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**Cronin (A Minor) v. Minister for Education and Science & Ors [2004] IEHC 255 (06 July 2004)**

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This judgment cites the following other judgments:

* [[2001] 2 IR 545](http://www.judgmental.org.uk/judgments/IESC/2001/%5B2001%5D_IESC_63.html)
* [[2001] 4 IR 259](http://www.judgmental.org.uk/judgments/IESC/2012/%5B2001%5D_IESC_101.html)

2004-07-06

**[2004] IEHC 255**

**THE HIGH COURT**

**DUBLIN**

**[2003]1144OP**

**HC 255/04**

**JEREMIAH CRONIN (A MINOR) SUING BY HIS MOTHER**

**AND NEXT FRIEND MARGARET CRONIN**

**Plaintiff**

**THE MINISTER FOR EDUCATION AND SCIENCE THE MINISTER FOR HEALTH AND CHILDREN THE SOUTHERN HEALTH BOARD IRELAND AND THE ATTORNEY GENERAL**

**Defendants**

**APPROVED JUDGMENT DELIVERED BY MS. JUSTICE LAFFOY TUESDAY 6TH JULY 2004**

BACKGROUND

The Plaintiff, Jerry Cronin, is a four-year-old boy and he sues for his mother and next friend, Mrs. Margaret Cronin. In June, 2002 he was diagnosed as suffering from attention deficit hyperactivity, autistic features and/or hearing deficit and speech delay by a consultant paediatrician in Cork. Subsequently, in December 2002 following assessment by the Regional Autism Spectrum Disorder Service, which is funded by the Southern Health Board and operated under the auspices of the Brothers of Charity, a disorder in the autistic spectrum was confirmed. Jerry lives with his parents in Macroom, Co.Cork.

THE PROCEEDINGS

The proceedings were initiated by a Plenary Summons which was issued on 15th October 2003 in which the Plaintiff claims various declaratory reliefs in relation to his constitutional, statutory and other legal entitlements to be provided with appropriate free primary education and also appropriate free

therapies and care. He also claims damages for breach of his constitutional rights. Significantly for present purposes he seeks a mandatory injunction pursuant to the Education Act, 1998 (the Act of 1998) directing the First Defendant, the Minister for Education and Science, to forthwith provide for free primary education, including support services appropriate, to his needs. On the same day as the summons was issued, that is to say, 15th October 2003, a Notice of Motion claiming various interlocutory reliefs was issued. The Motion came on for hearing on the 20th February, 2004.The issues between the Plaintiff and the third Defendant, Southern Health Board, were resolved by agreement. The issues between the Plaintiffs and the First Defendant were considerably narrowed and they were, in fact, narrowed down to two issues. This judgement is concerned with those issues.

THE EVIDENCE

The evidence pertinent to the issues with which the Court is concerned is contained in Affidavits sworn by the Plaintiff's mother, Mrs. Cronin, on the 10th October, 2003; 12th January, 2004; and 27th January, 2004 and in Affidavits setting out the First Defendant's position sworn by a civil servant in this department, Mr. John P. Kelly, on the 12th December, 2003; 23rd January, 2004; and 12th February, 2004.In the Affidavits there have been exhibited a number of professional assessments of Jerry by educational psychologists, which include expressions of opinion as to the manner in which Jerry's education, training and care should be progressed. I propose summarising the views of the professionals insofar as they are relevant to the issues which arise on this application.

SUMMARY OF PROFESSIONAL OPINIONS

Dr. Olive Healy has been involved with Jerry since January, 2003. She is the Director of Education at Cork CABAS School. Jerry has been on the school waiting list since January, 2003. At that time the First Defendant sanctioned ten hours home tuition for Jerry and Dr. Healy, at his mother's request, agreed to supervise a home programme for him.

In February, 2003 Dr. Healy assessed Jerry and concluded that, given that he was unlikely to be offered a place in the Cork CABAS school soon, the next best option was for Jerry to access a home based CABAS programme for ,thirty two hours per week until he should get his school placement. It was Dr. Healy's opinion that Jerry would benefit immensely from the consistent and effective behaviour management programme which a CABAS school can offer.

In April, 2003 Sally Williams, senior psychologist with the Regional Autism Spectrum Disorder Service, made an application to the First Defendant for an additional ten hours per week home tutoring for Jerry. She expressed the view that, while not ideal, twenty hours per week home tutoring was nearer to meeting Jerry's needs than the then current provision. On foot of this application the First Defendant, in May, 2003, sanctioned a further five hours per week home tutoring for Jerry.

