

THE HIGH COURT

[2009 No. 7 CT]

[2002 No. 00]

IN THE MATTER OF THE HEPATITIS C COMPENSATION TRIBUNAL ACTS 1997 – 2006, AND

IN THE MATTER OF AN APPEAL PURSUANT TO THE PROVISIONS OF S. 5(15)

BETWEEN

N O'R (AN INFANT PROCEEDING BY HIS MOTHER AND NEXT FRIEND C O'R)

APPELLANT

AND

THE MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on 20th December, 2013

1. This is an appeal from an award of the Hepatitis C Compensation Tribunal established under the Hepatitis C Compensation Tribunal Acts 1997- 2006, whereby the appellant (then a minor, born on 17th February, 1994) was found on the balance of probabilities to have been exposed to, or contracted Hepatitis C either in-vitro or at birth, as a result of transmission from his mother, and was awarded a sum of €125,000.00 and, in the unlikely event that the appellant becomes PCR positive, develops cirrhosis or hepatocellular carcinoma as a direct consequence of his previous hepatic or hepatitis C infection, he will be at liberty to return to the Tribunal to seek extra compensation. This award was subject to being ruled by the High Court. It was rejected by Hanna J.

2. By notice of motion dated 24th July, 2009, the appellant appealed the said award. The hearing of the appeal took place before this Court on 17th June, 2013. The notice of appeal is a general one, insofar as the whole of the award is appealed, and it was instructive for this Court to have the basis for the appeal fully opened by Dr. Craven, junior counsel, and from reading the transcript of the Tribunal hearing, as it is clear that not only is the level of the award of €125,000.00 inadequate, but also by reason of the failure of the Tribunal to consider a further aspect of the provisional award that could arise from economic loss, such as loss of earnings or loss of career opportunities by the appellant in the future. Dr. Craven had argued that this aspect should have been considered further by the Tribunal, through the making of a provisional award by reason of the possibility of such arising.

3. The respondent Minister, represented by Mr. Éanna Mulloy S.C. and Ms. D. Shivanan, explained from the outset that they were contesting the scientific basis upon which a conclusion could be made by the Tribunal that the appellant had contracted hepatitis C or was entitled to any compensation. Dr. Craven objected that this basis of defending the appeal was not permissible insofar as the Minister had not served a cross appeal as he was entitled to do under the Act of 1997. I ruled as a preliminary issue that, having regard to the fact that the notice of motion is a general one, and did not set out the parts of the award to which the appeal did not relate, the matter must proceed on the basis of a rehearing and that the appellant must prove his case with the result that the Minister could defend through its senior counsel as if a cross appeal had been served.

The Issues

4. After some discussion between the court and counsel on both sides in relation to the significance of the respondents reliance on a report from Professor Crowe, which pointed to the lack of positive findings in relation to certain tests and indeterminate results for the other, Mr. Mulloy S.C., conceded that he was not actually saying that the appellant did not have exposure to the hepatitis C virus, and that he was not likely to be visited again by the virus or consequences thereof in a manner which could give rise to compensation. While this comment eased the work on the appeal it nevertheless gave rise to an issue as to whether the ELISA and RIBA tests were more reliable than those put forward by Professor Crowe in his report on behalf of the respondent.

5. The second issue was whether the appellant suffered from the undoubted fatigue and tiredness as a result of his hepatitis C infection or not.

Decision on First Issue

6. Having heard the evidence of Dr. Liam Fanning, who has a PhD in Molecular Biology and is currently a Director of Molecular Biology in a Research Diagnostic Laboratory in the Department of Medicine, UCC, I am satisfied that the methodology behind the ELISA test is more thorough and more likely to give an accurate read out of the state of infection of a person who has hepatitis C, than the test relied upon by the appellant through Professor Crowe's report. While it is not a factor determinative of my decision in this case, it is comfort nevertheless to know that the ELISA test has been incorporated into the new and perhaps more rigorous definition of hepatitis C infection in the Hepatitis C Compensation Tribunal Acts of 1997 - 2006. My conclusion is also reinforced by Dr. Fanning's explanation of the influence of the RIBA test.

7. In relation to the second issue, I find that on the evidence in Professor Crowe's report, and having regard to the transcript of the proceedings before the Tribunal in which Professor Burke gave evidence failing to link the infection to the acknowledged symptoms of tiredness and fatigue of the appellant, I would have been left in a position where I would find great difficulty in establishing causality between the appellant's present fatigue and tiredness and his exposure to hepatitis C. The position was significantly changed by the evidence of Dr. William Kinsella, an educational expert with considerable experience in dealing with persons who have been infected by the hepatitis C virus. Dr. Fanning analysed the educational performance of the appellant as against the moderate but successful performance of his three siblings (who had not been infected with hepatitis C) and his basic intellect measurements, and found that his underperformance academically in the face of great dedication and effort on his part, and assistance by way of grinds from outside sources, was entirely inconsistent with outside factors such as dyslexia or poor mental ability. Dr. Fanning's extensive, (albeit anecdotal in the sense of epidemiological science), experience of persons who had been infected with hepatitis C virus, who had in many cases suffered with the same tiredness and fatigue as was experienced by the appellant in this case, which were unexplained for reasons other than the hepatitis C infection, and was an important factor introduced in the appeal. Having regard to the impressive and balanced nature of Dr. Fanning's evidence, and the credibility of the appellant's evidence and that of his mother, I am satisfied that symptoms of fatigue may, on the balance of probabilities, be attributed to exposure to the hepatitis C virus in the appellant's case.

Conclusion

8. On the basis of the above findings in relation to causality, and on the basis that I find that the award of €125,000.00 made by the Tribunal on the initial aspect of the case is appropriate to cater for the then findings of same, it is possible to consider increasing the award of €125,000.00, now that there is an additional finding, not about a possibility of influence of the hepatitis C exposure, but the probability of the hepatitis C exposure causing the fatigue, to increase the award for past and present fatigue suffering. I am not inclined to award such an increase, as the figure of €125,000.00 is now more financially significant in this post depression era, and there is a possibility of a significant award being made on foot of the second provisional award, which I propose to make on this appeal.

9. I confirm the provisional award made by the Tribunal in relation to the possibility of future infection, but in view of the conclusions that this Court has been able to make on the appeal which, on the evidence of Professor Burke, were probably not open to the Tribunal. I am prepared to make a further provisional award in accordance with the Act, such as was sought on behalf of the appellant by Dr. Craven in the Tribunal. I await submissions from counsel into how the further provisional award should be drafted to ensure proper transparency in the event of same occurring through the appellant suffering loss of earnings or job opportunities in the future by reason of the fatigue and tiredness found to exist in this appeal, if it continues in the future.