THE HIGH COURT

[2017/10 C.T.]

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 5 (15) OF THE HEPATITIS C COMPENSATION TRIBUNAL ACTS 1997-2006

AND

IN THE MATTER OF A DECISION OF THE HEPATITIS C COMPENSATION TRIBUNAL TO THE CLAIMANT, B. O'K. ON THE 27TH NOVEMBER 2017 REFERENCE 4120/08

AND

IN THE MATTER OF AN APPEAL BY B. O'K.

BETWEEN

B. O'K.

APPELLANT

AND

THE MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 24th day of May, 2019

1. This case comes before the Court by way of an appeal from a decision of the Tribunal given on the 27th November, 2017, whereby the Appellant was awarded €150,000 general compensation on a return application having developed Hepatocellular Carcinoma and Cirrhosis of the liver. These life-threatening conditions arose as a consequence of Hepatitis C infection contracted in 1977 through the administration of an infected batch of Anti-D immunoglobulin which the Appellant received following the birth of her daughter, O.

Background

2. The Appellant was born on the 14th August, 1948, and was married in 1973. Her husband died after a long illness in 1995. There were six children of the marriage, five daughters and one son. Four of the children have learning difficulties and attended a special school where they received remedial education. They remain partially dependant and continue to reside in the family home. When the Appellant reached fifteen years of age she left school and commenced a training course in nursing. She contracted pneumonia shortly afterwards and was hospitalised. On recovery she did not return to the course but instead took up full time employment in the vintner's trade working in a series of public houses until she got married. Her intention was to return to the workforce after she had had her family.

Diagnosis for Hepatitis C

3. B. O'K. first tested positive for the Hepatitis C virus (HCV) by polymerase chain reaction test (PCR) in 2007. She brought an application to the Tribunal for compensation under the statutory scheme established by the Hepatitis C Compensation Tribunal Acts, 1997 to 2006 (the 1997 to 2006 Acts). Her application was determined on the 1st November, 2010. The Tribunal made an award of €275,000 which included travelling expenses and what was described as a "small amount" in respect of a claim for loss of opportunity. Given the home circumstances, where the children were highly dependent on their mother for their care, the Tribunal was not entirely satisfied that there was a reality to the Appellant's stated attempts to return to the workforce in 2002.

4. At the Appellant's election and having due regard to the medical evidence the Tribunal made the award provisional on certain terms. As required by the provisions of s. 5 subs. 7(a) of the 1997-2006 Acts, the award identified the serious consequences which would entitle the Appellant to return to the Tribunal for additional compensation, namely, Cirrhosis and/ or Hepatocellular Carcinoma. In the years that followed the Appellant's liver disease continued to deteriorate and in 2016 she was informed that not only had her disease progressed to Cirrhosis but she had also developed Hepatocellular Carcinoma. Accordingly, she became entitled to return to the Tribunal on foot of the provisional award. The return application was heard and determined the 21st of December 2017; an award of €150.000 was made. The award was made provisional on the terms set out in the Tribunal's decision.

Treatments; Delay; Failure to Mitigate Loss

5. Subsequent to diagnosis the Appellant had initially declined to undergo biopsies or the antiviral therapy treatments available at the time, however, as a result of the seriousness of her deteriorating condition and having regard to the advances in treatments for the virus in 2015, she decided to undergo directly acting antiviral (DAA) therapy in 2015. The treatment was a success and she cleared the virus. On the 2nd December, 2016 she underwent a thermal ablation of the liver tumour which had been idntified. A subsequent CT scan in February 2019 demonstrated a complete response to the treated lesion and this was confirmed on repeat scanning.

6. The Appellant's failure post diagnosis to undergo a liver biopsy or avail of antiviral treatments notwithstanding medical advice thereby increasing the risk she would develop Cirrhosis and /or Hepatocellular Carcinoma was an issue raised by Respondent in respect of which there was considerable controversy between the parties; the significance of the issue was brought into sharp focus by the medical prognosis.

