the principle of separation, and its application in practice, are dealt with in the illuminating judgment of Costello J. in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181. This was a claim by various members of the travelling community who lived on unofficial sites in Limerick in conditions of considerable poverty and deprivation. They wanted to be provided with halting sites. They sought a mandatory injunction directing the local authority to provide them with such sites, pursuant to a statutory duty alleged to exist under the Housing Act, 1966. They also claimed that the State should pay them damages for past sufferings which they would have undergone, on the basis that the conditions in which they had been required to live amounted to a breach of their constitutional rights.

It is the last section of the judgment, at pp. 192 to 195, which are of relevance here. Costello J. held that their claims in relation to damages "should, to comply with the Constitution, be advanced in Leinster House rather than in the Four Courts". I believe that the reasons for this decision are of the greatest relevance here.

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Costello J. first noted that the claim for a mandatory injunction was based wholly on statute, and the breach of constitutional duty was alleged to ground an award of damages only. He said at p. 193 that:-

"This seems to me to imply an admission that the court would not have jurisdiction to make such an order and to raise the question why if the court lacks jurisdiction to make a mandatory order for the present breach of a constitutional duty it has jurisdiction to award damages for past breaches?"

The learned judge pointed out that the jurisdiction claimed would apply equally to breaches of other constitutional rights, and he instances specifically the right to education. He then said at p. 193:-

"The question raised by their claim is this; can the courts with constitutional propriety adjudicate on an allegation that the organs of Government responsible for the distribution of the nation's wealth have improperly exercised their powers? Or would such an adjudication be an infringement by the courts of the role which the Constitution has conferred on them?"

It seems to me that similar questions arise, at least in part, in the present case.

Costello J. then went on to develop the basis of the constitutional separation of powers. He traced it to the distinction, acknowledged since classical times, between distributive justice and commutative justice, at p. 194:-

"There is an important distinction to be made between the relationship which arises in dealings between individuals â€¦ and the relationship which arises between the individual and those in authority in a political community (which for convenience I will call the Government) when goods held in common for the benefit of the entire community (which would nowadays include wealth raised by taxation) fall to be distributed and allocated."

Having further discussed the basis of the distinction the learned judge went on, in a passage of crucial importance, at p. 194:-

"An obligation in distributive justice is placed on those administering the common stock of goods, the common resource and the wealth held in common which has been raised by taxation, to distribute them and the common wealth fairly and to determine what is due to each individual. But that distribution can only be made by reference to the common good and by those charged with furthering the common good (the Government); it cannot be made by any individual who may claim a share in the common stock *and no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due.* This situation is very different in the

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case of commutative justice. What is due to an individual from another individual (including a public authority) from a relationship arising from their mutual dealings can be ascertained and is due to him exclusively and the precepts of commutative justice will enable an arbitrator such as a court to decide what is properly due should the matter be disputed. This distinction explains why the court has jurisdiction to award damages against the State when a servant of the State for whose activity it is vicariously liable commits a wrong and why it may not get jurisdiction in cases where the claim is for damages based on a failure to distribute adequately in the plaintiff's favour a portion of the community's wealth."

This passage, amongst other things, illustrates the fallacy of one of the important arguments deployed by the first plaintiff. In seeking to rebut suggestions that the relief claimed in the present proceedings offended the separation of powers, it was argued forcibly that the relief was no different in principle to that which would readily be afforded against a state authority which had committed a tort such as negligence or trespass. But relief in such a case is plainly a matter of commutative justice, arising from a specific wrongful interference by the State with an individual or his property. It is not a claim made by a citizen as such, or one of a class of citizens, to have distributed to him in money or monies worth, a specific part of the community's wealth, or sufficient of it for a particular purpose.

In further, and perhaps even more directly relevant, explanation of his decision, Costello J. said at pp. 194 and 195:-

"The State (against whom damages are sought) is the legal embodiment of the political community whose affairs are regulated by the Constitution. The powers of government of the State are to be exercised by the organs of State established by it. The sole and exclusive power of making laws for the State is vested in the Oireachtas; the executive power of the State is exercised by or on the authority of the Government; and justice is to be administered in court established by law. In relation to the raising of a common fund to pay for the many services which the State provides by law, the Government is constitutionally responsible to DÃ¡il Ã‰ireann for preparing annual estimates of proposed expenditure and estimates of proposed receipts from taxation. Approval for plans for expenditure, and the raising of taxes, is given in the first instance by DÃ¡il Ã‰ireann and later by the Oireachtas by the enactment of the annual Appropriation Act and the annual Finance Act. This means that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas, although laws enacted by the Oireachtas may

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give wide discretionary powers to public authorities, and public officials (including Ministers) as to their distribution in individual cases."

Turning to the suggestion that the courts should in some way oversee the work of the other organs of government Costello J. said at p. 195:-

"The courts' constitutional function is to administer justice but I do not think that by exercising the suggested supervisory role it could be said that a court was administering justice as contemplated in the Constitution. What could be involved in the exercise of the suggested jurisdiction would be the imposition by the court of its view that there had been an unfair distribution of national resources. To arrive at such a conclusion it would have to make an assessment of the validity of the many competing claims on those resources the correct priority to be given to them and the financial implications of the plaintiff's claim â€¦ In exercising this function the court would not be administering justice as it does when determining an issue relating to commutative justice but it would be engaged in an entirely different exercise namely an adjudication on the fairness or otherwise of the manner in which other organs of state had administered public resources."

Costello J. went on, at p. 195, to point out that apart from these considerations "the judiciary have no special qualification to undertake such a function".

In my view all of the considerations mentioned by Costello J. are of prime importance in dealing with the present case. In particular, the constitutionally mandated separation of powers is a vital constituent of the sovereign independent republican and democratic State envisaged by the Constitution. It is not a mere administrative arrangement: it is itself a high constitutional value. It exists to prevent the accumulation of excessive power in any one of the organs of government or its members, and to allow each to check and balance the others. It is an essential part of the democratic procedures of the State, not inferior in importance to any article of the Constitution.

The principles set out by Costello J. were approved by the Supreme Court in *MacMathÃºna v. Attorney General* [1995] 1 I.R. 484. There, the plaintiffs, who were a married couple with nine children, complained that, over time, the tax free allowance to married couples in respect of dependent children had been reduced to nil, while unmarried mothers and other categories of parent continued to enjoy a tax free allowance in respect of such children. Furthermore they claimed that their other benefits had been increased at a rate less than the rate of inflation whereas benefits received by other categories of parent had increased to more than keep pace with it. They claimed they were discriminated against and that their rights under Article 41 of the Constitution had been infringed.

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The court upheld the High Court's decision to the effect that the judicial arm of government lacked the power, by declaration or otherwise, to direct the Oireachtas to initiate and pass legislation in any particular form. In relation to the alleged breach of constitutional rights, the court held as follows at p. 499:-

"With regard to the provisions of Article 41 of the Constitution, it is clearly conceivable that under certain circumstances statutory provisions, particularly those removing in its entirety financial support for the family, could constitute a breach of the constitutional duty of the State under Article 41. This is not a case in which such total removal of support or absence of support can be asserted. What is asserted here is that the measure of support over a period has become insufficient.

