

## THE HIGH COURT

[2017 No. 2 C.T.]

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 5(15) OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT, 1997, AS AMENDED****AND IN THE MATTER OF A CLAIM BY N.C.****AND IN THE MATTER OF A DECISION BY THE HEPATITIS C AND HIV COMPENSATION TRIBUNAL OF THE 25TH OF APRIL, 2017****BETWEEN****N.C.****APPELLANT****AND****THE MINISTER FOR HEALTH AND CHILDREN****RESPONDENT****JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 20th day of October, 2017.**

1. These proceedings come before the Court by way of an Appeal from the decision of the Tribunal dated the 25th April, 2017, brought pursuant to s. 5(15) of the Hepatitis C Compensation Acts 1997-2006 (the Acts). The Tribunal made a provisional award of €150,000 conditional upon a significant number of circumstances any one of which, should they occur, will entitle the Appellant to return to the Tribunal. The only issue with which the Court is concerned is the question of quantum for decompensated Cirrhosis of the liver and its probable consequences.
2. The Appellant has suffered from Hepatitis C infection since she received a contaminated batch of Anti-D on or about the 28th August, 1997. She had a number of liver biopsies during the 1990s which confirmed chronic Hepatitis C infection with mild activity and at all times she has tested PCR positive.
3. As a consequence, the Appellant brought a claim for compensation which was heard on the 6th October, 1998, on foot of which the Tribunal made a provisional award in the sum of £120,000 for general compensation and £180,000 in respect of pecuniary losses conditional upon the Appellant being entitled to return to the Tribunal in the event that her disease deteriorated to Cirrhosis or Hepatocellular Carcinoma.
4. It was apparent from her evidence and, indeed, from the materials made available to the Court, that the Appellant was in every respect a high achiever. She qualified as a teacher by profession and was principal of a school at the time of the original hearing, a position from which she retired shortly afterwards due to the affects which the infection had on her capacity and ability to function professionally; her decision had been made prior to the hearing and was known to the Tribunal which found the decision to be entirely reasonable in the circumstances.
5. As already stated, the Appellant had tested PCR positive at all times and throughout the intervening years before her return to the Tribunal she had suffered from a constellation of symptoms which included fatigue, exhaustion, sleep disorder, lack of energy and depression. She also developed arthritis and hypothyroidism as well as type 2 diabetes, hypertension and eyelid disorders for which she continues to receive ongoing medication. Although these conditions were not caused by the infection, it complicated treatment of them.
6. The Appellant attended her GP and the hospital outpatient clinic over the intervening years. A very helpful record and history of these attendances was set out in a medical report prepared by her GP, dated the 21st November, 2016. When fibro scanning became available comparatively recently the Appellant underwent a scan which disclosed advanced Cirrhosis of the liver as a result of which she was prioritised for the new Direct Acting Antiviral (DAA) therapy, a treatment which had been shown to be highly effective in eradicating the virus. A subsequent fibro scan taken on the 2nd June, 2016, confirmed well established Cirrhosis with portal hypertension of the liver.
7. Studies into the results of effective Interferon therapy had established that there was an 80% reduction in the risk of going into liver failure or of developing liver cancer. However, with regard to the reduction in those risks following successful DAA therapy, while the Appellant's gastroenterologist, Dr. Houlihan expressed the opinion that it was too early to say, he estimated the risk at 1% to 2% per annum cumulatively. The prognosis could hardly have been bleak, without DAA therapy there was a serious risk her condition would deteriorate to liver failure or cancer necessitating a liver transplant; either way life expectancy was extremely poor.
8. Against that background the Appellant decided to undergo DAA treatment, which commenced in the Spring of 2015. The treatment is associated with well known negative effects on patients including deterioration in the disease and function of the liver, and so it proved to be for the Appellant. Significantly her GP noted that during the period 2014-2016 she complained of increasing fatigue and pain, her blood pressure became unstable and her capacity to concentrate deteriorated. During the twelve-week course of therapy she also continued to test PCR positive and did not test negative until some two weeks or thereabouts after completion of the course.
9. Although not diagnosed by her GP at the time, he had noticed a diminution in the Appellant's ability to concentrate which Dr. Houlihan subsequently diagnosed as Encephalopathy, a condition which affects mental functioning, most noticeably, the faculties of thought and balance. These features were not evident to Dr. Houlihan or to her GP before the Appellant commenced DAA treatment but became manifest during treatment and were confirmed by worsening liver function tests. Dr. Houlihan explained the effects of treatment on liver function, how this had deteriorated to decompensation and was the most likely cause of the Encephalopathy.
10. In January, 2016 the Appellant had a very nasty fall as a result of which she suffered multiple rib fractures and lung contusions and a haemothorax. These injuries were separately the cause of significant pain, distress, discomfort and inconvenience for which the Appellant required prolonged treatment in hospital and subsequent rehabilitation in a nursing home.
11. Dr. Houlihan categorised the symptoms of confusion, difficulty with concentration and keeping her balance as consistent with Grade II Encephalopathy, symptoms which were the most likely explanation for the fall. That evidence, which I accept, very well