In May, 2003 Jerry was assessed in London by Mr. Allen Willis, an education and psychology consultant who specialises in autism and communication disorders. He diagnosed Jerry in the moderate range of the autistic spectrum. He summarised his views of Jerry's educational needs, as follows, in his report:

"Jerry has significant and complex educational needs and poor compliance to adult direction. He requires an intensive education programme to meet those needs, that is autism specific and consists of 1:1 direct teaching. Jerry needs to have an intensive and systematic approach such as Applied Behavioral Analysis (ABA) as he is not yet able to imitate other children consistently or learn by a language based instructions in a group or class setting. Jerry needs to establish compliance to adult direction as a priority, so that he is then ready to earn from adults and then from other children. He has responded well to 1:1 teaching at home but the hours are insufficient at present. Research indicates that a minimum of thirty two hours per week of ABA is needed to be effective and I would recommend that Jerry receive an ABA programme of no less than this amount per week. He is currently on the waiting list for CABAS in Cork and it is my opinion that he should be placed there and receive an interim ABA programme at home for at least thirty two hours per week until such time as he is placed at CABAS."

The next milestone was the institution of these proceedings. In November, 2003, the First Defendant sanctioned home tuition for Jerry for twenty hours

per week and this provision was backdated to January, 2003.

In connection with these proceedings Jerry was assessed by Dr. Clare Mangan on behalf of the First Defendant. Dr. Mangan is an educational psychologist. She is the Assistant Senior Education Officer with the Southern Educational and Library Board in Northern Ireland, where she has direct responsibility for children and young people with special education needs, including autism.

Having assessed Jerry in his home, Dr. Mangan furnished a comprehensive report to the First Defendant. Dr. Mangan's opinion is that Jerry has learning difficulties that are at least in the mild range of learning disability, bordering on the moderate learning disability range in some areas. She diagnosed Jerry as mildly autistic relative to other children who have been given a diagnosis. She recognised that he had special education needs arising from his learning disability and autism and also because of his significant expressive and receptive language delay and problems with social communication. The pre-school provision she recommended was as follows.

On the basis of her assessment she recommended that in the first instance Jerry would benefit from:

"1. A pre-school placement for at least three days per week.

2. In this context he should access full time assistance for the hours that he attends.

3. This assistant and other pre-school staff should require training and support from local autism services to facilitate the delivery of a structural, social, cognitive and language based programme.

The pre-school placement could be supplemented by a home based programme for part of the week. The home based programme would provide additional support in relation to key targets and assist Jerry's parents with the establishment of targets for self-help and her [his?] functional activities.

"5. Furthermore, speech and language therapy, which is currently being provided at home, should continue to be delivered in this context. The speech and language therapist would also liaise with the pre-school staff as part of an integrated language programme."

The foregoing could be delivered until Jerry reaches compulsory school age and could also incorporate recommendations 5 to 14 and 16 to 18, inclusive, as specified in the next section of her report which set out her views on school provision. One of the recommendations is the measured use of a behavioral approach such as Applied Behavior Analysis (ABA) if deemed appropriate by his teacher. Dr. Mangan emphasised the word "measured".

In her report Dr. Mangan also addressed the following issues:

(1) Mr. Willis's recommendation that Jerry receive 32 hours per week tuition based on ABA. She expressed concern as to the appropriateness and efficacy of such a lengthy and intensive programme.

Other interventions, aside from ABA, for example, the TEACHH programme, which she opined might be more beneficial for Jerry. In relation to school provision for Jerry, Dr. Mangan recommended the application of the TEACHH programme with particular reference to visual schedule. It is necessary to pause here to consider the factual context in which Dr. Mangan's recommendations have to be considered, the most important factor being the geographic factor which Dr. Mangan recognised as being important. As I've stated at the outset, Jerry lives with his family, his parents, two sisters and grandmother in Macroom. There is considerable controversy on the Affidavits as to whether a suitable pre;-school placement could be arranged for Jerry within a reasonable distance of his home. It is not possible to resolve that controversy on the Affidavit evidence. However, the factual position is that a pre-school placement, which his parents considered suitable, has not been found for Jerry apart from a limited in duration pre-school placement at a local pre-school, Toonbridge.

Dr. Healy commented on Dr. Mangan's recommendations and observations in a report exhibited in Mrs. Cronin's Affidavit of 27th January, 2004. In relation to the appropriate form of education for Jerry, she disagreed with Dr. Mangan's choice of TEACHH and favoured ABA within a CABAS model, stating that CABAS is –

"A system that supports optimum pedagogy through the science of individualised instruction."