It is clear that the provisions of the social welfare allowance for children of married parents living together is not by any means the only form of financial support provided by the State for the upbringing of children by married parents. Such matters as the contributions of the State to free primary and secondary education, provision of free or assisted medical services and other matters would all go into the question as to whether the support was a proper discharge of the constitutional duty. Added to that would be the vital question as to whether it was a proper discharge of the duty of the State under Article 41 bearing in mind the other constitutional duties of the State and the other demands properly to be made upon the resources of the State.

As is already indicated in this judgment these are peculiarly matters within the field of national policy, to be decided by a combination of the executive and the legislature, that cannot be adjudicated upon by the courts."

Similar principles have been expounded in a number of other cases including *Boland v. An Taoiseach* [1974] I.R. 338 and *Riordan v. An Taoiseach* [2000] 4 I.R. 542.

Indeed, these principles appear to have been accepted by the learned trial judge in part at least of his judgment. Thus, at p. 571 having made certain observations critical of the State authorities, he said:-

"â€¦ I recognise that I should not trespass into the realm of executive or administrative decision making by the State in which under the doctrine of separation of powers the court has no function. However, the evidence herein establishes that the difficulties encountered by the first plaintiff and his mother in pursuing their rights against the State are symptomatic of a widespread malaise. It seems to me that the court as the guardian of the constitutional rights of the citizen has a duty to criticise the response of the State to such claims. In the instant case the grounds for criticism are overwhelmingly. In my view the court will be

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failing in its responsibility as guardian of such rights if it did not allude to the perceived problem areas which appear to have collectively contributed to the failure of the State to honour its constitutional obligations to the plaintiffs which comprise rights into the future as well as in the past. It is now a matter for the State to assess the problem areas in its administrative and decision making structure which have brought about the failure to honour constitutional obligations to the first plaintiffs and other similar claimants, and to remedy the situation thus revealed as in its wisdom it deems most appropriate."

However, when the learned trial judge moved to consider the question of remedies, he did not content himself with declarations, criticisms, or allusions to specific problems. He not merely held that the first plaintiff should have the best available primary education and training but he went on to prescribe in considerable detail what precisely that the process should involve. Because the learned trial judge had been "much impressed by the evidence of Mr. Alan Willis about the Applied Behaviour Analysis home based programme â€¦ which is presently being successfully pioneered in England", the judge required this to be provided by mandatory order, together with funding for home based ancillary services, speech, physiotherapy, occupational and music therapies. If necessary, he said, the experts required for providing the programme may be recruited in England or elsewhere. He prescribed the length of this Applied Behaviour Analysis programme as being two and a half years, awarded damages based on the cost of this programme, provided for review by the court in April, 2003, at which time the question of further damages might arise.

*Legal basis for the foregoing*

A lengthy section of the learned trial judge's judgment, between pp. 572 to 582 is entitled "The law". The only case mentioned in this section apart from a reference to the definition of education as deriving from *Ryan v. Attorney General* [1965] I.R. 294 at p. 350, is *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. The case is described by the learned trial judge at p. 572 as "a major landmark in Irish constitutional law and jurisprudence". The learned trial judge's judgment contains many and lengthy quotations from the judgment in *O'Donoghue* , summaries of further portions of it, and quotations from documentary material relied upon in it. It is therefore clear that *O'Donoghue* was profoundly influential on the learned trial judge.

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Despite this, the form of the order in this case is quite different from that found in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20. There, O'Hanlon J. granted declaratory relief only. This was so despite the fact that the judgment detailed his "strong conviction" that effective primary education for a person such as the plaintiff in that case required a "new approach" in respect of the various specific matters which he detailed including the teacher-pupil ratio to be observed and the number of care assistants (two per six students).

There are a number of aspects of *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 on which I wish to reserve my position until they are raised in an appeal to this court. However, I am in agreement with O'Hanlon J. in his reasons for confining the relief granted to declarations. He said at p. 71:-

"In a case like the present one it should normally be sufficient to grant declaratory relief in the expectation that the institutions of the State would respond by taking whatever action was appropriate to vindicate the constitutional rights of the successful applicant. I therefore propose to make no further order at the present time, save in relation to the costs of the proceedings, but I reserve liberty to the applicant to apply to the court again in the future should it become necessary to do so for further relief by way of*mandamus* or otherwise as may come within the scope of the present proceedings. A general liberty to apply will also be given to all the parties to the proceedings."

The form of the declaration granted by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 was as follows:-

"â€¦ that the respondents, in failing to provide for free primary education for the applicant and in discriminating against him as compared with other children, have deprived him of constitutional rights arising under Article 42 of the Constitution, with particular reference to Article 42.3.2 and Article 42.3.4 thereof."

On appeal, a new form of declaration was substituted for the one just quoted, by consent of the parties. This was:-

"â€¦ that the infant applicant is entitled to free primary education in accordance with Article 42.4 of the Constitution and the State is under an obligation to provide for such education."

The events which occurred on appeal are the subject of an editorial note after the report of *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 at p. 72. From this it appears:-

(a) That the court was informed by both parties that the State was then "providing for the infant applicant education appropriate to his current condition".

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(b) Counsel for the Minister and the other respondents stated that the respondents were not to be taken as accepting the manner in which the learned trial judge had interpreted the obligation to provide primary education to the applicant.

(c) Counsel for the applicant stated that he was not to be taken as acknowledging any error in the manner in which the learned trial judge had interpreted the said obligation.

It thus appears that the appeal in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 was dealt with in a manner satisfactory to the parties at the time but without a resolution of the legal issues involved by this court. In the present case, as noted at the start of this judgment, certain concessions and limitations of the scope of argument by one side or the other has again led to a situation in which the issues before the court are much narrower than those originally raised on the pleadings. The State appear to have adopted an attitude of "*nolo contendere*" to the findings of O'Hanlon J. in *O'Donoghue* ,and certain findings of the learned trial judge in this case. The State does not wish to be taken as accepting certain aspects of the judgment of O'Hanlon J., but neither has it persisted in appealing them on either of the two effective opportunities which were available. This stance may relate to the fact that, in each case, the plaintiff was in fact receiving services agreed to be appropriate by the time the case came before this court, and to the transformation of the legal landscape in relation to education effected by the Act of 1998 and other statutory interventions since this case commenced. But it has the effect of leaving an area of uncertainty to whether the State in fact accept, as opposed to conceding for the purposes of a particular case, the main features of findings of O'Hanlon J. and the learned trial judge in this case in relation to the type of services to be provided to persons in the position of the respective plaintiffs.