Medical Prognosis; Diminution in Life Expectancy

7. In June, 2017 the Appellant's treating Consultant Hepatologist, Dr. Houlihan, prognosticated that notwithstanding the successful outcome of the ablation procedure it was likely further carcinomas of the liver would develop and that notwithstanding treatment these would ultimately claim her life, evidence which the Tribunal accepted. Dr. Houlihan's initial opinion, comprised in his first medical report of June 2017, was that the success of the DAA therapy would likely have at least one positive impact on the Appellant's health; he felt the absence of the virus would halt progression of the condition to decompensated cirrhosis. However, in reply to a question by Mr. Rogers, Senior Counsel for the Appellant, Dr Houlihan was more pessimistic. His evidence to the Tribunal was that the disease would probably progress to decompensated cirrhosis notwithstanding clearance of the virus.

8. Addressing the failure to seek and avail of treatment which had been medically advised, the Tribunal found that the Appellant had lived a decent and selfless life and was a devoted carer for others as a result of which she had felt unable to seek care for herself. Her prognosis is bleak. Dr. Houlihan's evidence to the Court, as it had been to the Tribunal, was that the Appellant's life expectancy

has been considerably foreshortened, a prognosis with which Dr. Stewart, a Consultant Hepatologist retained on behalf of the Tribunal, concurred. In a report prepared for the Minister he estimated the Appellant's survival at five years post ablation to be 50%; he estimated her average life expectancy to be five years, a foreshortening of approximately eight years.

The Issues
9. It is agreed between the parties that as a result of the deterioration in her liver disease to Cirrhosis and Hepatocellular Carcinoma the Appellant's life expectancy is, as a matter of probability, foreshortened by seven to eight years. In issue is whether or not an award of €150,000 compensation for the development and consequences of these conditions, including the foreshortening of her life, is fair and reasonable compensation. On behalf of the Appellant, Mr. Rogers S.C. contended that the amount was wholly insufficient and that it was manifest from the award that the foreshortening of life in particular had not been taken into account by the Tribunal at all or if it had been, insufficient provision had been made.

10. The case advanced by Mr Callanan S.C on behalf of the Minister was that the award should not be disturbed as it represented fair and reasonable compensation for the conditions which had unfortunately developed. In this regard, the Court was entitled to take into account what, in essence, amounted to a failure on the part of the Appellant to mitigate her loss by her decision to decline medical advice and undergo treatment which could have significantly reduced the risk of her liver disease progressing to Cirrhosis and to the development of Hepatocellular Carcinoma.

11. Moreover, the Court had to take into account the premise on which the award of general compensation in 2010 had preceded, namely, that neither of the conditions in question would occur. Accordingly, to the extent that the award consisted of compensation for future pain and suffering such was assessed on the premise of an average life expectancy. In this regard I consider it pertinent to note here that the assumptions adopted for the calculation of the pecuniary loss claim contained in an actuarial report which had been prepared for the hearing before the Tribunal and was admitted in evidence on the appeal were based on normal mortality which in the case of the Appellant was assessed at 22.246 years.

Decision: Failure to Mitigate Loss; Contributory Negligence
12. I understood the submissions made on behalf of the Minister on the issue of failure to mitigate loss that this could in some way be divorced from the concept of contributory negligence. I cannot accept that submission. When the Tribunal or, the Court on appeal, is carrying out an assessment of compensation it is concerned with a claimant who has been admitted to the scheme established by the Hepatitis C and HIV Compensation Tribunal Acts 1997 to 2006 (the 1997 to 2006 Acts), and, subject to certain statutory modifications----the ability to made a provisional award----is required by s. 5 (1) to apply the same principles which apply to the assessment of damages in the law of tort and any relevant statutory provisions, which include the Civil Liability Act 1961, as amended (the 1961 Act).

