

THE SUPREME COURT

Record No. 326 & 327/00 Keane C.J. Denham J. Murphy J. Murray J. Hardiman J. Geoghegan J. Fennelly J.

BETWEEN

JAMIE SINNOTT A PERSON OF UNSOUND MIND NOT SO FOUND SUING BY HIS MOTHER AND NEXT FRIEND KATHRYN SINNOTT

Plaintiff/Respondent

AND

THE MINISTER FOR EDUCATION, IRELAND AND THE ATTORNEY GENERAL

Defendants/Appellants

and BETWEEN

KATHRYN SINNOTT

Plaintiff/Respondent

AND

THE MINISTER FOR EDUCATION, IRELAND AND THE ATTORNEY GENERAL

Defendants/Appellants

JUDGMENT of Mrs. Justice Denham delivered the 12th day of July, 2001.

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 the 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 the 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 to the natural and imprescriptible rights of the child."

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5. Submissions

115. Counsel for the State, Mr. Eoghan Fitzsimons, S.C., presented full written submissions and in addition submitted orally that there were five questions to be considered on this appeal.

116. 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?

117. The State accepted that there was an obligation to provide for free primary education but submitted that it ceased when Jamie was eighteen 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 Jamie will proceed until 2003, as a matter of law the State submitted that Jamie's right exists only to the age of eighteen.

118. The State accepted that a person such as Jamie needs education for life. However, the State submitted that, the Constitution does not make provision for free primary education after the age of eighteen. The State submitted that while eighteen is an arbitrary age, it is consistent with the Constitution. Furthermore, it was argued that Article 42 provides for the education

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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 eighteen.

119. Counsel for the State 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.

120. Counsel for Jamie and Mrs. Sinnott, Mr. Dermot Gleeson S.C., presented full written submissions and submitted orally seven points, as follows:

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 Jamie's constitutional rights were infringed and that he is entitled to damages insofar as they flow from that fact. Counsel submitted that Jamie 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 Jamie's constitutional rights and had conceded damages, therefore, he argued that, Jamie 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

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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 Jamie was receiving now was education. The education that Jamie 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 Jamie can learn to walk if it is not continuously reinforced he regresses.

121. Counsel admitted that there is not the remotest chance of Jamie 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 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.

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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 twenty-two 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 Jamie, yet COPE was the best available in Cork. The State had in one other case consented to a particular type of training, the ABA envisaged in this case. It was submitted that during the trial the State had for the first time in twenty years produced an individual education plan for Jamie. 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 Jamie was not autistic. Counsel submitted that the home based ABA 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 Mrs. Sinnott'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. Mr. Sreenan, S.C., counsel for Mrs. Sinnott and Jamie, submitted that the State now submitted that she had no constitutional rights. He submitted that this had not been pleaded,

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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 Mrs. Sinnott's case be dismissed.

6. Jamie's Case

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

123. The State submitted that Jamie's right to free primary education exists only until he is an adult. The case was submitted that eighteen 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 eighteen. On the other hand counsel for Jamie submitted that the right to free primary education is a promise open to all citizens with no time limitation.

124. 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

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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.

125. 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 Article 26 of the Constitution and the School Attendance Bill, 1942* [1943] I.R. 334; *Ryan v. The Attorney General* [1965] I.R. 294; *Crowley v. Ireland* [1980] I.R. 102; *O'Donoghue v. The*

Minister for Health [1996] 2 I.R. 20; O'Shiel v. The Minister for Education [1999] 2 I.R. 321; Director of Public Prosecutions v. Best [2000] 2 I.L.R.M. 1. The nature of primary education is not in issue in this case. The State has conceded that the education which Jamie is receiving is primary education. Whether or not the education is primary education is not a matter for analysis or decision.

126. 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?

127. 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 schools or in schools recognised

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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."

128. 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.

129. 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.

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130. Into this formation the right to have provided free primary education is placed. I am satisfied that counsel for Jamie 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.

131. 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.

132. 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 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.

133. 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

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society. The words of Article 42, including those relating to the family, parents and children, continue the theme.

134. 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.

135. 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.

136. 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 Jamie has the right until he is eighteen. The choice of eighteen 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 eighteen. He or she may vote, inter alia.

137. Most children finish primary education, as it is understood in a general sense, between the ages of twelve and fourteen years of age. Thus on first impression it would appear that

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fourteen is a more logical age than eighteen. 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 treats a young person as an adult as the age when the right ceases to exist. The State's case that Jamie is recognised as an adult when he reaches eighteen years of age is reasonable.

138. 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 eighteen. Thus Jamie had a right to the provision of free primary education until he reached eighteen years of age but he has not got the constitutional right to free primary education after that age. That is not to say that Jamie will not require continuing support and training beyond the age of eighteen. Much of Jamie'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, Jamie's other personal rights under the Constitution, including the right to dignity and bodily integrity, continue.

