



THE COURT OF APPEAL

Neutral Citation Number: [2017] IECA 7

Record No. 2016/219

**Peart J.
Irvine J.
Hedigan J.**

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

BETWEEN/

L O'S

RESPONDENT

- AND -

THE MINISTER FOR HEALTH AND CHILDREN

APPELLANT

JUDGMENT of Ms. Justice Irvine delivered on the 27th day of January 2017

1. This judgment concerns the interpretation of the provisions of s.5 of the Hepatitis C Compensation Act 1997 ("the Act") which provides that in certain specified circumstances an applicant who qualifies for compensation under the statutory compensation scheme thereby created, may apply to the Hepatitis C Compensation Tribunal ("the Tribunal") or the High Court on appeal, for what is described therein as a provisional award of damages which entitles them to return to the tribunal to claim additional compensation should certain serious consequences of their infection occur.

2. By order of the High Court (Abbott J.) made on 22nd May 2014, the Minister for Health and Children ("the Minister") was granted leave to apply to the Supreme Court from the decision which he had earlier made on the respondent's appeal from the determination of the Tribunal on the following specified questions of law:-

1. Whether the "principles which govern the measure of damages" specified in s. 5(1) could warrant a provisional award pursuant to s. 5(7) by which the "particular serious consequences in the future" may be itemised or specified as external to the appellant's medical or clinical condition;
2. whether the "principles which govern the measure of damages" specified in s. 5(1) could warrant a provisional award pursuant to s. 5(7) by which the "particular serious consequences in the future" may arise without any worsening or deteriorating medical condition of the appellant;
3. whether the "principles which govern the measure of damages" specified in s. 5(1) could warrant a provisional award pursuant to s. 5(7) by which the "particular serious consequences in the future" confined to future pecuniary or a special damages assessment alone, and without any deteriorating pain and suffering or loss of amenity;
4. whether the "principles which govern the measure of damages" specified in s. 5(1) could warrant a provisional award pursuant to s. 5(7) by which the "particular serious consequences in the future" relating to future pecuniary or special damages assessment alone, and in the absence of any cause or trigger at some future date for any further general damages;
5. whether the "principles which govern the measure of damages" specified in s. 5(1) could warrant a provisional award pursuant to s. 5(7) by which the "particular serious consequences in the future" might be limited solely to future pecuniary or special damages;
6. whether the "principles which govern the measure of damages" specified in s. 5(1) could warrant the Tribunal or court on appeal from refraining to make a full assessment, guided by such evidence expert or otherwise as may be helpful, in present day money of pecuniary or special damages in the future;
7. whether the "principles which govern the measure of damages" specified in s. 5(1) could warrant the Tribunal or court in its determination from refraining to assess "or any claimant from refraining to adduce present day evidence of" pecuniary or special damages into the future based upon extant medical, clinical and expert evidence on the footing of a "provisional award" which make specify isolated or unspecified "particular serious consequences" in the future unconnected to or without deteriorating or worsening clinical or medical condition, and
8. whether the appellant is entitled to have the appeal from the Tribunal remitted to the High Court for reconsideration in the event of the Supreme Court's (Court of Appeals) determining any of the questions at nos. 1 to 7 in favour of the respondent.

Background facts

3. The respondent ("L O'S") was born in 1994 and is the youngest of four children. His mother received transfusions of contaminated blood in 1981 while a patient in the National Maternity Hospital and was diagnosed as positive for the Hepatitis 'C' virus (HCV) in 1998. L O'S contracted HCV from his mother in or around the time of his birth but cleared that infection. That he had earlier contracted HCV was ascertained by blood testing which established the continued presence of antibodies to the virus.

4. When L O'S was fifteen years of age he brought an application for compensation before the Tribunal. He was awarded €125,000 by way of general damages. His only alleged symptom arising from his past exposure to HCV was fatigue. The medical evidence was to the effect that he was unlikely to have any future complications arising out of his past exposure to the virus. However, his consultant gastroenterologist was not in a position to definitively rule out the remote possibility that he might at some stage in the future become HCV positive again and might not thereafter develop cirrhosis or a hepatocellular carcinoma. That being so, in keeping with the statutory provisions to which I will later refer, the Tribunal made a provisional award under s.5 (7) of the Hepatitis C Act 1997 with the effect that in the event of any of those complications arising L O'S might return to the Tribunal to seek additional compensation. The Tribunal refused his application to make the award provisional on the possibility that he might incur financial loss as a consequence of his past HCV exposure.

5. L O'S appealed the award of the Tribunal to the High Court. It should be stated that the appeal was a full rehearing of his application, as is provided for by statute. At the time of the appeal L O'S was struggling with a third level course involving one particular sport and had earlier performed poorly in his leaving certificate examination. His educational psychologist, Dr. Billy Kinsella, ascribed his poor results to symptoms of tiredness and difficulty with concentration which he considered consistent with symptoms he had noted in dealing with other clients who were infected with or had been exposed to HCV. Based on L O'S's IQ and the fact that he did not suffer from any condition such as dyslexia or ADHD and against a backdrop of working hard at school he felt that L O'S should have done much better in his exams. It was uncertain as to how he would perform in the work market having regard to his fatigue and L O'S and his mother were both concerned that this problem might adversely affect him in his employment opportunities.