In relation to Dr. Mangan's recommendations for school provision when Jerry reaches compulsory school age, she expressed the view that Jerry could access most of them at Cork CABAS School.

Finally, in a report of 4th February, 2004, Dr. Mangan commented on Dr. Healy's observations which she interpreted as having synthesised –

" ..the discussion into a TEACHH/ABA dichotomy".

She confirmed that her opinion was that Jerry would benefit from a range of interventions to meet his special educational needs. As regards future placement, which is not an issue to be dealt with in this judgement, she queried the potential "value added" of a CABAS place over placement in a more geographically convenient autism specific class where an appropriate programme could be planned and delivered.

**THE SPECIFIC RELIEF SOUGHT IN THIS APPLICATION**

The Plaintiff seeks a mandatory injunction that the First Defendant provide for the cost of twenty nine hours per week one-to-one ABA tuition from appropriately qualified staff throughout the calendar year in his home during the Plaintiff's pre-school phase and also the coast of supervision of the Plaintiffs educational programme, measured at 300 Euro per month, during the pre-school phase. The arrangements for putting in place the Plaintiff's programme of home tuition were made by Mrs. Cronin with the assistance of Dr. Healy and others. In effect, what the First Defendant is being asked to do is to fund the provision of the programme. The programme is additional to the Plaintiff's limited placement in Toonbridge.

**GROUNDS ON WHICH THE PLAINTIFF BASES HIS ENTITLEMENTS**

The Plaintiff invokes the following rights in support of his claim:

(a) His constitutional right to free primary education appropriate to his needs as recognised by the Supreme Court in **Sinnott -v- The Minister for Education** [[2001] 2 IR 545](http://www.judgmental.org.uk/cgi-bin/redirect.cgi?path=/ie/cases/IESC/2001/63.html)

(b) His statutory right under the Act of 1998. In particular, reference was made to Section 6, paragraph (g), which provides that every person concerned in the implementation of the Act should have regard to the objects set out, including:

"(g) To promote effective liaison and consultation between schools and centres for education, patrons, teachers, parents, the communities served by schools, local authorities, health boards, persons or groups of persons who have a special interest in or experience of the education of students with special educational needs and the Minister."

(c) His rights under the European Convention on Human Rights Act, 2003 and in particular the rights derived from Article 13 (Effective Remedy) and Article 2 of the First Protocol (Right to Education).

Counsel for the Plaintiff laid particular emphasis on the observations of Hardiman, J. In **Sinnott –v- Minister** for Education, at page 711, pointing to the possibility of enforcement of statutory duties in relation to the provision of education for autistic children through court intervention.

**THE RESPONSE OF THE FIRST DEFENDANT**

In broad outline the response of the First Defendant is as follows:

1.In the provision already made, the First Defendant has fulfilled his duties to the plaintiff both under the constitution and the Act of 1998.

2.Regard has been had by him to the concerns expressed by Dr. Mangan.

3.In relation to a discrete issue which arises in relation to the provision of home tuition during the month of August, home tuition follows the mainstream school year with an extension into July, but not August, to which Mrs. Cronin's response is that the policy should be informed by the needs of the child

and not by the mainstream school year.

4. The First Defendant is committed to continuing to fulfill his obligations to the Plaintiff and to ensuring that suitable and appropriate education is

made available for him having regard to his needs.

5. However, Section 5, Sub-section 4 of the Act of 1998 mandates the First Defendant in carrying out his functions under the Act to have regard, inter alia, to the resources available. Moreover, his duty under section 6, paragraph (b) of the Act is:

"To provide that as far as is practicable and having regard to the resources available, here is made available to people resident in the State a level and quality of education appropriate to meeting the needs and abilities of those people."

Counsel for the First Defendant emphasised in particular the reference in paragraph (b) to "the resources available" and to "quality of education appropriate to meeting the needs and abilities of those people".

It was submitted that what is required of the Defendant is to adopt a reasonable approach and this cannot mean that he may be enjoined to give effect to a programme, just because it is proposed by a psychologist.

THE TEST TO BE APPLIED IN THIS APPLICATION

This is an interlocutory application. The reliefs sought are designed to provide for interim measures pending a full hearing. The application is grounded on Affidavit evidence. In this case the Affidavits have thrown up serious conflictps of evidence, not to mention fundamental conflicts of professional opinion. I have outlined the professional opinion at some length for the purpose of illustrating this point. It is not the function of the Court to resolve such conflicts, even if it could. In particular, the Court cannot make a judgment on the basis of the evidence before it now as to what is in the best interest of Jerry, which after all is what these proceedings are all about.