This, in turn, seems to reflect the concern within aspects of the public service at any rate with the nature of the High Court's decision in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, rather than the details of it. The judgment in the present case has attached to it certain correspondence between departments of State. These include the comment:-

"â€¦ it is the strong view of the Minister that the decision of the High Court should be appealed to the Supreme Court in view of the wider implications of having policy issues determined by the courts."

In another document, dealing with the basis of the State's appeal in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20, the following was said:-

"(1) In appealing the decision of the High Court in the case of Paul O'Donoghue, the State was not appealing the central element of the High Court judgment - that a profoundly handicapped child is

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educable. The State accepted that education in a formal school setting, including integration in the conventional school environment, can be of real benefit to children with disabilities.

(2) However, the judgment raised issues of more general concern, primarily relating to the proper separation of the powers and duties of the executive and judicial arms of government and the appropriate relationship between the two. These were viewed as constitutional matters of the utmost importance, having relevance across the entire spectrum of State activities."

It appears to me that the concerns raised in the public service are serious ones entirely appropriate to be considered by the executive and by persons holding important positions in the service of the State. In so far as the learned trial judge's judgment in this case can be read as critical of the decision to appeal, I would respectfully demur. Where an appellate jurisdiction exists it is the right of every party, the State itself no less than the humblest citizen, to invoke it. It is also inappropriate in any case to embarrass or criticise a party for having exercised his right of appeal. According to reports, there has been public comment of this sort in connection with the present case.

In *Buckley and Others (Sinn FÃ©in) v. Attorney General and Another* [1950] I.R. 67, the High Court and the Supreme Court affirmed in strong terms the courts' independence of the other branches of government, and specifically the unconstitutionality of a legislative measure purporting to determine the disposal of funds when the courts were seized of the issue. The striking affirmation in that case of the separation of powers has already been quoted. It appears to me that the courts must be equally concerned not to infringe upon the proper prerogatives and area of operations of the other branches of government. The functions of these branches, like those of the courts, are themselves of constitutional origin and constitutionally defined.

In my view, the foregoing principles underlie the essential distinction drawn by Costello J. between issues which can be pursued in the Four Courts and issues which, to comply with the Constitution, must be pursued in Leinster House. It is easy to imagine a particular case in which a party might think, and might convince a judge, that a particular act or omission of the legislature or executive was clearly wrong and that another course of action (outlined perhaps in considerable detail in uncontradicted evidence) clearly right or at least preferable. That indeed was what happened in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181. But even if a court were quite satisfied that this situation existed, that fact alone would not justify it in purporting to take a decision properly within the remit of the legislature or the executive. I reiterate that it is an independent constitutional value, essential to the maintenance of parliamentary democracy, that

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the legislature and the executive retain their proper independence in their respective spheres of action. In these spheres, the executive is answerable to DÃ¡il Ã‰ireann and the members of the legislature are answerable to the electorate.

Moreover, the independence of these organs of government within their spheres must be real and not merely nominal. This is imperatively required by the Constitution. Article 15.2.1 provides:-

"The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State."

Equally, Article 28.2 provides that:-

"The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government."

Article 28.4.1 provides that:-

"The Government shall be responsible to DÃ¡il Ã‰ireann ."

The provisions under which, alone, public monies may be appropriated to particular uses have already been cited.

*Suggested basis of court intervention*

The foregoing matters were extensively canvassed in the course of argument and the difficulty of reconciling the mandatory relief claimed and granted in the High Court with the constitutional provisions cited was fully acknowledged. The basis on which, it was said, the court's intervention was nonetheless justified was expounded in some detail. It rests on a number of strongly worded statements of eminent judges over a period of years. I propose to deal with this point on the basis of the strongest of them, that of Ã“ DÃ¡laigh C.J. in *The State (Quinn) v. Ryan* [1965] I.R. 70 where he said at p. 122:-

"It was not the intention of the Constitution in guaranteeing the fundamental rights of the citizen that these rights should be set at nought or circumvented. The intention was that rights of substance were being assured to the individual and the courts were the custodians of these rights. As a necessary corollary it follows that no-one can with impunity set these rights or nought or circumvent them, and that the courts' powers in this regard are as ample as the defence of the Constitution requires."

This passage was the subject of special reliance, in particular the last phrase in it as to the scope of the courts' power.

*The State (Quinn) v. Ryan* [1965] I.R. 70 related to the notorious circumstances in which Mr. Quinn, having obtained an absolute order of

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*habeas corpus*, was re-arrested and bundled out of the jurisdiction in a manner characterised by subterfuge and deceit. His right of access to the courts was wholly subverted. Those responsible for this state of affairs were found guilty of contempt, though this fact did not avail Mr. Quinn who remained in custody abroad. Certain foreign police officers found guilty of contempt tendered an apology through counsel and were discharged without penalty. A perusal of the report shows a sustained campaign to spirit Mr. Quinn out of the country and to deceive his solicitor as to his whereabouts.

The passage relied upon is in response to the answer made by one of the members of the gardaÃ­ whose conduct was impugned. This answer, as it is summarised in the judgment of Ã“ DÃ¡laigh C.J. in two paragraphs immediately before the passage relied upon is as follows at p.122:-

"On behalf of Inspector Ryan it has been submitted that the return he makes to the order of this court is good and sufficient: that he no longer has custody of the prosecutor.

The action which Inspector Ryan took with regard to the prosecutor was taken in disregard of the prosecutor's constitutional rights, and the return he makes to the order of this court is in effect this: that he should not be held answerable by this court because he has succeeded by reason of careful planning and the celerity of his action in preventing the prosecutor from obtaining effective relief in the courts."

In my view it is essential to read the passage relied upon in its context. So read, it is clear that it is not an assertion of an unrestricted general power in the judicial arm of government but rather a strong and entirely appropriate statement that a petty fogging, legalistic response to an order in the terms of Article 40.4 of the Constitution will not be permitted to obscure the realities of the case, or to preclude appropriate action by the courts.

Counsel for the first plaintiff argued with more effect there must be residual power in the court to ensure that a persons constitutional rights were not circumvented or denied. They instanced a situation in which a hypothetical legislature and government simply ceased to make any provision whatever for free primary education: in such circumstances, they said, the court must retain the jurisdiction to enforce the constitutional right under Article 42.4.

In my view, it is neither logically sound nor desirable to ground an argument by hypothesising an altogether extreme situation which admittedly has no applicability to the facts of the instant case, and to contend that the powers necessarily available to deal with so acute an emergency are therefore equally available to deal with an altogether different situation.

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A position in which a hypothetical government would not only ignore a constitutional imperative, and presumably defy a court declaration on the topic, is indeed an extreme one. It is a situation expressively described by counsel for the first plaintiff as one of "meltdown".

The courts have, however, always retained necessary discretion to deal with such circumstances. In *MacMathÃºna v. Attorney General* [1995] 1 I.R. 484, the court declined to interfere with the social welfare and other provisions in issue. This was on the basis that the plaintiff's complaints related to "â€¦ matters peculiarly within the field of national policy, to be decided by a combination of the executive and the legislature, but cannot be adjudicated upon by the courts". But the Supreme Court specifically stated, at p. 499, that it was "clearly conceivable that under certain circumstances statutory provisions, particularly those removing in its entirety financial support from the family could constitute a breach of the constitutional duty of the State under Article 41" thus requiring court intervention.