6. It is clear from his judgment of 20th December 2013 that Abbott J. was satisfied that L O'S's symptoms of fatigue were due to past HCV infection and that they would likely continue. He refused however to interfere with the award of damages of €125,000 that had been made by the Tribunal as he considered it sufficient to compensate L O'S in respect of his fatigue having regard to the economic changes which prevailed and the possibility that he might receive a further award of compensation at a later date as a result of the provisional award that he had decided to make.

7. Following legal argument the High Court judge affirmed the award of general damages made by the Tribunal in the sum of €125,000 and confirmed L O'S's entitlement to recover a further sum of €25,000 from the Reparation Fund. He then made the award provisional, in the following terms:-

"And it is ordered that the award be provisional and the appellant is at liberty to return to the Tribunal in the event that:-

- 1. He should hereafter become PCR positive or otherwise positive for the presence of hepatitis virus by clinical or medical assay tests and / or*
- 2. On exacerbation or recrudescence of any past Hepatitis C infection, he develops cirrhosis or hepatocellular carcinoma, as a direct consequence of his Hepatitis C infection and / or*
- 3. The respondent [sic] suffering adverse effects on his income generating capacity as a consequence of tiredness and / or fatigue caused by his having been diagnosed positive for Hepatitis C or his having been exposed to Hepatitis C virus.*

In any of which instances he is at liberty to return to the Tribunal to seek further compensation."

8. On the Minister's application, the High Court specified the questions of law earlier set out for the attention of this court.

Relevant Statutory Provisions

9. The aforementioned questions concern the scheme of compensation provided by the State to compensate those infected with HCV by reason of their receipt of or contact with infected blood products. The scheme, as already advised, is provided for in the Hepatitis C Compensation Tribunal Acts 1997 - 2006. However, the section relevant to this appeal is s. 5 of the 1997 Act which provides as follows:-

"5(1) An award of the Tribunal to a claimant shall be made on the same basis as an award of the High Court calculated by reference to the principles which govern the measure of damages in the law of tort and any relevant statutory provisions (including Part IV of the Civil Liability Act, 1961), and including, subject to section 11, consideration of an award on the basis which reflects the principles of aggravated or exemplary damages.

(2) Notwithstanding subsection (1) of this section and section 2(2) of the Civil Liability (Amendment) Act, 1996 , section 49(1)(b) of the Civil Liability Act, 1961 (as amended by section 2(1)(a) of the Civil Liability (Amendment) Act, 1996) shall have effect in respect of a claim made pursuant to section 4 (1)(e) of this Act.

(3) An award in respect of aggravated or exemplary damages may be made by the Tribunal where a claimant establishes a legal entitlement to such against a relevant agency or the Minister.

(4) Subject to subsection (8), the Tribunal shall decide upon the amount of any award it may make to a claimant.

(5) Where the Tribunal makes an award to a claimant it shall award to the claimant any reasonable costs and expenses the claimant has incurred in taking her or his claim.

(6) The Tribunal shall assess and make any award for general or special damages on the basis of a single lump sum award or a provisional award as chosen by a claimant under subsection (8).

(7) (a) Where the Tribunal is of the view that there is a possibility, but no more than a possibility, that a claimant as a result of having contracted Hepatitis C may suffer particular serious consequences in the future, the Tribunal may make an award ("provisional award") calculated in accordance with subsection (1) but assessed on the assumption that such serious consequences will not occur, identifying those consequences and specifying the period within which the claimant may apply in the event of such occurring.

(b) Subject to paragraph (c), where the consequences referred to in this subsection do occur, the claimant may apply for an award of further compensation in accordance with the terms of the provisional award.

(c) Where an application is made under paragraph (b), the Tribunal in awarding any further compensation shall not award

any further amount in respect of aggravated or exemplary damages.

(8) A claimant shall choose, on making a claim to the Tribunal, whether she or he is seeking a single lump sum award or a provisional award. A claimant may, at the discretion of the Tribunal, alter her or his choice up to the commencement of the hearing of her or his claim.

(9) (a) Subject to subsection (13), where the Tribunal makes an award to a claimant, the claimant shall have a period of one month or such greater period as may be prescribed from the date of receiving notice of the making of the award during which the claimant may decide in writing either to accept or reject the award or to appeal the award under subsection (15).

(b) If a claimant neither accepts nor rejects an award or appeals the award under subsection (15) within the period referred to in paragraph (a), the claimant shall be deemed to have rejected the award.

(10) (a) Where a claimant accepts an award (including a provisional award) of the Tribunal, the claimant must agree in writing to waive any right of action which the claimant may otherwise have had against any party and to discontinue any other proceedings instituted by the claimant arising out of the circumstances of the claimant's claim before the Tribunal.

(b) An award of the Tribunal shall not be paid to a claimant unless she or he complies with this subsection.

(11) Where a claimant does not wish to receive the entire amount of an award made to her or him in a single payment, the Tribunal, having heard the claimant, may in its absolute discretion, direct that the award shall be paid to the claimant in instalments.

(12) Where a claimant chooses to accept an award of the Tribunal, the amount of the award shall, subject to this section, be paid to the claimant within 28 days of receipt by the Tribunal of notification of acceptance of the award.

