

THE HIGH COURT

[2025] IEHC 38

[Record No. 2021/4875P]

BETWEEN

[AM]

APPLICANT

-AND-

DEREK KIERNAN

RESPONDENT

Ruling of Mr Justice Mark Heslin delivered on the 15th day of January 2025

1. Given the somewhat complicated background, I think that in this ruling I should refer to it. As I understand, having considered all the papers with care, Messrs. Kent Carty are the solicitors on record for the plaintiff in proceedings of a personal injuries type which were brought against a Mr. Derek Kiernan, bearing record number 2021/4875P.

2. In those proceedings, the plaintiff sought damages for personal injuries incurred in an accident on the 27th July 2020. In the relevant personal injuries summons, which issued on the 30th July 2021, it is pleaded that the plaintiff resides in Romania and that the accident occurred in Dublin when the defendant's motorcar struck the plaintiff's bicycle. It is also pleaded that, having spent time in intensive care, the plaintiff was discharged from hospital, on the 30th September 2020, and went to Italy to reside with family members and undergo rehabilitation.

3. From the papers, and subject to correction, it would appear that the plaintiff has not resided in Ireland since then. It is also indicated that a settlement of the personal injuries proceedings was negotiated and accepted on behalf of the plaintiff by his daughter and next friend [A]. An order was made by my colleague Ms. Justice Reynolds, on the 18th October 2023, which approved a settlement in the sum of €190,000 in favour of the plaintiff as “a person of unsound mind not so found”.

4. The matter subsequently came before me in the following circumstances. On the 8th December 2023, evidence as to the plaintiff’s lack of capacity was put before me, and that was in the form of a copy report prepared by Professor Timothy Lynch, Consultant Neurologist, dated the 1st December 2021. It was proffered in the context of an ‘*ex parte* docket’ of December 2023 which stated “*Take notice that application will be made pursuant to the Inherent Jurisdiction of the court and in consideration of part 11, s. 110 of the Assisted Decision Making Capacity Act, 2015 and Article 10 of the Convention on the International Protection of Adults 2000 for permission to apply to this Honourable Court for orders for measures to protect property of the plaintiff in the State and subject of an order of the court made on the 18th October 2023 in favour of the plaintiff in the within proceedings and for such a further order as may be fit including as to costs.*”

5. In other words that *ex parte* application ‘flagged’ an intention to seek permission to bring an application.

6. Turning to Professor Lynch’s report, it states *inter alia* that the plaintiff in the personal injuries proceedings had life-threatening injuries, and reference is made to those. It said that he made a slow partial recovery but is “*left with significant cognitive deficits including problems with language disfunction aphasia causing difficulty understanding the spoken word and his output of the spoken word*”. In addition, he has “*a problem with memory function in both long term and short term events probably aggravated by aphasia*” and later its stated that all these cognitive deficits have resulted in [AM] requiring “*increased assistance and care and he is now dependent on his wife for his caring needs requiring help with dressing, sometimes bathing and managing day to day activities*” etc.

7. In other words – and bearing in mind the functional approach to the assessment of capacity which would require somebody to understand, retain, weigh and use information and

communicate a decision - Professor Lynch's report would indicate impairment in relation to more than one of those elements, in particular, understanding and retaining as well as communication difficulties.

8. At that stage in December 2023, I took the view that this Court's inherent jurisdiction was engaged sufficient to consider and determine an application, but it is important to say that no application of any sort was *brought* at that time.

9. I also took the view that, given the evidence of the plaintiff's impaired capacity, and consistent with fair procedures, it would be appropriate that a *Guardian ad Litem* be appointed. I took that view so that any future application would be on notice to the *Guardian ad Litem* as well as to the plaintiff.

10. It was suggested, in December 2023, that I direct that the relevant funds (€190,000) be paid into court, and I so directed. The order, as made in 2023, was: 1st, to order the €190,000 to be paid into court; 2nd, to order that an application be made for the appointment of a *Guardian ad Litem* for the plaintiff; and 3rd, to give liberty for the filing of any further application, which should be by way of motion grounded on affidavit.

11. I indicated that I would consider any such application on the 19th or 20th December, 2023. I also indicated that further evidence regarding capacity would be appropriate to obtain, given that Professor Lynch's report goes back to 2021.

12. Although it is not a criticism, it is a fact that no application, be it to appoint a *Guardian ad Litem* or, indeed, for any protective measure was brought on the 19th or 20th December 2023 and, in those circumstances, I certainly didn't and don't retain seisin of the matter.

13. Today, an application is made for the appointment of a *Guardian ad Litem*. I note from the papers that the *ex parte* application concerning such an appointment was initially filed on the 25th July 2024, although not moved until today. Again, that is not a criticism, but is another fact.

14. With regard to today's application, as I said at the outset, I have considered carefully the affidavits by Mr. Killian Carty, solicitor for the plaintiff in the personal injuries proceedings, and his most recent affidavit sets out in some detail the efforts made by his firm to try and progress

matters and the difficulties encountered. That included efforts to secure a solicitor to act as *Guardian ad Litem* and that appears to have proved unsuccessful.

15. It is clear however, that Ms. Aoife Keely of the independent Guardian ad Litem agency is currently available and is currently willing to be appointed as *Guardian ad Litem*; and Mr. Carty's 25th July 2024 affidavit exhibits Ms. Keely's C.V.

16. As Ms. Kilraine BL appropriately submits, Ms. Keely is described as a very experienced social worker. Therefore, the sole issue before me is to appoint a *Guardian ad Litem* and it seems entirely appropriate to do so, notwithstanding the antiquity of Professor Lynch's reporting. I take that view because there is nothing in Professor's Lynch's report to suggest that the plaintiff's impairments are other than long term.

17. Given that I have now made the appointment, it does seem appropriate to make certain comments. First, it seems entirely evident from Mr. Carty's affidavits that the focus of his firm is on seeking to protect their client.

18. Ms. Kilraine makes clear that the application to appoint the *Guardian ad Litem* is made with a view to an application under the assisted decision-making legislation. Without pre-determining anything, it is clear from the papers that the plaintiff has not resided in Ireland for several years; and s. 4 s.s. 1 of the Assisted Decision-Making Capacity Act makes reference to a relevant person having resided "*at any time during the period of three years immediately prior to the making of the application*".

19. All I have done today is appoint a *Guardian ad Litem* and there is permission, of course, to bring a further application, which should be by way of formal motion and served, not only on the plaintiff, but on the Guardian ad Litem and, indeed, any other relevant party.

20. In any further application that is brought, it will be for the applicant to make clear (i) what relief is being sought; and (ii) what jurisdiction this court enjoys to grant it.

21. In that context, it seems to me that it might well be helpful if the application was accompanied by written legal submissions identifying the jurisdiction being relied on, be that statutory or otherwise, and which engages with the relevant facts, not least because, on the face of, it the plaintiff would appear to be a non-citizen not resident in the State and it would appear to

be an application for protection of property, rather than, for example, someone's care or treatment or detention, all issues explicitly preserved in the 2015 Act as remaining within the court's inherent jurisdiction.

22. I thought it would be helpful to just set out where things stand when granting the sole relief sought, namely, to appoint a *Guardian ad Litem*.