The fact that powers to deal with extreme circumstances must be retained cannot be a basis for the exercise of such powers in any other circumstances. Firstly, to do so would offend the constitutional separation of powers. Secondly, it would lead the courts into the taking of decisions in areas in which they have no special qualification or experience. Thirdly, it would permit the courts to take such decisions even though they are not, and cannot be, democratically responsible for them as the legislature and the executive are. Fourthly, the evidence based adversarial procedures of the court, which are excellently adapted for the administration of commutative justice, are too technical, too expensive, too focused on the individual issue to be an appropriate method for deciding on issues of policy.

*Challenge to the separation of powers*

The view of the separation of powers summarised above was for many years implicitly accepted by lawyers and jurists. It can be found in most if not all of the great constitutional documents and in the writings of such commanding figures as Aristotle, Locke, Montesquieu and the founding fathers of the United States. Central to this view is a recognition that there is a proper sphere for both elected representatives of the people and the executive elected or endorsed by them in the taking of social and economic and legislative decisions, as well as another sphere where the judiciary is solely competent.

In the last quarter century, there has arisen another point of view whose major manifestation in a quasi legal context is found in the works of the American academic John Rawls. It subordinates politics to a theory of

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justice, seeming to view political philosophy as a branch of jurisprudence. Theorists of this view consider that they can provide a body of principles which can be interpreted and applied by courts, to the virtual exclusion or marginalisation of the political process. Preferably, but not essentially, the mechanism of this process is to enshrine the selected principles in some form of code or charter. Failing this, one can try to imply them into older texts. The political process thus avoided or marginalised is regarded as too diverse, clamorous, and populist in values to be worth preserving as more than an inferior organ of government.

In my view, conflicts of priorities, values, modes of administration or sentiments cannot be avoided or ignored by adopting an agreed or imposed exclusive theory of justice. And if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others, they would step beyond their appointed role. The views of aspirants to judicial office on such social and economic questions are not canvassed for the good reason that they are thought to be irrelevant. They have no mandate in these areas. And the legislature and the executive, possessed of a democratic mandate, are liable to recall by the withdrawal of that mandate. That is the most fundamental, but by no means the only, basis of the absolute necessity for judicial restraint in these areas. To abandon this restraint would be unacceptably and I believe unconstitutionally to limit the proper freedom of action of the legislature and the executive branch of government.

I wish to emphasise that this is not a case in which the law has no remedy for the first plaintiff on the fraught and moving question of what is to be done for him in the future. This is a case where, in my view, the first plaintiff is not entitled to succeed in the single, limited avenue which, to the exclusion of all others, was pursued on his behalf. In particular, recent statutory provisions have effected a revolution in educational legislation which will undoubtedly be explored by some person with grievances about educational services, but this has not been done here. Similarly, the court retains its wide jurisdiction to ascertain and enforce the rights of individuals, whatever their origin in law or in the Constitution. The rejection of the very specific and unique claim advanced by the first plaintiff in this action does not alter the fact that the courts will continue to develop the jurisprudence of individual rights and enforce such rights on all appropriate occasions.

It is hardly necessary to point out that a case based on a duty to provide services imposed by statute would avoid the difficulties of principle described in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181 and elsewhere. It is clearly not possible to say, in the abstract, whether other

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difficulties might await a specific case, but the enforcement of duties imposed by the legislature is obviously an exercise of a different kind to the devising or inferring of such duties without legislative intervention. The cases on autism cited from the United Kingdom and the United States have proceeded on the basis of a statutory duty.

I agree with Keane C.J. that the High Court had no power to retain jurisdiction in this case after final judgment.

I agree with the alteration proposed to the declaratory order by Geoghegan J. Otherwise, I would allow the appeal and vary the order of the learned High Court Judge by deleting the entirety of it save for the award of damages. The State have agreed that these will be paid regardless of the outcome of the appeal. The State has also agreed to pay the costs of the appeal.

In relation to the second plaintiff's action, I agree with the judgments of Keane C.J. and Geoghegan J. and I would concur in the orders they propose.

In reaching the contrary conclusion Denham J. in a memorable aphorism says that the "Constitution of Ireland is a constitution for the people of Ireland, not an economy". It may not be necessary to distinguish so rigidly between the people and their economy. I would prefer to say that the Constitution is not solely or primarily about the economic as opposed to other attributes of the people. But the Constitution is directly concerned with such economic topics as natural resources, with the gathering and allocation of public money, with the human rights to earn a livelihood and hold property and with the regulation of these rights in the interest of the common good.

But however one rephrases the aphorism I do not see it as relevant to the question as to whether the second plaintiff has a cause of action. The reasons for the conclusion that she has no such cause are not economic in character, but legal and constitutional. It is true that if she were found to have such a cause of action, the economic consequences might be very great. This might impact on the State or on any other party found to have committed a constitutional wrong, as a trade union was in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305.

But these consequences would not be a reason to deny her relief if a cause of action existed, and are irrelevant to the question of whether it exists or not. The existence and scope of a duty whose breach gives rise to liability requires to be firmly identified in law if liability is justly to be imposed. In my view this has not been done in the second plaintiff's case for the reasons given in the judgments to which I have referred.

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**Geoghegan J.**

*Introduction*

The first plaintiff, brought the first of the above entitled actions against the State. In it he claimed that he was an autistic child and that the State had not provided him with the kind of education which it was constitutionally bound to provide having regard to his disability. Various provisions of the Constitution were relied on for this purpose. The relief sought included a declaration that the first plaintiff had been deprived of his constitutional rights pursuant to Articles 40 and 42 of the Constitution, and in particular Article 40.1, Article 40.3.1, Article 40.3.2, Article 42.3.2 and Article 42.4, damages for breach of the constitutional rights, for negligence and for breach of duty, and a wide ranging mandatory injunction directing the first defendant to provide for free education for the first plaintiff, appropriate to his needs for as long as he was capable of benefiting from same. The first plaintiff's mother, the second plaintiff, also sued the State in that action and claimed a declaration that the first defendant, in failing to fulfill the first plaintiff's constitutional rights, deprived the second plaintiff of alleged constitutional rights of her own pursuant to Articles 40.1, 40.3.1 and 2, 41.1 and 2, and 42.1 to 4. The second plaintiff also claimed damages for breach of her constitutional rights, negligence and breach of duty and a similar wide-ranging mandatory injunction as was sought in her son's action.