(13) In the case of an award to a claimant who is a minor or in the case of a settlement for a claimant who is a minor, the acceptance of the award shall be subject to the approval of the High Court, which approval shall be sought within one month of the notification of the making of the award, and the claimant shall have one month from the date of such approval within which to accept or reject such approved award. The High Court may direct that where it considers any part of such an award, in respect of aggravated or exemplary damages, is too low, that the claimant shall apply to have a payment made from the Reparation Fund in lieu of such damages.

(14) Where a claimant does not accept an award within the time and in the manner provided in this section, and proceeds with any right of action she or he may have, the Minister or a relevant agency will not in such proceedings to which it is a party rely for the purposes of the Statutes of Limitation, 1957 and 1991, upon the period between the date of the claimant's application to the Tribunal and the date upon which the claimant abandoned her or his claim, was adjudged not entitled to compensation under this Act, or was last entitled to accept any award made by the Tribunal (whichever of such dates is the later) in bar of any right of recovery under such proceedings.

(15) An appeal shall lie to the High Court by a claimant in respect of any decision made by the Tribunal and the Minister may cross-appeal any such appeal.

(16) An appeal shall lie to the High Court by the Minister or a relevant agency in respect of an award of aggravated or exemplary damages.

(17) (a) An appeal under this section shall be heard otherwise than in public at the request of the claimant making the appeal.

(b) Unless the claimant otherwise requests, an appeal by the Minister or relevant agency under subsection (16) shall be heard otherwise than in public.

(18) Where a claimant makes an appeal under subsection (15), the claimant must agree in writing to waive any right of action which the claimant may otherwise have had against any party and to discontinue any other proceedings instituted by the claimant arising out of the circumstances of the claimant's claim before the Tribunal.

(19) A decision of the High Court on an appeal under this section shall be final, save that, by leave of the Court, an appeal from the decision shall lie to the Supreme Court on a specified question of law.

The appellant's submission

10. Mr. Mulloy S.C., on behalf of the Minister, accepts the appropriateness of the first two provisional orders made by Abbott J. These identify three medical events which, should they happen, trigger L O'S's entitlement to seek additional compensation. The first is the possible return or recrudescence of the HCV virus. The second is the possibility that he might develop cirrhosis and the third that he might develop a liver cancer. All of these are possible "serious consequences" of L O'S's exposure to HCV. However, Counsel submits that s. 5(7) does not permit a provisional award to be made in respect of possible future economic loss based upon a mere continuation of the symptoms of fatigue experienced by L O'S at the time of the hearing. That sub section had to be interpreted in light of s. 5(1) which provides that awards are to be made on the same basis as would be made by the High Court and calculated by reference to the principles which govern the measure of damages in the law of tort and any relevant statutory provisions. The common law, he submits, requires damages to be assessed on a once and for all basis and in support of that proposition he relies on the judgment to Finlay C.J. in *Dalton v. The Minister for Finance* [1989] 1 I.R. 269. L O'S was suffering from fatigue at the time of the hearing before the High Court. Applying common law principles, there was no reason for him not to finalise his case in respect of general and special damages based upon evidence as to how fatigue would likely affect him in the future.

11. Mr. Mulloy submits that s. 5(7) requires the Tribunal, or the High court on appeal, to find as a fact that it is possible that the applicant's medical condition may deteriorate in the future before it can make a provisional award. For the trial judge to have made a provisional award entitling L O'S to return to seek further compensation for pecuniary loss without any change in his medical condition was inconsistent with the section as a whole. Further, to construe the section in this way would not only undermine the fundamental concept of finality in litigation but would offend the principles governing how damages are to be assessed in the law of tort.

12. While Mr. Mulloy accepts that the Tribunal has made a handful of provisional awards in similar terms to that under consideration by this court, the same were made in the course of what he described as something akin to *ex parte* hearings in which there had been no legal argument concerning the Tribunal's statutory entitlement to make an award in such terms. Further, given that it is only an applicant that enjoys a right of appeal to the High Court, the present case was the first case in which the entitlement of the Tribunal or the Court to make an award in such terms had been tested. Thus, he urged this court when considering the jurisdiction of the Tribunal or the High Court to make a provisional award of the nature under scrutiny, to discount the significance of any prior awards that may have been made on a similar basis.

13. Mr. Mulloy submits that if s. 5(7) were to be interpreted as permitting the making of a provisional award in terms similar to those made in the present case, the same would likely have many undesirable consequences. He cautioned that provisional awards might impede the rehabilitation of those who had actually cleared HCV, such as L O'S. They would likely encourage those without motivation to sit back rather than seek out employment, knowing that they could later apply to recover any lost earnings based on an assertion of ongoing fatigue. He placed emphasis on the subjective nature of fatigue and how, even with causation remaining in issue on any application for additional compensation, it would be difficult to test that evidence. He expressed concern as to the numbers of applicants who might seek provisional awards in similar terms to that made by Abbott J. in the present case and the effect that the same might have on the possibility that the Tribunal could ever conclude its work.

The respondent's submission

14. Mr. Craven S.C., on behalf of L O'S, submits that the answer to the questions raised for this court on the appeal turn on the proper interpretation of the words "particular serious consequences in the future" as they are used in s. 5(7) of the Act. Those words, in their plain and ordinary meaning, can attach to any serious consequences arising for an individual who has an entitlement to claim compensation under the scheme and are not dependant upon those consequences being of a medical nature. For the Minister's submissions to succeed the court would have to import the word "medical" into s.5 (7) and place it between the words "serious" and "consequences".