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7. Separation of Powers

139. 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. Corporation of Dublin* [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."

140. 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.

141. 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 Jamie. However, the State has conceded breach of Jamie's right and has agreed to continue Jamie's education as ordered by the High Court. Also, as Jamie's constitutional right ceased when he became eighteen 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.

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142. 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. Mrs. Sinnott's Case

8.1. Noteworthy Factors

143. There are a number of noteworthy factors about Mrs. Sinnott's case. It is unusual in a number of ways.

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

(i) Mrs. Sinnott claimed a declaration that the State in failing to provide for free education for Jamie 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-&-vis other children, has deprived her of her constitutional rights pursuant to Articles 40.1, 40.3.1, 40.3.2, 41.1.2, 41.2, 42.1, 42.2, 42.3 and 42.4. Mrs. Sinnott claimed damages for breach of her constitutional rights, negligence and breach of duty. Further, Mrs. Sinnott claimed a mandatory injunction directing the State to provide for free education for Jamie 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 Jamie; it denied that the State had deprived Mrs. Sinnott of any of her constitutional rights pursuant to Article 40.1,

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40.3.1 or 2, 41.1 or 2, 42.1 or 2, 3 or 4; it denied that the State had been guilty of negligence or breach of duty; and it pleaded that Mrs. Sinnott 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.

(ii) In the High Court the State opposed the claim of Mrs. Sinnott largely on the ground that it duplicated Jamie's claim.

(iii) However, on this appeal the State submitted that Mrs. Sinnott 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 Mrs. Sinnott 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 State with the request that they be taken into account. Counsel for Mrs. Sinnott, Mr. Gleeson, S.C., submitted that this should not be allowed. Counsel for Mrs. Sinnott, Mr. Sreenan, S.C., supported this argument submitting that the State did not contest her rights in the High Court but argued a duplicity. Further, he 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 Jamie's case. The case took 29 days in the High Court. It was hard fought. Now the State has conceded Jamie's right to free primary education to the age of eighteen and has undertaken to pay damages and costs. Further, apparently the State has agreed to pay the £15,000 special damages awarded to Mrs. Sinnott.

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(c) The claim is noteworthy also in that, as regards Mrs. Sinnott, 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 Mrs. Sinnott 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 Éireann* [1992] 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 Mrs. Sinnott.

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

8.2. Remedies

145. 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 O'Dálaigh 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."

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Also, in *Byrne v. Ireland* [1972] I.R. 241 at 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."

146. He continued at p. 280:

"In my view, that was clearly enforceable against Saorstát Éireann 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."

147. He also stated:

"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."

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

"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."

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149. Later, Barrington J. said:

"..... constitutional rights do not need recognition by the legislature 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 that:

(Article 6)"... [established] beyond question the separation of the executive, legislative and judicial powers of government... 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."

150. In the same case, Griffin J., at p. 370 - 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 *DG v. The 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."

151. Mrs. Sinnott 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 Mrs. Sinnott has rights which have been breached or another cause of action. If she has, the court has jurisdiction to make the relevant orders.

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8.3. Articles of the Constitution

152. The major contention on behalf of Mrs. Sinnott 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.

8.3.a. Equality

153. 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.

154. 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 (D.P.P.) v. Quilligan and O'Reilly (No. 3) [1993] 2 I.R. 305 at p. 321.

155. There is no question but that the treatment of Jamie 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 Mrs. Sinnott was entitled to be held equal before the law as a parent and a mother.

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156. Mrs. Sinnott had duties in relation to all her children - including those duties related to education. In her role as mother of Jamie, Mrs. Sinnott 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 Jamie. Distinctions of themselves would not be invalid; indeed they would be valid in that the education of Jamie would follow a different pattern. But an absence of provision of free primary education for Jamie, which the State has conceded breached Jamie's rights, also discriminated against Mrs. Sinnott'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 Mrs. Sinnott's rights were breached and she was discriminated against invidiously.

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

158. As a parent and mother Mrs. Sinnott 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 Jamie. 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 Jamie's rights by the State. However, it is also a breach of Mrs. Sinnott's right to be held equal. Mrs. Sinnott 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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159. This is an invidious discrimination. This is not to say that Mrs. Sinnott 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 Jamie's right is acknowledged by the State, a consequence is that the rights and duties of the parents were also affected and breached. Mrs. Sinnott's rights in relation to her child

were not held equal. Mrs. Sinnott 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

160. 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."

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

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

162. 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

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163. Constitution Review Group, 1995. However, any such controversy is irrelevant to this case. Mrs. Sinnott and Jamie are a family for the purpose of Article 41.