explains in medical terms the Appellant's description of the accident, particularly how she came to lose her balance.

12. Understandably, the Appellant was very pleased to learn that she had cleared the virus following treatment and as a consequence her life expectancy has been greatly enhanced. There was also some reassurance in knowing that biochemically her liver function had generally improved and that her liver was no longer being damaged by the virus. However, her evidence was that she remains debilitated physically and continues to experience symptoms of Encephalopathy, which she described as "a fog" in her brain.

13. The Encephalopathy was caused as a result of toxins which were carried into the brain in the blood stream, toxins which would otherwise have been cleared by a healthy liver. Dr Houlihan explained that although the Appellants liver function had improved following successful treatment, the improvement was insufficient to screen out or clear all of the toxins which continued to affect her mental faculties, albeit not to the same extent as previously.

14. In this regard, although he considered the level of Encephalopathy had improved to what he categorised as 'low grade' and remained hopeful of further improvement, it was indicative of continuing decompensation in liver function; in his opinion, while the Appellant's condition had most likely reached a plateau, her life expectancy had greatly improved as a result of the successful DAA treatment.

15. The Appellant's evidence was that although she had been told that she had cleared the virus she had not yet returned to her pre-treatment level of functioning albeit that even then she was suffering from a myriad of symptoms which affected her abilities to the point where she described her life as a struggle. Unfortunately, life was even more of a struggle now and was not anyway close to what she would have expected of a human being of her age. As to that she could not help comparing herself unfavourably with the capacity of her siblings to live a normal life; hers was a very different position.

16. Although she was basically independent, could look after, feed and dress herself, engage in light household chores and enjoy reading, she was not able to cope with anything that involved any significant physical effort or anything which caused worry or stress. Nevertheless, it was clear from her demeanour and, indeed, from the reporting and evidence of Jo Campion, clinical psychologist, that she puts on a brave face, tries to wear a smile and do the best to live her life as best she may, describing herself as a very positive person by nature.

17. Notwithstanding her outward presentation to the World it was clear that the Appellant still worries about her liver disease and remains anxious about what the future holds in store, especially as she is aware that although the virus has been cleared and her liver is no longer being damaged, her disease is well established and not reversible.

18. In assessing compensation, I am mindful that the Appellant has other significant medical conditions which carry with them symptoms that also impact on her life which are not caused by Hepatitis C. The Court must also be mindful, given that the present application is also one for a provisional award, that in carrying out an assessment the risks of deterioration in her condition or the happening of other specified matters in respect of which the Appellant will be able to return to the Tribunal do not fall to be taken into consideration. On the occurrence of any of these events she will be entitled to return and have full compensation assessed by the Tribunal. See *LOS v. The Minister for Health and Children* [2017] IECA 7.

19. I have had regard to the case authorities which were opened to the Court, including the judgment which I delivered in *A.M. v. The Minister for Health and Children* [2015] IEHC 660, upon which reliance is placed by the Appellant in the submissions made on her behalf with regard to quantum, having regard to the many similarities between the facts in that case and the circumstances of the case under consideration.

20. On my view of the evidence, the circumstances and facts in this case are not on all fours with or as grave as those in *A.M.*, nevertheless, that is not in any way to be taken as minimising the seriousness of the permanent and irreversible condition from which the Appellant suffers and for which she is entitled to be fully compensated.

21. Having regard to the findings made the reasons given and conclusions reached and having regard to the well settled principals of tort law in the assessment of compensation subject to the necessary modifications which arise where the Tribunal, or the Court on appeal, is concerned with making a provisional award, as here, I consider that a fair and reasonable sum to compensate the Appellant commensurate with her injuries, including the injuries suffered as a result of the fall, is €185,000.

## **Ruling**

22. The Court will allow the Appeal and vary the award of the Tribunal by substituting the sum of € 185,000. The terms of the Provisional Award will otherwise be affirmed and the Court will so Order.