15. Counsel submits that s. 5(1) does not apply or impact on provisional awards. The Act provides a complete statutory code which deviates in many instances from the common law system. Provisional awards are not available at common law and L O'S is only entitled to a provisional award of damages because that right was afforded to him by the statutory scheme. He instanced in this regard the Hepatitis C Compensation Tribunal Amendment Act 2002 which provides for general damages for loss of expectation of life even if the person infected with HCV is dead and the entitlement of their next of kin to claim for damages for loss of society, rights unavailable at common law.

16. Mr. Craven submits that the 1997 Act is a remedial statute. The compensation scheme was designed to protect those who had contracted HCV or had been exposed to the virus in circumstances where it was difficult to anticipate the possible impact that their infection or exposure might have on their lives in the future. S.5 allows an applicant to choose whether to seek a lump sum award or a provisional award. The section does not limit "serious consequences" to medical complications or symptoms associated with HCV infection. Applicants are entitled to a provisional award under s.5(7) once they can prove they it is possible that they may experience "serious consequences" as a result of their HCV status and if they do the Tribunal, or the High Court on appeal, must, if the criteria are met, make a provisional award entitling them to return to seek additional compensation should such serious consequences materialise. However, where a provisional award is made the Tribunal / Court must, exclude awarding any compensation based on the possibility that such serious consequences may arise.

17. Counsel relies upon the fact that the Oireachtas did not, as it might have done, confine or limit the words "serious consequences" to the medical consequences of HCV. He contrasted the provisions of s. 5(7) of the 1997 Act with s. 32A of the Supreme Court Act 1981 in the U.K. which provides a jurisdiction to make a provisional award of damages in personal injuries actions but restricts the making of such an award to cases where the plaintiff may develop some serious condition or suffer some serious deterioration in their physical or mental condition. Section 5(7) of the 1997 Act is not so qualified or restricted.

17. Mr. Craven also relies upon the fact that in December 1996, the year before the 1997 Act was enacted, the Law Reform Commission published a report concerning Personal Injuries, Periodic Payments and Structured Settlements. He referred to that section of the report which deals with interim awards of damages. He noted that in Appendix 1 of its report the Commission annexed a draft bill to provide for provisional awards of damages in personal injuries cases. s. 6(1) of the Bill proposed that such awards would be confined to cases where the plaintiff was at risk of developing "some serious disease" or might "suffer some serious deterioration" in "his physical or mental condition". Mr. Craven submits that the Oireachtas had it so wished, could have imported such limitations into the 1997 Act thereby restricting an applicant's right to a provisional award to circumstances in which he or she could establish a risk of developing some serious physical or psychological consequence of HCV but had not done so.

18. Mr Craven submits that the words provided for in s.5(7) in their ordinary and natural meaning support the provisional award made by the trial judge in respect of possible pecuniary loss that might be sustained by L O'S as a result of his fatigue. The wording of the section is not ambiguous in any way.

19. If in any doubt as to the true meaning of the words in s. 5(7) counsel submits that the court should interpret the section in a liberal fashion and to the advantage of L O'S. The statute is what he described as a remedial statute. That being so, the words contained in s. 5(7) should be given a broad and liberal interpretation. He relied upon the decision of Hogan J. in *McE v. Residential Institutions Redress Board* [2016] IECA 17 in support of this submission.

20. Mr. Craven further submits that s. 5(7) intentionally and expressly disapplies the "once and for all" basis of assessing damages as provided for at common law once the requirements of s. 5(7) are met.

21. Finally, Mr. Craven submits that even if the section, as interpreted by Abbott J., could have any or all of the adverse consequences described by Mr Mulloy S.C. in his submission, it is not for this Court to interpret the section so as to achieve some favoured policy objective. The Court cannot add to or delete from express statutory provisions in order to achieve objectives which it considers desirable. It was not for the Court to protect against the type of moral hazard suggested by Mr. Mulloy in his submissions. He relied upon the judgment of Finlay C.J. in *McGrath v. McDermott* [1988] I.R. 258.

Decision

The undisputed provisional award based upon the possibility of recurrence of HCV infection, the development of cirrhosis or hepatocellular carcinoma.

22. Without wishing to downplay the consequences to L O'S of his past exposure to HCV, it is undoubtedly the case that his

symptoms are very much at the lowest end of the spectrum of symptoms experienced by those who qualify for compensation under the 1997 Act. He was infected in or around the time of his birth. By the time he was tested in September 1999 his blood tested positive for antibodies to HCV on Eliza testing, evidence later accepted by the trial judge as proof that he had earlier contracted the virus but had cleared it by that point in time.

23. The medical evidence in the High Court was that it was unlikely that L O'S would have recrudescence of the virus and even more unlikely that he might develop cirrhosis or a liver cancer, both conditions associated with ongoing infection. However, because these were all serious consequences of HCV infection which could not definitely be ruled out, notwithstanding his clearance of the virus, the court was entitled to make a provisional award entitling him to return to seek additional compensation should any of these events occur. The Minister does not challenge the validity of an award of this nature and indeed relies upon the objectively ascertainable conditions stated to trigger L O'S's entitlement to seek further compensation, to demonstrate the true circumstances in which he maintains the court enjoys jurisdiction to make a provisional award.