13. Failure to mitigate loss is expressly addressed in the provisions of s. 34 of the 1961 Act which is concerned with contributory negligence. Section 34(1) of the 1961 provides:

> *Where, in any action brought by one person in respect of a wrong committed by any other person, it is proved that the damage suffered by the plaintiff was caused partly by the negligence or want of care of the plaintiff or of one for whose acts he is responsible (in this Part called contributory negligence) and partly by the wrong of the defendant, the damages recoverable in respect of the said wrong shall be reduced by such amount as the court thinks just and equitable having regard to the degrees fault of the plaintiff and defendant: provided that—*
>
> > *(a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally;*

The remaining provisions of sub. s (1) are not relevant for present purposes but Sub.s (2) provides

> *For the purpose of subsection (1) of this section -----*
>
> > *(a) …..*
> >
> > *(b) a* negligent *or* careless failure *to* mitigate damage *shall be deemed to be contributory negligence in respect of the amount by which such damage exceeds the damage that would otherwise have occurred*; [emphasis added]

It is clear from this wording that in order to be deemed contributory negligence and thus to result in a reduction of damages the failure to mitigate loss must be a failure which is either careless or negligent. It follows that before any question of a reduction in damages arises the court is required to make a determination as to whether or not there was a failure to mitigate loss and if so whether such was negligent or careless; all are essential ingredients. The suggestion that a failure to mitigate loss may be taken into account by the tribunal or the court divorced from the concept of contributory negligence is misconceived in law.

14. Where there is a negligent or careless failure to mitigate loss, such as where an injured plaintiff refuses to undergo necessary medical treatment in circumstances where the refusal is unreasonable having regard to the nature of the treatment, the assessment of damages is approached on the basis that the treatment was carried out. See judgement of Murphy J. in *Bohan v. Finn* DPIJ, Trinity and Michaelmas terms 1994, pp 65-66 and for a discussion on the topic Law of Torts, 4th Ed. McMahon and Binchy, Ch. 20.31.

15. The real question which arises in this case is whether contributory negligence on the part of a claimant or a person for whom the claimant is legally responsible may be taken into account by the tribunal or by the court on appeal when carrying out an assessment. One of the attributes and a central feature of the scheme of compensation established by the 1997 to 2006 Acts is the absence of a requirement to prove breach of contract, negligence or breach of statutory duty in order to succeed in a claim rather the obligation on the Claimant is confined to establishing causation loss and damage.

16. In circumstances where the Oireachtas quite clearly decided to remove the necessity to address issues of liability it is hardly surprising that there is no express provision in the 1997 to 2006 Acts which allows for a reduction in compensation for contributory negligence of whatever kind not to mention a failure to mitigate loss. However, as I understand the submissions made on behalf of the Minister that is not the end of the matter, the suggestion being that the concept of contributory negligence is nevertheless available to the Minister in meeting a claim and that this is the legislative intention of the provisions of section 5(1) of the 1997 to 2006 Acts. It follows that as the relevant statutory provisions include the 1961 Act, compensation maybe reduced by reason of contributory negligence.

Conclusion

17. I am quite satisfied that where one of the fundamental features and attributes of the scheme is to remove questions of legal liability it would be wholly contrary to the policy underlying the scheme as well as the object for which it was established and the mischief which it seeks to redress, were s. 5 (1) to be construed as a back door through which the Minister or the Tribunal could introduce questions of legal liability to reduce awards to the victims of HCV or HIV infection.

18. Furthermore, to construe the section in the way suggested would offend against the approach to construction of the provision, contained as it is in a 'redress statute', mandated by the Supreme Court in *CM v. Minister for Health* [2017] IESC 76, and recently applied by this Court in *AC v. Minister for Health* [2019] IEHC 431. Moreover, it would be contrary to the manifest legislative intention apparent from the express provisions of the 1997 to 2006 Acts that claimants would not have to concern themselves with questions of legal liability or with the apportionment of fault which would necessarily arise from issues of contributory negligence.

19. For completeness, I should add that even if contributory negligence was a factor which the tribunal, or the court on appeal, could consider and where established could reduce the level of an award I am satisfied, in the circumstances of this case, that the Appellant's refusal to undergo treatment in 2008 and 2012 could not properly be regarded as unreasonable. Declining the treatment then available, where the known side effects were truly awful, where she was terrified to subject herself to treatment, where there was no guarantee of a successful outcome or indeed even improvement, and where she felt her life had already been devastated at what she perceived to be the hands of the medical profession, the Appellant's behaviour was entirely understandable.

