

THE HIGH COURT

COURT 10

L O'S

and

THE MINISTER FOR HEALTH AND CHILDREN

Record no. 2007 No. 13

Applicant

Respondent

EXTEMPORE JUDGMENT OF MR. JUSTICE HANNA

DELIVERED ON TUESDAY THE 18TH DAY OF JULY 2017

APPEARANCES

For the APPLICANT:

MS. O. McCRANN SC

MR. R. FITZPATRICK BL

Instructed by:

MALCOMSON LAW

BLOCK C ICELAND HOUSE

ARRAN COURT

ARRAN QUAY

DUBLIN 7

For the RESPONDENT:

MS. E. DALY BL

Instructed by:

MS. A. FOSKIN

CHIEF STATE SOLICITORS OFFICE

OSMOND HOUSE

LITTLE SHIP STREET

DUBLIN 8

MR. JUSTICE HANNA DELIVERED EXTEMPORE JUDGMENT ON TUESDAY,

18TH JULY 2017, AS FOLLOWS:

MR. JUSTICE HANNA: This case comes before me for an assessment of damages. It has a long history. I first dealt with this Applicant, as long ago as 2008.

Having previously delivered judgment on what was essentially a matters of law, the case then made its way from this Court to the Supreme Court by way of case stated. That Court dealt with a preliminary point of law, a not insignificant one, concerning the scope of the hearing of the appeal on foot of a case stated. What brought the matter to that point is succinctly described in the judgment of Clarke J. (See *L O'S v the Minister for Health and Children* [2015] IESC 61 at paras. 1.1 and 1.2).

Before the matter proceeded to full determination of the issues raised in the Supreme Court, an amicable arrangement was arrived at between the parties resolving the legal question which had first confronted us. Thus, the matter now returns to me to resolve the issue of damages.

At the earlier hearing before me and central to the case was the question of whether or not the Applicant, had suffered a recognised psychiatric injury or illness in circumstances such as would satisfy the qualifying features of the judgment of Hamilton C.J. in *Kelly v Hennessy* and in view of the agreement between the parties we do not have to consider the application of that authority or, for example, *Fletcher v The Commissioner of Public Works* [2003] 1 I.R 465.

Mr. Eanna Mulloy SC, on behalf of the Respondent, has acknowledged that the Applicant has suffered a major depressive illness as a consequence of the traumatic exposure to his late father's death, his entitlement to be compensated under the statutory scheme is, therefore, established.

Evidence was heard from the Applicant. Mr. William P Kinsella, Educational Psychologist,

Ms. Susan Tolan, Occupational Therapist, and

Mr. John Logan, Consulting Actuary. The Applicant had previously been treated, inter alia, by Dr. F. P. O'Donoghue, Consultant Psychiatrist. Dr. O'Donoghue has since retired. In addition in the intervening period, the diagnostic tool, DSM IV, has moved on to DSM V and in addition the passage of years assists in giving a better perspective on the impact on the Applicant and his progress through life.

The Applicant's father died on the 18th November 1993 from the consequences of Hepatitis C infection. The deceased was a haemophiliac and this infection resulted from the transfusion of contaminated blood or blood product. The circumstances surrounding this tragic state of affairs fall within the statutory framework under which the Plaintiff seeks, and is entitled, to be compensated.

The Applicant is the middle child of three siblings. All three reacted differently to their father's death. His older sister has achieved distinction both academically and in the Public Service. His younger sister, on the other hand, has failed to reach her potential. She has underachieved in employment terms, having withdrawn to a large extent from the perceived problems of the world. However, I understand that of late she has become engaged in academic pursuits more befitting her undoubted talents. One can only wish her well in her courageous endeavours.

The Applicant was aware of his father's illness over the years, more so in retrospect than he comprehended at the time. However, up to the final stages of his father's illness, he excelled as a student. He showed flair in academic matters related to nature, marine life, et cetera, and the possibility of a significant academic career in matters, such as marine biology, clearly beckoned to him. The Applicant, who was born on the 6th October 1975, sat his Leaving Certificate around the year 1993, at which time his father became profoundly ill. I am satisfied from the Applicant's evidence and from that of Mr. William Kavanagh, Educational Psychiatrist, that his father's serious illness impacted to a significant degree upon the academic performance of L in his Leaving Certificate.