The contested provisional award based on the possibility of L O'S suffering adverse consequences to his income generating capacity due to ongoing fatigue.

24. The High Court judge would appear to have accepted the evidence proffered on behalf of L O'S to the effect that he suffered from levels of fatigue that were unnatural for a young man of his age. It should be said that at the time of the hearing in the High Court L O'S was struggling to keep up with the demands of the third level sports studies programme in which he had enrolled. Based upon the evidence to which I will later refer at the conclusion of my judgment, the trial judge concluded that his fatigue was likely to have been caused by his past exposure to HCV.

25. The High Court judge also accepted the evidence of Dr. Kinsella to the effect that it was likely that L O'S's poor leaving certificate results could be ascribed to fatigue rather than to other causes.

26. It is clear from the terms of the provisional award which he made that the trial judge must firstly have concluded that any compromise to L O'S's earning capacity by reason of HCV related fatigue would amount to a "serious consequence" of his exposure to the virus within the meaning of s. 5(7) of the Act, and secondly that any such potential compromise was no more than a mere possibility as otherwise he would not have been entitled to make the award which he did.

27. For reasons which I will now explain I am fully satisfied that the tribunal, or the High Court on appeal, enjoys the jurisdiction, where the necessary evidence is adduced, to make a provisional award in terms such as were made in L O'S's case.

General observations regarding the Statutory Scheme for compensation of victims of HCV.

28. The provisional award permitting L O'S to return to the Tribunal to seek additional compensation should his fatigue adversely affect his income generating capacity was made under s. 5(7) of the Act. That being so it is important to note that the 1997 Act creates a statutory code which entitles an applicant to elect between a lump sum award and a provisional award. Even though an applicant may lead evidence that would entitle them to a provisional award, he/she may nonetheless opt for a lump sum award. For example, an applicant who remains infected with HCV may prove that it is possible, but not probable, that he/she will develop cirrhosis or a liver cancer at a later date but nonetheless may decide not to seek a provisional award and, instead, seek a lump sum award so that the matter is dealt with once and for all. If they do so, the Tribunal, or the High Court on appeal, will assess their damages on the basis that those complications will remain mere possibilities. In such a case the applicant may receive some additional compensation for the fact that these complications remain live, but that will depend upon just how serious any such risks are. However, having taken a lump sum award, the applicant is debarred from seeking any further compensation even where cirrhosis or liver cancer later develops, and regardless of the severity of the symptoms or the prognosis. Another applicant in precisely similar circumstances might elect for a provisional award permitting their return to claim additional compensation should they later develop cirrhosis or a liver cancer. In such a case the applicant would likely receive a lower award than their counterpart who opted for a lump sum, because the Tribunal / Court must, in making a provisional award, exclude from its consideration any damages for the risk that the serious complications identified in the provisional award might occur. However, if the applicant were to go on to develop cirrhosis or liver cancer they would then be compensated in full in respect of such condition and its consequences.

29. I have referred to these two examples solely for the purposes of highlighting the fact that the 1997 Act makes available to those who qualify for compensation, a discrete scheme designed to protect them from a range of potentially serious consequences of HCV infection about which the long term prognosis was somewhat guarded in 1997. In this regard I agree with the submission made by Mr. Craven that this statutory scheme deviates in many respect from the common law system of awarding damages for injuries tortiously inflicted.

30. It is true, as Mr. Mulloy submits, that s. 5(1) of the Act requires that a claimant's award be made on the same basis as an award that might be made by the High Court calculated by reference to the principles which govern the measure of damages in the law of tort. However, that section, in my view, does not impact in any way on the provisions of s. 5(7) which gives the Tribunal, or the High Court on appeal, the additional entitlement to allow an applicant who cannot prove the probability that he/she may suffer some particular "serious consequences" of Hepatitis C in the future but where those consequences are nonetheless possible, the opportunity to seek a provisional award thereby permitting a return for an additional award should those consequences becomes an actuality. Hence, the statutory scheme provides for a specific departure from the common law principle that seeks finality in litigation, once the applicant can bring themselves within the provision of s. 5(7).

31. It is perhaps important to recognise that there is no possibility of any form of double recovery for an applicant who seeks and obtains a provisional award. On the hearing of their claim the Tribunal, or the High Court on appeal, is obliged to exclude from its award any compensation for the possible serious consequences of HCV identified in its award. If any such specified consequence should become a reality the applicant may return to the Tribunal for a further award in respect of those consequences. That is not to deny that such an applicant enjoys a very significant advantage over what I would describe as the ordinary personal injuries litigant in that a provisional award may protect him/her from the unfairness that regularly occurs at common law when damages are assessed on a once and for all basis, where a court may make an award of damages on the basis that some serious condition is no more than a possibility, and where, after the case is over, the plaintiff in fact goes on develop that condition with the effect that he/she will have been inadequately compensated.

Statutory Interpretation.

32. In truth, the outcome of this appeal depends upon the interpretation of s. 5(7) of the 1997 Act. For the Minister to succeed on this appeal he must convince the Court that the words "particular serious consequences in the future" are to be interpreted as relating to serious medical consequences of HCV as opposed to serious consequences which may go beyond such confines.

33. The starting point for any Court, when asked to interpret any statutory provision is to recognise that under Article 15.2.1 of the

Constitution, the sole and exclusive power to make laws is vested in the Oireachtas. The Courts have no constitutional power to make laws. That being so, judges must be careful when interpreting legislation not to do so in such a way that they cast themselves in the role of legislators.