By way of comment, I would say that the Affidavits on both sides display a level of contention and acrimony which I did not find helpful in determining the issues before the Court. Moreover, Mrs. Cronin raised in one of her Affidavits the outcome of other proceedings in this Court dealing with the type of issues raised in this case and also provision made by the First Defendant for other children with special needs. The response on behalf of the First Defendant was that the "High Court Agreements" referred to are "confidential in nature". I say by way of comment that it is difficult for the Court to apply the law fairly, consistently, and on the basis of equality, if it is not given the full picture.

The only authority directly in point to which the Court has been referred is **Nagle (a minor) -v- South Western Area Health Board and The Minister for Education and Others**, in which judgement was delivered by Herbert, J. on the 30th October, 2001, post the decision of the Supreme Court in the Sinnott case and the enactment of the Act of 1998.

Counsel for the First Defendant submitted that, as the Plaintiff is seeking mandatory relief at an interlocutory stage, the criterion which the Court should apply is whether the Plaintiff is likely to succeed at the trial, there being currently the clearest indication that the First Defendant is not in breach of his constitutional or statutory duties to the Plaintiff.

I do not consider that that is the appropriate criterion to apply at this interlocutory stage. It involves making a judgement at this juncture as to the strength of the respective cases of the Plaintiff and the First Defendant, which the court is not entitled to do, as was made clear by the Supreme Court in **Westman Holdings -v- McCormack** [1992] 1IR 15 (see the judgement of Finlay, C.J.) In this case, given the divergence `of professional opinion, it would be impossible to make such a judgement in any event and none is implicit in this decision.

The relevant criteria are those laid down by the Supreme Court in **Campus Oil Limited -v-TheMinister for Industry and Energy (No.2)** [1983] IR 88. These criteria and their application to the circumstances of this case are as follows:

First, is there a fair bona fide issue to be tried? The answer is that there is undoubtedly such an issue as to the appropriate pre-school provision of education for the Plaintiff.

Secondly, where does the balance of convenience lie, for or against the grant of an injunction? The answer, in my view, is that it lies in favour of the grant of an injunction. In reality, the refined narrowed matter before the Court is about the provision of money for the programme of education which the plaintiff's parents believe, and have been advised, is appropriate to his needs at this juncture. I am satisfied that the Plaintiff's parents could not, without incurring serious hardship, fund the programme from their own resources. The provision sought is specific to the Plaintiff, is limited both in quantum and duration and can have no significant resource or budgetary implications for the First Defendant.

Thirdly, would damages be an adequate remedy if the injunction were refused in the event of the plaintiff being successful? The answer in my view is that they would not, as there is inherent in the circumstances of the plaintiff's family the real possibility that without the benefit of the provision which is sought, his educational progress would be hindered.

Fourthly, would damages be an adequate remedy if in due course the plaintiff is unsuccessful and the First Defendant has to have recourse to the undertaking given by Mrs. Cronin? As is required, Mrs. Cronin has given the usual undertaking as to damages and in doing so she has very candidly set out the family's financial circumstances. I am satisfied that she could make the undertaking and that the First Defendant is adequately protected in this regard.

I consider that this is a proper case in which to grant a mandatory injunction in the terms sought on an interlocutory basis.

In reaching this conclusion, I have had particular regard to the decision of the Supreme Court in **T. D. -v- The Minister of Education** [[2001] 4 IR 259](http://www.judgmental.org.uk/cgi-bin/redirect.cgi?path=/ie/cases/IESC/2001/101.html), and, in particular, to the observations of Keane, C. J. At page 287. I am satisfied that granting a mandatory injunction does not fall foul of that decision. The relief granted is limited to the particular needs of the Plaintiff and merely extends a programme which the First Defendant has already sanctioned.

**THE ORDER**

There will be an Order directing the First Defendant, during the pre-school phase of the Plaintiff's education, to provide for the cost of twenty nine hours per week one-to-one ABA tuition from appropriately qualified personnel throughout the calendar year in his home and the cost of supervision of his education programme measured at 300 Euro per month.

The duration of the pre-school phase depends on appropriate arrangements being made for the plaintiff when he reaches his compulsory school going age, which will be next September. There will be liberty to both parties to apply in relation to the continuation of this Order.

**END OF JUDGMENT**

Approved: Laffoy J.

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