As a consequence, his points tally fell short of what he required to undertake his chosen field of study in his first choices of University College Dublin and Trinity College. He was able to muster sufficient points to undertake a general science degree in Maynooth. This carried with the possibility of proceeding into a more specialised area at a later stage.

He described graphically the trauma of his father's death. He knew that his father was profoundly ill and was going to die. However, the sad event occurred quite suddenly and unexpectedly causing the Applicant to be taken out of a practical class and to be driven by taxi to the hospital in Dublin. He described the journey in the dark, wintry conditions so near to Christmas, in very moving terms.

He arrived at the hospital and was present for his father's last moments. The clinical objectivity of a judgment of the Court cannot properly reflect the deeply harrowing picture painted by L in his testimony. Suffice it to say that this young man at an important and impressionable age was confronted with and had to deal with a situation of almost unimaginable anguish and grief.

After the funeral he returned to Maynooth where he successfully completed his first year exams. Difficulties began to creep in, however, in his second year he became socially withdrawn. He probably abused alcohol. He began experiencing anxiety and panic attacks. He suffered a disturbed sleep pattern. At the end of that year he failed everything, bar biology. He was unable to focus academically. He repeated that academic year but failed the exams a second time. He then made a supreme effort, including attending grinds and managed to pass the repeats. It appears that he had issues with mathematics, rather surprisingly given his scientific bent. However, he got through the exams with a real push. Alas, he did not feel up to third year and his marks were not up to a level such as would entitle him to follow the academically demanding course that he wished to pursue. With sorrow he left Maynooth.

Since abandoning his academic career, L appears to have settled into a career in retail. He works in shops that sell marine animals including tropical fish. In addition to this particular career path, he has an interest in music and apparently plays and composes. He undertook a music course in Ballyfermot at an early stage after he left Maynooth but that does not appear to have worked out for him. He has, unquestionably, suffered psychologically and to a significant degree over the years and continues to do so. He has engaged in bouts of therapy and, particularly, around 2009 and continues this to date. He is engaged in group therapy and seems to be drawing great assistance from this. He lives at home with his mother.

The arrival of a nephew set off a light bulb in his head, as he put it, and he feels he now has a greater appreciation of the bigger things going on in the outside world. Now aged 41, he maintains a number of friends from college. However, many of them have moved into stable familial relationships and lifestyles and have their own children. He has engaged in relationships on and off but without any form of lasting commitment.

A number of expert reports have been submitted dealing with the Plaintiff's illness on the one hand and his academic and employment achievements and presumed shortfalls on the other. Without reciting any of these reports in any detail, I have read and considered the reports of Dr. Elizabeth Cryan, Consultant Psychiatrist, and Ms. Jo Campion, Consultant Psychologist, dated respectively 15th January and

17th February, both of 2017.

I have also considered three reports that were submitted on behalf of the Respondent from

Dr. Kenneth Sinanan, Consultant Psychiatrist, dated respectively 5th October 2016, 6th February 2017 and 29th May 2017.

Reports were also available from the other expert witnesses above referred to. None of the medical experts gave evidence. It is appropriate for completeness that all of these reports be appended to this judgment in due course once the parties are satisfied that they have been appropriately redacted.

However, they are not to be published on the Courts Website with this Judgment.

Mr. William Kinsella, Educational Psychologist, gave evidence confirming his view that the Applicant was a potential high achiever in academic terms. His intelligence assessment indicated a superior range of cognitive ability, placing him in the top three percent of the population. He performed equally well in verbal and non verbal tests. These tests indicated that he should have been able to sustain an academic career and Mr. Kinsella would have expected from the applicant a significantly better Leaving Certificate than he actually achieved.

He attended Marian College, a school with high academic standards. He would have expected the Applicant to achieve in the order of

more than 500 points in his Leaving Cert and feels that his shortcomings in this regard were attributable to his father's illness around the time of his Leaving Certificate. He was in no doubt that, bar the harrowing events, the Plaintiff was on course for academic success in his chosen field.