34. When approaching its task the Court must presume that the Oireachtas was fully aware of the range of possible limitations it could impose on the circumstances in which the Tribunal, or the High Court on appeal, might make a provisional award. It should presume that it was, for example, fully *au fait* with the recommendations of the Law Reform Commission concerning periodic payments and structured settlements and as to the type of limitations which it advised ought to be included should the Oireachtas favour introducing legalisation to provide for provisional awards. Its proficiency in achieving its desired objectives is to be assumed and I would expect the relevant parliamentary draughtsman to have considered and had regard to other statutory schemes which permit of provisional awards in personal injuries litigation such as that introduced in the U.K. in the Supreme Court Act of 1982 ("the 1982 Act").

35. It was clearly open to the Oireachtas, when enacting the 1997 Act, to limit the circumstances in which provisional awards could be made along lines similar or close to those provided for in s. 32A of the U.K. 1982 Act. That section provides that a provisional award may be made where:-

"There is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious condition or suffer some serious deterioration in his physical or mental condition."

However, the Oireachtas chose to pursue a more expansive approach for those who were infected or earlier exposed to HCV.

36. The intention of the legislature is, of course, to be ascertained from the words chosen to express that intention. Accordingly, the court must first have regard to the literal meaning of the words under consideration. The importance of giving words their ordinary meaning when determining the legislator's intention and in respecting the separation of powers envisaged by the Constitution was acknowledged by Denham J. in *Lawlor v. Flood* [1999] 3 I.R. 107 when, concerning the meaning of the enactment under consideration she said as follows:-

"In applying the ordinary meaning of the words the Court is enforcing the clear intention of the legislature. This aspect of statutory construction is an essential part of the separation of powers. Further, it is an illustration of appropriate respect by one organ of government to another."

37. In this case the words that require interpretation are "particular serious consequences" in the context in which they appear in s. 5(7) of the 1997 Act. Those words are not qualified or limited in any way. They are unambiguous and that being so the Court must give them their literal and plain meaning. They do not seek to restrict or confine provisional awards to cases where the applicant can identify as a possibility some future serious medical consequence of HCV. The words embrace any identifiable serious potential consequence of infection such as a loss or diminution in income generating capacity. The words are plain. There is no ambiguity.

38. I entirely appreciate the concerns expressed by Mr. Mulloy on behalf of his client that to uphold the entitlement of the Tribunal or High Court, to make a provisional award in circumstances such as exist in the present case could have all of the adverse consequences to which he referred in argument. It is of course correct that an unscrupulous or untrustworthy applicant might, having obtained a provisional award such as that obtained by L O'S, make no effort to obtain employment and later seek to recover very substantial sums of money at the expense of the tax payer, based on symptoms of fatigue which are indeed, as Mr Mulloy pointed out, difficult to contest. However, it has to be remembered that many claims for general and special damages at common law are based upon symptoms which cannot be objectively assessed; headaches, depression and chronic pain syndrome are but a few examples of such symptoms. Yet nobody would seriously argue that a plaintiff with such injuries could be treated any differently to those with objectively ascertainable symptoms.

39. I accept Mr. Mulloy's submissions that certain public policy objectives could be put at risk if provisional awards concerning future loss of income-generating capacity were to be made routinely without a requirement that there be some objectively identifiable deterioration in an applicant's health before such an entitlement could arise. To date, for those with ongoing infection, the possibility that they might develop cirrhosis or liver cancer, have been the two most frequently favoured "serious consequences" of HCV identified in provisional awards entitling an applicant to seek additional compensation. For those who have cleared the virus the possibility that they might return to HCV positivity is routinely identified as a serious consequence that would trigger their entitlement to seek further compensation. All of these are objectively ascertainable consequences of HCV infection and that being so there is simply no possibility that the section could ever be abused.

40. While I understand and respect the concerns expressed on behalf of the Minister on this appeal as to the potential consequence of the interpretation placed on the wording of s. 5(7) of the 1997 Act, the Court enjoys no jurisdiction or entitlement to depart from the literal meaning of the words in that section because it considers such an approach might seem desirable. The following is what Finlay C.J. stated concerning such approach to statutory interpretation at p. 275 of his judgment in *McGrath v. McDermott* [1998] I.R. 258:-

"The function of the Courts in interpreting a Statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislator to be inferred from other provisions of the Statute involved, or even other Statutes expressed to be construed with it. The Courts have not got a function to add to or to leave from express statutory provisions so as to achieve the objectives which to the Court seem desirable. In rare or limited circumstances words or phrases maybe implied into statutory provisions solely for the purpose of making them effective to achieve their expressively avowed objective."

Consequences which flow from the wording of the provisional award in the present case

41. While s. 5(7) is capable of embracing a provisional award of the nature made in the present case, it is clear that a provisional award which entitles an applicant to return to the tribunal to make a potentially significant claim for pecuniary loss without any change in their medical status is difficult to fashion. How is the court to make clear precisely when and in what circumstances the right to apply for further compensation can be stated to crystallise?