The two actions were fully contested by the defendants over many days in the High Court before Barr J. The learned trial judge heard the two actions together, and delivered a single reserved judgment in which effectively, he found for both plaintiffs. I will be returning to his judgment in due course. The order, as drawn up in the first plaintiff's action, is to the following effect. The High Court declared that the Minister for Education, in failing to provide for free primary education for the first plaintiff appropriate to his needs as a severely autistic child with related profound mental and physical handicap and in discriminating against the first plaintiff with respect to provision of appropriate educational facilities*vis-Ã -vis* other children, has deprived the first plaintiff of his constitutional rights pursuant to Articles 40 and 42 of the Constitution, and in particular Article 40.1, Article 40.3.1 and 2, Article 42.3.2 and Article 42.4. It is then ordered that the first plaintiff should recover Â£222,500 damages "for breach of the first plaintiff's constitutional rights, negligence and breach of duty" and that the Minister should "forthwith provide for free primary education for the first plaintiff appropriate to his needs for as long as he is capable of benefiting from same". It is further provided in the order that the

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necessary funding be forthcoming for the "applied behavioural analysis home based programme for sufferers from autism" for two and a half years estimated at Â£28,000 *per annum* subject to review on completion, and that the first plaintiff be provided with the necessary funding for home based ancillary services, speech, physiotherapy, occupational and music therapies and medical care estimated at Â£15,000 *per annum* subject to review on completion. The order then directs that the mandatory injunction and damages granted by it are to be reviewed in April, 2003, and that a claim for further damages over and above the damages awarded by the court to date be adjourned to that review with liberty to the first plaintiff to re-enter or to apply in the interim in that regard. The order, as drawn up, does not in some respects correspond to the written judgment and I will return to that matter in due course.

The order, as drawn up in the second plaintiff's action, contains a declaration that the Minister "in failing to provide for free primary education for the second plaintiff's son, the first plaintiff, appropriate to his needs as a severely autistic child with related profound mental and physical handicap and in discriminating against the second plaintiff's son with respect to provisions or appropriate educational facilities *vis-Ã -vis* other children has deprived the second plaintiff of her constitutional rights pursuant to Articles 40.1, 40.3.1 and 2, 41.2.1 and 2 and 42.1 to 4 of the Constitution" and there is then an award of Â£55,000 damages "for breach of the second plaintiff's constitutional rights, negligence and breach of duty" and an order that the Minister "do forthwith provide for free primary education for the second plaintiff's son appropriate to his needs for as long as he is capable of benefiting from same".There followed a provision that the mandatory injunction could be reviewed in April, 2003, with liberty to the first plaintiff to re-enter or to apply in the interim in that regard.

The defendants appealed both orders to this court. I think it appropriate to summarise the grounds of appeal, as set out in both notices of appeal, even though some aspects of the appeals were subsequently withdrawn. In the first plaintiff's action the defendants appealed on substantially the following grounds:-

1. That the learned trial judge was wrong in interpreting Article 42.4 of the Constitution as requiring the State to provide for free education and related services for the first plaintiff "as an open ended obligation, based on need rather than age".

2. That such an interpretation by the trial judge constituted a far-reaching exercise of judicial authority contrary to the constitutional jurisprudence relating to judicial restraint.

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3. That the right declared by the learned trial judge was not an express right under Article 42.4 and must therefore, if it exists, be regarded as a non-specified constitutional right.

4. That the learned trial judge was wrong in holding that an entitlement to free primary education for life in some circumstances existed from the coming into operation of the Constitution in 1937 and that failure to honour it has sounded in damages since the early 1970s when expert opinion widely accepted that the mentally handicapped were capable of onward benefit from appropriate education.

5. That in the declarations and orders which the trial judge made, he failed to have proper regard to the doctrine of separation of powers under the Constitution and particularly when the raising of tax revenue and the spending of public monies were involved.

6. That the trial judge was in error in providing for a review in the future of the reliefs by way of mandatory injunction and damages.

7. That the trial judge erred in interpreting Article 40.1, Article 40.3.1 and 2 and Article 42.3.2 as relevant to the interpretation of the Constitution which he made.

8. That the trial judge erred in awarding damages and in particular in failing to articulate the basis for such damages and in failing to consider any temporal limitation thereon.

9. That there was no justification for awarding damages for negligence or breach of duty as those claims had not been maintained in the action.

10. That the trial judge erred in pronouncing on the liability of the defendants for punitive damages.

The grounds of appeal as set out in the notice of appeal in the second plaintiff's action, were more or less identical.

In the event, the State has agreed to pay the full award of damages to the first plaintiff to date. This court is not now being asked to set aside that award but what is still under appeal is the following.

1. The mandatory injunction granted in the first plaintiff's case.

2. The provision for review in April, 2003, and indeed the entire concept of the court retaining control of the proceedings and remedies into the future in any way.

3. The entitlement of the second plaintiff in her action to any of the reliefs which she sought.

Counsel for the defendants was instructed to inform the court that the defendants were conceding that the constitutional duty under Article 42.4 of the Constitution, to provide free primary education embraced a duty to provide training and education to the first plaintiff appropriate to his needs

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until he reached the age of 18 and that the State had been in breach of that duty. As far as this court is concerned it would seem to me that two principles immediately arise here. First of all, this court cannot be bound by any agreement or concession as to matters of law. Secondly, this court must, as far as possible, avoid deciding matters which are not now under appeal. As some of the matters under appeal are intertwined with other matters no longer under appeal, the full application of the second principle may not be entirely possible.

In considering the parameters of the appeal there is another issue which needs to be considered and which I have already mentioned. To some extent when it came to the reliefs, the orders of the High Court appeared to have been drawn up by reference to the respective statements of claim rather than by reference to the actual judgment of Barr J. Presumably this is because at one point in the judgment the learned trial judge did state that the plaintiffs were entitled to the relief sought in the statement of claim. This court, however, should only concern itself with the relevant findings of fact and law by the learned trial judge as expressed in his written judgment. I propose now to examine what those findings were, first in the first plaintiff's action and secondly, in the second plaintiff's action.

Although at p. 51, the learned High Court Judge stated that both plaintiffs were entitled to the declarations which they claimed in their respective statements of claim and "to damages arising out of breach of their constitutional rights, negligence and breach of duty by the State in that regard", it seems quite clear that in the case of the first plaintiff, at least, only one constitutional duty was analysed and found to be breached in the judgment and that is the duty under Article 42.4 to provide for free primary education. Article 42.4 does not actually stop there but goes on to provide that the State"â€¦ shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation." But as I read the judgment of Barr J., he has concerned himself only with the first part of Article 42.4 and, indeed, no argument was put forward on behalf of the defendants in this court that the remainder of the sub-article was relevant. Conceivably, the constitutional requirement that "when the public good requires it" the State must provide other educational facilities or institutions could have been invoked by the first plaintiff but as it was not, I do not intend to express any view on its relevance. The point was made at the hearing of the appeal that normally under the separation of powers principles, the courts do not determine what might be required by the public good. But I am not convinced that there would not be exceptions to that principle. For the purposes of this

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appeal, therefore, I am regarding the alleged failure to provide for free primary education to the first plaintiff as the only breach of constitutional duty found. The issues of common law negligence and breach of duty were not dealt with by the learned trial judge in his judgment and were not argued before this court and, therefore, I do not think that they arise for consideration.