20. As it is when the prospects for clearing the virus improved the Appellant agreed to undergo treatment. In that regard, I found the evidence of Jo Campion Clinical Psychologist to be compelling. She highlighted the trouble which Dr Houlihan had taken to explain what was involved in the new DAA treatment, why that treatment was necessary and the benefits which would be derived, at least in the short term. The Appellant presented quite a pathetic figure as she gave her evidence in Court but I noticed from the transcript of the hearing before the Tribunal that her presentation appears to have been much more robust. The Tribunal's assessment is summed up at p. 33 of the transcript where the Chairman observed the Appellant's own description in relation to the medical treatment issue *"I am afraid that my life would be taken over by hospitals and doctors."* This is a particularly significant finding since it is concerned with the factual situation as it was at the time before the DAA treatment was known or was available

Life Expectancy; Foreshortening; Consequences for Assessment

21. With regard to the question of life expectancy the Court was referred to the judgement of Irvine J. *RC v. Minister for Health* [2012] IEHC 204. At the time of the hearing in 2010 the Tribunal was aware from the actuarial evidence that the Appellant's life expectancy was 22.246 years but there is no mention of this in the decision or of what part such played in the assessment of compensation for future loss. Mr Callanan made a forceful submission that the Court should approach this issue in the same way as it had been approached by Irvine J. in *RC,* supra, and proceed on the premise that the award made in 2010 for future pain and suffering assumed a normal life expectancy to 2032, particularly as there was nothing in the medical evidence at the time to suggest that her life was in anyway going to be foreshortened. In fact, Professor Norris made clear that in the absence of biopsies or scanning it was difficult to prognosticate as to whether the Appellant was going to develop any of the possible conditions associated with the infection; compensation had been assessed on the basis that the possible serious conditions would not occur.

22. Since the decision in RC the Court of Appeal has delivered a judgment in *L'OS v. The Minister for Health* [2017] IECA 7 in which the applicable legal principles on the approach to be taken by the court or the tribunal, as the case maybe, to the assessment of compensation are set out and were recently applied by this Court in *BD v. Minister for Health* [2019] IEHC 173. In my judgment, Mr Callanan SC is correct in the submission he made on this issue. It would be wholly wrong to proceed on the premise that life expectancy was never considered by the Tribunal when compensation was being assessed in 2010. Even though there was no apportionment of compensation between 'to date 'and 'for the future' I think it highly likely that some element of the compensation in so far as it was concerned with future pain and suffering had to take account of the life expectancy as it then was. It follows that in carrying out the assessment on this application allowance must be made for this fact if double recovery for any element of loss is to be avoided.

Conclusion

23. In applying the principles set out in *L'OS* the Appellant is entitled to be compensated in full for the development of Cirrhosis and Hepatocellular Carcinoma; the compensation awarded in 2010 had to be assessed on the premise that those conditions would not occur. It follows that as the foreshortening of life is a consequence of the development of those conditions the compensation to be assessed on this application must make provision for that fact and in that regard I accept Mr. Rodgers' submissions. The Court is not concerned with whether or not the Tribunal made proper provision for the foreshortening of life expectancy; the appeal proceeds *de novo* on this issue as it does on the appeal from the decision of the Tribunal on any issue

24. I am satisfied that this is not a case to which the so called 'cap' on general compensation applies nevertheless this question is not of any great significance in the circumstances. Suffice it to say that having regard to the totality of the injuries sustained, the compensation previously awarded for pain and suffering to date and into the future in respect of injuries which had or which were likely to arise at the time I consider that on all the evidence adduced a fair and reasonable sum to compensate the Appellant commensurate with the development of Cirrhosis and Hepatocellular Carcinoma and for the consequences of these conditions, including the foreshortening of her life expectancy, is €225.000, from which I consider €25.000 to be a reasonable sum which falls to be deducted in order to take account of the average life expectancy element comprised in the 2010 award, leaving a final net amount for general compensation on this application in the sum of €200,000. And the Court will so order. I will discuss with Counsel the terms and final form of the order to be made.