42. The facts of the present case are useful for the purpose of demonstrating the difficulty and risks which attach to the making of such a provisional award based on potential pecuniary loss with no requirement that there be any change in the medical status of the

applicant. L O'S has chosen to pursue a third level course in sports studies even though he suffers from fatigue which is stated to be very severe. If it transpires in a few years time that he cannot work a forty hour week in sports related employment, is he entitled to apply with immediate effect to seek additional compensation for loss or impairment of his income-generating capacity, or does he have to try alternative employment and if so for how long before he might so apply? Then there is the other thorny question as to how the court will comply with its obligation to fix the time limit within which the applicant must apply to the tribunal in the event of such "serious consequences" occurring. Should that be within 12 months or two years of an applicant first having to reduce his/her work commitments by reason of fatigue, or does the imposition of such a time limit discourage both rehabilitation and mitigation of loss such that it should be a much greater period? The problems are vast and far too numerous to enumerate in this judgment.

43. Clearly there are real difficulties with provisional awards of the type made in the present case. However, in my view they are permissible under the legislation as it stands. Regardless of any concerns that I might have concerning the broad wording of s.5 (7), I am not entitled to interpret that section in a manner which would circumvent the possible abuse of the provision. Should the Minister consider that s. 5(7) of the 1997 Act, insofar as it permits of the making of provisional awards of the nature provided for in the present case, is not in accordance with what had been intended by the legislature, he could of course seek to amend the legislation with a view to eliminating or reducing the potential adverse consequences of what I consider to be the proper interpretation of the section.

Answers to the questions posed for the court's consideration

44. The answers to the questions raised on this appeal are, for the reasons outlined earlier in this judgment, as follows:-

1. This question is, I believe, miscast. I am fairly certain that the question which was intended was whether, in light of the requirement that awards of the Tribunal should be calculated by reference to "the principles which govern the measure of damages in the law of tort" it was permissible for the Tribunal/ Court to make a provisional award under s.5 (7) by reference to possible "serious consequences" external to the applicant's medical condition. The answer to that question is yes.
2. Again, I consider this question to be miscast and is the same question as question one only framed differently. The question intended I believe is whether in light of the requirement in s.5 (1) that awards be made on the same basis as those made in the High Court by reference to "the principles that govern the measure of damages in the law of tort" it is permissible for the Tribunal/Court to make a provisional award without making the same provisional on a specified deterioration in the applicant's medical condition. The answer to that question is yes.
3. Question 3 is in truth the same question as question two. However, for the purposes of clarity, the Tribunal/Court may make a provisional award entitling an applicant to return to the tribunal to seek additional compensation in respect only of pecuniary loss, such as loss of earnings as is the position in the present case, without requiring them to demonstrate any change in their medical status.
4. The answer to this question should be clear from the answers to the earlier questions. However, for completeness let me state that the trigger for the applicant's right to seek additional compensation is not any deterioration in his fatigue. The "serious consequence" identified was the possibility that his income generating capacity might be compromised at some future date by reason of ongoing fatigue. He has not been given the right to seek any additional general damages. The evidence was not that there was any possibility that his fatigue might deteriorate but only that as a result of that fatigue he might suffer pecuniary loss. Accordingly, even if his fatigue were to deteriorate and even if it could be established that the same was related to his past exposure to HCV he is not entitled to seek additional general damages as a result.
5. This question has already been answered.
6. If this question is meant to ask whether the court may refuse a provisional award, even where the applicant can satisfy the criteria required for the purposes of s. 5(7) and force an applicant to take a lump sum award, the answer is no. If the evidential proofs for a provisional award are met s. 5(1) cannot be invoked to force an applicant to take a lump sum award.
7. This question has already been answered above.
8. Does not apply.

Concluding concerns

45. There is of course no appeal to this court against the findings of fact made by the High Court judge. This court has jurisdiction only to adjudicate upon the points of law raised for its consideration. That said, for the purposes of dealing with those questions, I have read in full the transcript of the hearing before the Tribunal and also the transcript of the evidence that was before the High Court on the appeal. Having done so, and mindful of the fact that I do not wish to be overcritical of the trial judge who was hearing his first appeal under the 1997 Act, I believe it is important to emphasise that the normal rules of evidence must be strictly applied on any appeal from a determination of the Tribunal.

46. Having read the transcripts I have a real concern regarding the evidence relied upon by the trial judge to permit him to conclude that L O'S's fatigue was probably related to his past HCV exposure. In the Tribunal, the applicant called his consultant gastroenterologist, Professor Billy Burke, to give evidence on his behalf. Given that L O'S had cleared the virus Professor Burke was not willing to state that his fatigue, as a matter of probability, could be ascribed to his past HCV infection, although he said that it had been "attested to by some authorities" that this was possible. While the Tribunal referred to L O'S's symptoms of fatigue as recounted by himself and his mother, it made no finding that his fatigue was caused as a matter of probability by his past exposure to HCV and went on to note that "Professor Burke had not been in a position to state whether the same [his fatigue] is in any way a direct or indirect consequence of his past infection with Hepatitis C".

47. It is perhaps not surprising in such circumstances that Professor Burke was not called to give evidence when L O'S brought his appeal to the High Court. As that appeal was a rehearing, he bore the onus of proving firstly that he had been infected by HCV and secondly the connection between his symptoms of fatigue and his past exposure to HCV.