In relation to breach of constitutional rights, the position of the second plaintiff's appeal is somewhat different. The learned trial judge, in addition to finding breaches of constitutional duty to her by the State under Article 42.4 of the Constitution, also found breaches of constitutional duty to her under Article 41.2 and Article 40.1.

Given that the complaint against the State giving rise to both actions is a complaint that appropriate training and education was not given to the first plaintiff, having regard to his autistic condition, I can understand that there is an arguable case that in such circumstances a constitutional duty would be owed to the second plaintiff under Article 42.4, but I find it impossible to understand how that basic complaint underlying both actions could give rise to breaches of constitutional duty to the second plaintiff under Article 41.2 or Article 40.1. None of the conduct of the State, as established in the evidence, was tantamount to any attack on the Sinnott family in its constitution and authority nor it would seem to me, does an equality issue arise under Article 40.1. Insofar as the learned High Court Judge found that there were breaches of these two constitutional provisions, I am of opinion that his decision was wrong. As to whether he was correct in his view that there was a constitutional duty under Article 42.4 and that it had been breached is a question to which I will return later in the judgment.

In considering the matters under appeal it is important to note that there has been no appeal against any finding of fact by the learned trial judge. In considering the question of future reliefs therefore I am assuming that those findings of fact were correct.

*The facts*

The facts are exhaustively dealt with in the judgment of Barr J. and again in the judgment of Keane C.J. on this appeal. I find it unnecessary to repeat them in this judgment.

*The law*

For the purposes of determining whether the learned High Court Judge made the appropriate orders or not, it is necessary first to consider what is

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the correct interpretation of the first part of Article 42.4 of the Constitution. Although as I will be explaining, I am not of the view that a historical interpretation of the Article must, for all time, be regarded as the correct interpretation, it is nevertheless important in interpreting any provision of the Constitution to consider what it was intended to mean as of the date that the people approved it. I do not think that any judge or lawyer as of 1937 would have had any difficulty in that task. The expression "primary education" was in common currency and it meant the type of schooling that was provided in the so called national schools up to about the age of twelve. The word "free" meant what it said. Every child was to be entitled to such primary education free of charge. I doubt very much that it would ever have occurred to anybody in 1937 that the obligation on the State meant anything more than that. Furthermore, I would be reasonably satisfied that the draftsman of Article 42.4 intended the word"education" to have the meaning ascribed to it by Kenny J. in *Ryan v. Attorney General* [1965] I.R. 294. In his judgment in the High Court in that case Kenny J. said the following at p. 310:-

"The education referred to in section 1 must, therefore, be one that can be provided in schools and must, therefore, be one of a scholastic nature."

But in limiting the meaning of "education" it seems clear that Kenny J. had in mind that it was intended to cover only the kind of teaching or training that is done in schools. I do not think that he was using the word "scholastic" in a strictly literal sense. In the same case in the Supreme Court, Ã“ DÃ¡laigh C.J. at p. 350 rejected a contention of counsel for the plaintiff in that case that "the provision of suitable food and drink for children" was physical education, holding that that was "nurture, not education". The former Chief Justice, however, then went on to give a definition of "education" which arguably was wider than that intended by Kenny J. Ã“ DÃ¡laigh C.J. said at p. 350 that:-

"Education essentially is the teaching and training of a child to make best possible use of his inherent and potential capacities, physical, mental and moral. To teach a child to minimise the dangers of dental caries by adequate brushing of his teeth is physical education for it induces him to use his own resources. To give him water of a nature calculated to minimise the danger of dental caries is in no way to educate him, physically or otherwise, for it does not develop his resources."

This formulation of words by Ã“ DÃ¡laigh C.J. legitimises (if such legitimation were ever required) a reinterpretation by this court of the expression "primary education" in the light of modern knowledge of the educational requirements of handicapped children which are totally

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different from that which was perceived in 1937. In a somewhat different context Walsh J., in his judgment in the Supreme Court in *McGee v. Attorney General* [1974] I.R. 284 at p. 319, commented as follows:-

"â€¦ no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts. The development of the constitutional law of the United States of America is ample proof of this."

It would seem to me that this principle should apply to the interpretation of any Article of the Constitution, but particularly the Articles relating to fundamental rights. I would, therefore, accept the basic proposition put forward by counsel for the plaintiffs and supported by the learned trial judge that the expression "primary education" must include suitable education for mentally handicapped children. But while I accept the basic proposition, I believe that even on a contemporary interpretation of the Constitution it is much more limited in application than has been put forward on behalf of the plaintiffs.

It was pointed out by this court in *Crowley v. Ireland* [1980] I.R. 102, that the duty of the State under Article 42.4 is not to provide free primary education but rather to provide for free primary education. But in my view for the purposes of this case nothing turns on that distinction. Either the State itself must provide the necessary educational requirements of the autistic child or it must fund the availing by the child of such services in some private institution or service.

There are other aspects of Article 42.4 which do need to be considered. First of all, I would accept the argument made by counsel for the defendants, that in the context in which Article 42.4 is placed, the duty arising under it is a duty owed to children and not to adults. I do not attach any significance to the absence of the word"children" in Article 42.4. I am deliberately using the word"children" as effectively meaning non-adults. While it does not fall to be determined in this case, I would be of opinion that in the case of the vast majority of children in this State who are non-handicapped the constitutional duty is discharged simply by ensuring that there are schools providing the necessary minimum education available for every child and that the education therein will be provided free of charge. The Constitution must be interpreted in the light of the realities of life. One of those realities is that no matter how efficient an education system there may be, there cannot be a guarantee of high quality teaching. It may well be, therefore, that largely due to poor teaching in a particular school a child who has difficulty in learning to read and write may never acquire those skills. But apart from possibly exceptional circumstances, such a child either at the time of schooling or in later life would not be entitled to bring an action based on an alleged breach of Article 42.4. Still less would some

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adult immigrant be entitled to invoke the Article, an idea which was mooted at the hearing of the appeal. But in the small percentage of mentally handicapped children the scope of the constitutional duty on the State may be different. If I am right in my view that Article 42.4 relates only to children and not adults then I think that in the case of mentally handicapped children the duty is owed to them as children only and not as adults. I cannot accept that there is no such thing as a mentally handicapped adult. Merely because some mental or physical abilities do not surpass those of a young child if they have even reached that stage, does not mean that in ordinary parlance these children do not become adults. Adulthood is as much to do with physical development as anything else.

If I am right in my view so far, then the practical effect is that whereas primary education might be regarded as education up to the age of 12 in the case of a normal child, because of slow learning or learning incapacity, the period to be covered by the expression"primary education" may obviously have to be extended in the case of handicapped children. In that sense, the arbitrary choice by the State of the age 18 is not necessarily illogical. In the perception of most people a child becomes an adult at 18.