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

165. 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 p. 538 Costello J. said:

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."

166. 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.

167. Thus Mrs. Sinnott 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 Jamie, 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

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family and Mrs. Sinnott of the breach by the State was fully documented by the learned High Court judge.

168. 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 Mrs. Sinnott.

169. 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.

170. 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."

171. 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."

172. The position afforded to women and mothers by Article 41 has been described in a negative fashion. Thus the Constitution Review Group 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

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not been of any particular assistance even to women working exclusively within the home."

173. 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 p. 98 - 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 women in the home. It is also in harmony with the 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 her 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."

174. 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 Article 26, *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

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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.* and *In Re Matrimonial Home Bill, 1993* related to property (the home). They also related to rights as between spouses - a balance involving property ownership. Neither case related to rights of a parent or parents or of the family as against others outside the family unit.

175. 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.

176. 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 319 Walsh J. stated:

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

177. Thus Article 41 is an article of the twenty-first 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.

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178. 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.

179. 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.

180. This special recognition is of the twenty-first 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.

181. 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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182. 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

183. 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.

184. 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.

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

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"..... the imposition of the duty under Article 42, s. 4... creates a corresponding right in those in whose behalf it is imposed to receive what must be provided.... 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."

186. 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 Jamie had the right to have free primary education provided for him. So too did Mrs. Sinnott have the right to have free primary education provided for Jamie.

187. Mrs. Sinnott 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 Jamie. This duty was breached in that she could not afford private education and needed to rely on the constitutional right to have free primary education provided. This was not done. Thus her rights as a parent were breached. Mrs. Sinnott's rights under Article 42, and especially under Article 42.4 were breached. Indeed, as the case law over the last sixty 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

188. Counsel on behalf of Mrs. Sinnott 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 Éireann* [1992] 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

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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."

189. The nexus between Jamie and Mrs. Sinnott could not be closer, nor is there any appeal against the findings of fact of injury to Mrs. Sinnott. 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 Mrs. Sinnott's constitutional rights. I make no decision on the civil issue of duty of care in this case.

9. Conclusion

190. 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.

191. There were facts found as to the additional burden of work, additional time, worry and anguish placed on Mrs. Sinnott in her duties in relation to Jamie by the State's acknowledged breach of its duties. The High Court held that:

"Mrs. Sinnott 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

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son's education and training, all of which was a reasonably foreseeable consequence of the State's conduct in that regard."

192. 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.

193. As to the law and the Constitution I am satisfied that:

- (a) There are a number of noteworthy factors about Mrs. Sinnott's case, see paragraph 8.1.
- (b) The courts have the power to remedy breaches of constitutional rights.
- (c) Mrs. Sinnott as a parent with duties to her child was not held equal and suffered invidious discrimination from the State, see paragraph 8.3.
- (d) Mrs. Sinnott 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 paragraph 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 paragraph 8.3.
- (f) Mrs. Sinnott 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.

194. 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.

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195. In relation to the five issues submitted as needing to be determined by counsel for the State 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 paragraphs numbers 1 and 2 above.
 4. Question 4 presupposes that there is only one cause of action. This is an error. Mrs. Sinnott has a cause of action. Damages may be awarded to separate persons arising out of the same set of 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 Mrs. Sinnott.
196. Counsel for Jamie and Mrs. Sinnott raised six points. I would answer them as follows:

1. The matter of a breach of Jamie's constitutional rights was conceded by the State. Jamie 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

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197. Constitution as granting this childhood right as including persons up to the age of eighteen. 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 Jamie 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 eighteen years of age. There is no question of a mandatory order as Jamie is now an adult.
6. The State case argued in the Supreme Court against Mrs. Sinnott was different from that argued in the High Court. As a matter of proceedings and law this approach is inappropriate. I am satisfied that Mrs. Sinnott has a constitutional status, rights and duties as a mother which should be upheld and were not.

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

1. The breach of Jamie's constitutional right that the State provide for free primary education was conceded. Jamie's constitutional right to the provision of free primary

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education existed during his childhood and ceased when he reached adulthood which, it is reasonable to construe, commenced at the age of eighteen.

199. Jamie is entitled to a declaration that the first named defendant in failing to provide for free primary education for him up to the age of eighteen 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.

200. Nothing in this judgment should be regarded as negating any other constitutional rights which Jamie might have.

2. The matter of mandatory orders does not arise for decision as Jamie has passed his eighteenth 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 Jamie to 2003.

201. 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 eighteen, and that provision is made for education for Jamie to an age in excess of eighteen 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 Jamie 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 Jamie would need further training and that provision would be made for that.

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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 Mrs. Sinnott. Mrs. Sinnott 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.