48. The only medical evidence called by L O'S on the appeal was that of Dr. Liam Fanning, the holder of a PhD in molecular biology,

and his evidence was limited to establishing that L O'S had probably contracted HCV around the time of his birth and had later cleared the virus. That got him over the hurdle in terms of his entitlement to make a claim for compensation. However, Dr. Fanning gave no evidence concerning the symptoms that could be ascribed to past HCV infection or as to any potentially serious consequences that might arise therefrom in the future.

49. The only other medical evidence available to the High Court judge was that of Professor John Crowe, a consultant gastroenterologist, retained on behalf of the Minister. He had prepared two reports, dated November 2009 and March 2013, concerning L O'S's test results. These were admitted into evidence on the appeal by agreement, and no evidence was called by L O'S to contest their content. In his report of 16th November 2009 he opined that since L O'S was not infected he was not "at risk of developing any of the complications of chronic Hepatitis C". He was not at risk of developing cirrhosis or liver cancer. Concerning fatigue this is what he said in the concluding line to his report:

"Furthermore it follows that since he does not have chronic Hepatitis C his symptoms of fatigue cannot be attributed to that diagnosis".

50. Having regard to Professor Crowe's evidence, the only way for L O'S to prove that his symptoms of fatigue were attributable, as a matter of probability, to his prior HCV infection, was to call evidence from a suitably qualified medical witness with the expertise capable of making that connection. Not only was Professor Burke not called, but no other gastroenterologist was called to prove the causative connection, and Dr Fanning was not even canvassed on the issue. That being so, it was not in my view open to the High Court judge to conclude that L O'S's fatigue could be ascribed to his resolved HCV infection. The onus was on L O'S to produce admissible evidence to prove that connection. He was not entitled to rely upon the evidence of an educational psychologist to so conclude, particularly in light of the evidence of Professor Crowe, the only witness qualified to express an opinion on the matter.

51. There is no doubting the professional qualifications of Dr. Kinsella who is an eminent educational psychologist. However, he is not a medical doctor and in particular is not a consultant gastroenterologist. He has no expertise which would qualify him to give admissible evidence as to the causation of L O'S's fatigue in the context of HCV infection. Furthermore his report which posits a connection between L O'S's fatigue and Hepatitis C was contradicted in stark terms by Professor Crowe in his report of the 13th March 2013, wherein he stated that as L O'S did not have Hepatitis C at the time of his leaving certificate his difficulties with that examination could not be ascribed to Hepatitis C.

52. It is perhaps worthwhile setting out what Dr. Kinsella said in the course of his evidence concerning this issue:

"A. OK, I have been involved in over 100 cases for the Hepatitis C HIV Tribunal, obviously some are HIV, some are pro [sic] infections. I'm only going on my own experience, I am not aware of population studies on this. I have had other experts from the UK giving evidence in this, but from my personal experience from these assessments a common theme in the cases of those presenting with Hepatitis C has been this is sure concentration, attention difficulties and fatigue. That is my own personal practice today.

Q. And has that given rise to the kind of difficulties that you are describing the context of this case?

A. Absolutely, very similar issues, not performing to their potential.

Mr Justice Abbott: Even where the Hepatitis virus has cleared?

A. Has cleared, yes."

53. Clearly, Dr. Kinsella was more than adequately qualified to conclude that fatigue rather than a poor IQ or a condition such as ADHD or dyslexia was the cause of L O'S's underachievement in his leaving certificate and the difficulties he was experiencing coping with his third level studies. Further, there was no reason why he should not advise the court that in his own practice he had noted similar symptoms in other patients who had ongoing infection or had cleared past HCV infection. Indeed, he had likely given that type of evidence in other cases where there was medical evidence to support the causative connection between the patient's HCV infection and their fatigue. However, what the trial judge was not entitled to do was to use Dr. Kinsella's evidence as the basis upon which he might conclude that L O'S's fatigue was caused by HCV infection. Dr. Kinsella was not qualified to give that evidence and the evidence of Professor Crowe, who did have the qualifications to give evidence on the matter, was left uncontested by L O'S. The causative connection could only have been proved by a suitably qualified gastroenterologist and none such was called to support the connection. Indeed, I doubt very much whether the court should have permitted Dr. Kinsella give any evidence in circumstances where the medical evidence adduced did not support the causative connection between the fatigue and L O'S's past HCV infection.

54. Thus, had the trial judge taken a proper approach to the evidence in relation to causation he would have concluded, on the balance of probabilities, that L O'S's fatigue was unrelated to his past infection. That being so, there would have been no basis upon which he could have made a provisional award entitling him to return to the tribunal if his income generating capacity were to be adversely affected as a result of tiredness or fatigue caused by his exposure to HCV.

55. Regardless of what I have just stated, this Court has no jurisdiction to interfere with the findings of fact made by the High Court judge in relation to the causation of L O'S's fatigue. However, should fatigue impact on his income generating capacity such that he considers himself entitled to apply for additional compensation under the terms of his provisional award, those terms arguably require him to prove at the time of any such further application that the fatigue which is interfering with his income generating capacity is indeed HCV related.

56. I will conclude by observing that the provisional award made by the High Court judge is not in compliance with s. 5(7) of the 1997 Act in that it does not, in respect of any of the special consequences of HCV identified therein, specify the period within which L O'S may apply for additional compensation in the event of the same occurring. That being so it would be in the interests of both parties that an application would be made to the High Court judge for the purposes of rectifying the situation. Hopefully the same can be achieved by agreement.