It seems quite clear on the evidence in this particular case that at least in relation the first plaintiff, unless the necessary basic training and education is continuous there is danger that he effectively unlearns everything that he has learned. Accordingly, no matter how appropriate the education or training afforded to him by the State in purported discharge of its obligations under Article 42.4 might have been it could be rendered useless in adulthood if it was stopped at the age of 18. While there has been no evidence before the court of the position in relation to forms of mental handicap other than autism, I would be surprised if this "unlearning" aspect applied in all forms of handicap. For instance I do not think that it would apply in the case of a down syndrome child. But I accept that it probably does apply in other categories of mentally handicapped children. Where it does not apply the constitutional duty would clearly come to an end at probably about the age of 18 as suggested by the State in this case or at the end of whatever might in all the circumstances be a reasonable though lesser extension over the normal period of primary education. I have carefully considered whether the position might be different in cases where the "unlearning" problem arises. It could be argued that even though the duty is to a non-adult, it cannot in practice be effectively discharged unless there is continuing training into the future. But I have reluctantly come to the conclusion that to so hold, would amount to an excessive straining of the wording of Article 42.4 when read in context.

In the conclusion which he reached the learned trial judge relied primarily on the judgment of O'Hanlon J. in *O'Donoghue v. Minister for*

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*Health* [1996] 2 I.R. 20. No appeal from that judgment was heard by this court. It is necessary now to consider the judgment carefully.

The principal issue considered by O'Hanlon J. was whether a severely mentally handicapped child was educable at all. It is quite clear from the *resumÃ©* of evidence which the learned judge gave in his judgment that there was ample evidence to support the finding of the judge that the plaintiff, as a severely mentally handicapped child, was educable. O'Hanlon J. based his conclusions on evidence of research and experience which long post-dated 1937. For the reasons which I have already indicated in this judgment, I believe that the learned judge on foot of such evidence was entirely justified in giving a modern interpretation to Article 42. One of the witnesses in that case was a Mr. John Twomey, an educational and clinical psychologist employed as principal and chief psychologist at the Cope Foundation from 1970 to 1982. He was a member of the working party which produced the "blue report" on the education and training of severely and profoundly mentally handicapped children in Ireland in the year 1983, but his evidence in court was that considerable further developments had occurred since then. He was apparently asked what meaning he gave to the word "primary" when linked with education and he said that it meant "first" or"basic" education for children. As it would have been for the court and not a witness to ascribe a meaning to the word "primary" it must be assumed that this line of questioning was simply to ensure that he was properly focussed when giving the court his views about basic education for mentally handicapped children. According to the judgment Mr. Twomey considered that such children should be given education from 4 to 18, the implication being as I understand the judgment that that is the period which would be required for such children to have a"basic" education. O'Hanlon J. says the following at pp. 69 to 70:-

"The evidence given in the case also gives rise to a strong conviction that primary education for this category, if it is to meet their special needs, requires a new approach in respect of:-

(1) Age of commencement: Early intervention and assessment being of vital importance if conditions of mental and physical handicap are not to become intractable.

(2) Duration of primary education: As this category will, in all probability never proceed further, and are unlikely to proceed far up the ladder of primary education itself, the process should, ideally, continue as long as the ability for further development is discernible. Professor Hogg suggests that age eighteen may not be unrealistic in this context.

(3) Continuity of education: The lengthy holiday breaks which take place in the life of the ordinary primary school appear likely to

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cause serious loss of ground which may never be recovered in the case of children with severe or profound handicap. Accordingly, to deal adequately with their needs appears to require that the teaching process should, as far as practicable, be continuous throughout the entire year."

I think that it is correct to adopt a modern interpretation of Article 42 and I find no reason to disagree with the conclusions reached by O'Hanlon J. in *O'Donoghue v. Minister for Health* [1996] 2 I.R. 20 although some of the sources relied on might be considered of doubtful value in an Irish court. But I find nothing in the judgment of O'Hanlon J. to support the view that a handicapped child may be entitled under Article 42 to some kind of education or training for the rest of his or her life or indeed into adulthood at all. I am unable to discern in Article 42 no matter what contemporary interpretation one gives to it any justification for the view that it continues to apply into adulthood. I am, therefore, persuaded by the argument of counsel for the defendants that the duty does not extend beyond the age of eighteen.

It is important that at this point I refer to part of the judgment of Keane C.J. which I have had the benefit of reading. Keane C.J. is clearly of the view that as the first plaintiff was 22 at the time of the High Court hearing and as the State has accepted liability for the High Court award of damages to date, this court can only consider whether the right to free primary education continued beyond the age of 22 and is precluded from considering whether it came to an end at the age of 18. It is pointed out by Keane C.J. that there is no appeal by the State against the finding that the right continued beyond the age of 18 and at least to 22. Needless to say, I entirely subscribe to the view of Keane C.J. that an unappealed High Court decision on a constitutional issue, or indeed on any other issue, must be treated as being an authoritative statement of the law. But rightly or wrongly, I interpret the approach adopted on behalf of the Minister on this appeal rather differently. He is accepting liability for the award of damages to date and neither the amount of the award or liability for it is in issue on this appeal. But in considering the potential future liability of the Minister, his counsel are not precluded, in my view, from arguing as a reason why there can be no liability into the future, that the constitutional right came to an end at age 18. They are putting forward that proposition as a legitimate argument in an aspect of the appeal which is before this court.

In the light of the view which I have expressed that the constitutional duty does not extend into adulthood but that the duty did continue until the age of 18 in the special circumstances of this case, the question arises as to what parts of the order of Barr J. ought to stand and what parts ought to be set aside.

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First of all, I would uphold the main thrust of the declaratory order which the learned High Court Judge made, but I would vary the wording so that it would read as follows:-

"The court doth declare that the first defendant in failing to provide for free primary education up to the age of 18 for the first plaintiff appropriate to his needs as a severely autistic child with related profound mental and physical handicap has deprived the first plaintiff of his constitutional rights pursuant to Article 42.4 of the Constitution."

I would express no view as to the first plaintiff's legal entitlement to damages for breach of that constitutional right as that issue is not before this court, the parties having agreed on a sum for damages.

I would obviously uphold the part of the order which directs that an application be made to have the first plaintiff taken into wardship.

As the first plaintiff has long ago reached the age of 18 I would set aside the mandatory injunction directing the first defendant to provide for free primary education into the future and the orders for the provision of funding. It must logically follow that I would also set aside the provisions for the review of the mandatory injunction and damages in April, 2003, and I would set aside any orders for damages for the future or providing for the possibility of damages for the future.

At the hearing of the appeal there has been considerable debate about separation of powers and, in particular the difficult question of when if at all the courts can order the State to allocate funds to a particular project even if there is a constitutional obligation to provide for such a project. This interesting question was analysed to some extent by Costello J. in *O'Reilly v. Limerick Corporation* [1989] I.L.R.M. 181. The learned judge in that case pointed out that questions relating to raising common funds by taxation and the mode of distribution of common funds are determined by the Oireachtas although wide discretionary powers may be given to public authorities and public officials as to their distribution in particular cases. The judge went on to observe that the courts' constitutional function is to administer justice and that a suggested supervisory role as to how money should be spent in a particular instance was not administering justice as contemplated by the Constitution. Costello J. went on to point out that in order to form a view as to whether there was an unfair distribution of national resources the court would have to make an assessment of the validity of many competing claims on those resources, the correct priority to be given to them and the financial implications of the plaintiff's claim. The judge opined (and I agree) that the courts were singularly unsuited for that task particularly having regard to the incremental way by which particular problems may come before them. It is the peculiar role of the Oireachtas to make these decisions.

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If I had taken the view that there was a continuing constitutional duty into the future owed by the State to the first plaintiff I would have had to consider particularly in the light of the principles identified by Costello J. whether the kind of orders made by Barr J. would be permissible or appropriate. As this matter does not have to be decided by me having regard to my judgment, I would reserve my position, but I do think that in very exceptional circumstances it may be open to a court to order allocation of funds where a constitutional right has been flouted without justification or reasonable excuse of any kind. I would have great doubts, however, that the courts should ever involve themselves in making the detailed kind of orders which were made in some of the American cases cited in relation to education.

The ongoing education into the future which the trial judge considered that the State was constitutionally bound to provide is obviously highly desirable having regard to the findings of fact of the learned trial judge and it may well be that the Minister is at any rate now legally obliged to provide such services under the Education Act, 1998. This court is not concerned with those issues but only with the issue of whether there is a continuing constitutional obligation after the age of 18 in this particular case and, in my opinion, there is not. I would, therefore, allow the appeal to the extent which I have indicated.

There is only one other matter on which I would like to comment. There has been some discussion at the hearing as to whether the requirements of the first plaintiff can be described as educational requirements at all or whether they are more in the nature of health or therapy requirements. It has been pointed out for instance that in the ordinary way primary education for a normal child would not commence before the age of four and that toilet training *etc.* which goes on in the home before that is not "education" in any accepted meaning of the term. The argument then runs that the first plaintiff, because of his condition, never reaches the stage of being able to benefit from any kind of training that could reasonably be described as "education". I would wholly reject this argument. The word"educate" in its Latin derivation refers to bringing or leading out. If a handicapped child, unlike a normal child, cannot naturally acquire skills in the home but has to have special training to acquire them then I cannot see why that special training would be inappropriately described as "education". At any rate I do not think that health therapy and education requirements are mutually exclusive of each other. They can overlap and can be given a double if not a treble description. I, therefore, find no fault in the trial judge's interpretation of "education" in the case of an autistic child.

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I now turn to deal with the second plaintiff's action. I can do so very briefly. The learned High Court Judge made, *inter alia*,the following declaratory order in her action:-

"The Court doth declare that the first defendant in failing to provide for free primary education for the second plaintiff's son, the first plaintiff, appropriate to his needs as a severely autistic child with related profound mental and physical handicap and in discriminating against the second plaintiff's son with respect to the provisions of appropriate educational facilities *vis-Ã -vis* other children has deprived the second plaintiff of her constitutional rights pursuant to Articles 40.1, 40.3.1 and 2, 41.2.1 and 2, and 42.1 to 4 of the Constitution."

Although numerous constitutional provisions are cited in the declaratory order they all are alleged to relate directly or indirectly to the basic complaint of the second plaintiff that the first plaintiff did not receive appropriate constitutionally required education. But any duty to educate or provide education or provide for education can only be owed to the person who is to be educated and not to the mother or any other relative of that person. Of course, insofar as the duty is to provide for primary education free of charge it may well be argued that the duty not to impose a charge is a duty owed to the parents. But that issue does not arise in this case. The damages awarded to her apart from the Â£15,000 special damages were not the cost of having to privately fund suitable training and education but rather general damages. It has already been pointed out in this judgment that notwithstanding the terms of the order in the first plaintiff's case the only constitutional breach in respect of which the learned trial judge gave a reasoned judgment was a breach of the first part of Article 42.4. But even if an issue did properly arise under Article 40.1 it would be an equality issue involving the first plaintiff. Again, there is nothing in the written judgment explaining any reasons why there might have been infringements of Article 40.3.1 and 2 but if there had been it could only have been the constitutional rights of the first plaintiff, which would have been infringed and not of his mother. There is no doubt that in an appropriate case the mother might be able to claim breaches of constitutional duties towards her under Articles 41.2.1 and 41.2.2 as these are constitutional provisions directly dealing with the family, but it does not seem to me that any of the behaviour of the State disapproved of by the learned trial judge constituted an attack on the family. For the same reason it would not seem to me that Article 42.1, 2 and 3 are in any way relevant to this case. Indeed, quite apart from the fact that no parental rights were being attacked contrary to those Articles, the provisions of the Articles themselves could not be relevant to the issues in this case. I therefore fail to understand how she can be held to have a right of action for infringement of any alleged constitutional

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rights. I am in complete agreement also with the analysis of the second plaintiff's claim in the judgment of Keane C.J. Any contraventions of the Constitution that there were appear to have been breaches of constitutional duty owed to the first plaintiff rather than to the second plaintiff. I would, therefore, allow the appeal in the second plaintiff's case except in relation to the award of Â£15,000 special damages.

**Fennelly J.**

I agree with the judgments of Hardiman and Geoghegan JJ., in the case of the first plaintiff, insofar as they state that the constitutional duty of the State to provide for free primary education is owed to children and not to adults. I agree in particular with the analysis by Hardiman J. of the language of the Irish and English texts of Articles 41 and 42 of the Constitution.

I do not think it necessary or desirable to consider in the present case the quality as distinct from the duration of the education which the State is obliged to provide, *i.e.* whether a person in the first plaintiff's tragic condition was ever in a position to enjoy it. The State's decision to admit that the first plaintiff's constitutional rights were infringed and not to contest the award of damages renders that issue moot. The comments on that issue contained in several judgments delivered today are therefore, *obiter*.

It follows also that there is no continuing breach of the first plaintiff's constitutional rights. There is, therefore, no need for any declaration either as to the future. I agree with the proposal of Geoghegan J. for reformulation of the declaration. As the State is not contesting the payment of any part of the damages awarded to the first plaintiff, including the payment for Applied Behaviour Analysis, there is no need to consider the issue of separation of powers. I do not think the High Court order, properly considered and certainly as it is now to be amended, does other than provide a sum of money for the first plaintiff for the purpose of providing that type of educational service. That is part of the award of damages, which is not under appeal.

As to the claim of the second plaintiff I agree with the judgment of Keane C.J.

Solicitors for the plaintiffs: *Ernest Cantillon & Co.*

Solicitor for the defendant: *The Chief State Solicitor.*

Cathleen Noctor, Barrister

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