Dr. Elizabeth Cryan advises us that the Plaintiff is suffering from recurrent depressive disorder as a consequence of his father's death. Severe episodes of depression, particularly in the year following his father's death, were abundant. This impacted upon, for example, his 21st birthday and the Lindsay Tribunal and he has been diagnosed as suffering from chronic dysthymia. He has a recurring depressive disorder, he suffers loss of confidence and this manifests itself in such things as interference with his sleep and social anxiety disorder.

Dr. Cryan is satisfied that the Applicant has suffered from Post Traumatic Stress Disorder and did so for more than two years after his father's death. He continues to suffer from these residual symptoms at the time of his assessment in 2017. He also suffers from recurring depressive disorder and social anxiety disorder as noted. She attributes these to the circumstances surrounding his father's death and it appears that this is something that will accompany the Applicant throughout the rest of his life.

The Applicant has suffered significant loss of opportunity and his social and relationship life has also been seriously and significantly affected.

Dr. Cryan's findings are underlined and substantiated in great measure by the findings of Ms. Jo Campion during her detailed assessment of L. She detailed, in particular, the various criteria set out in DSM V. He manifests a broad range of debilitating, psychological symptoms, including irritable behaviour, reckless or self destructive behaviour, hypervigilance, exaggerated start response, poor concentration and sleep patterns. He has ongoing problems with intrusive memories, his psychological symptoms are chronic in state. She notes that L has taken appropriate steps to address his ongoing problems by seeking professional help. We are in this case uniquely aided by the fact that these matters have been ongoing now for more than two decades and this gives us a clear picture of the effect of these incidents upon L's life.

In summary, the medical experts consulted by the Plaintiff, confirmed that he has suffered significant psychiatric injury. He has suffered from Post Traumatic Stress Disorder and this is now developed into chronic dysthymia, recurrent depressive disorder and social anxiety disorder. He is no longer suffering from the full syndrome of Post Traumatic Stress Disorder but has ongoing chronic psychological problems. His ongoing chronic psychological problems have impacted upon every aspect of his life and, in particular, his career prospects, social interaction and relationship formation.

He has taken medication, including antidepressant and Sir John's Wort, and he has been advised to stay on this. He is in danger of recurring psychological difficulties. The illness and its consequences will be lifelong.

Dr. Kenneth Sinanan, while not appearing to dispute in great measure the diagnosis offered by Dr. Cryan and Ms. Campion, nevertheless queries that they gave sufficient or any weight to findings of health professionals who were actively involved in treating the Plaintiff. He identifies these as including

Dr. Frieda O'Connell, Consultant Psychiatrist and

Dr. Judith McBrinn, Psychotherapist. The basic premise advanced by Dr. Sinanan is that the medical records and history would indicate that L was already manifesting psychological issues in his teenage years, in addition to other traumatic events, including the death of an uncle and an incident of drug abuse.

He wonders, quite legitimately, whether, in the absence of a more holistic consideration of the Plaintiff's psychological background, perhaps too much emphasis is laid upon the undoubted traumatic experience of his father's death. One should weigh in the balance the possibility that L was manifesting a severe but, nonetheless, normal grief reaction into which would, in any event, be factored to the various traumas that he experienced in the course of his life including, for example, the death of his grandmother and some socially disruptive activity at school and so forth.

In the absence of examination and cross examination of expert witnesses, I must take account of the acknowledgment by the Respondent that the Applicant has suffered significant psychological injury as a consequence of his late father's death resulting from a Hepatitis C infection. I think it appropriate that I have regard to the fact that L may have been predisposed to adverse psychological reaction to some degree due to life circumstances as they affected him and absent the input, if I might put it so crudely, of the medical cause of his father's demise.

I approach this aspect of the case from two perspectives. Firstly, we must take the Applicant as we find him at the time of the traumatic event. Given the acknowledgment of the psychiatric injury in accordance with the principles announced in

Kelly v Hennessy, it seems to me that the Applicant must be compensated for the injury and the consequences thereof attributable to his late father's illness and death. If his pre-existing psychological state rendered him less equipped to accommodate and withstand the trauma, then so be it.

Secondly, in measuring the general damages and impact of the events on the Applicant's working career and in measuring the damages generally, it is also appropriate that I have some regard to the matters to which

Dr. Sinanan alludes, to account for what might be determined an ordinary grief reaction in any event and the proposition that the Applicant's career path may not have been as positive in outlook as posited by the Applicant's expert witnesses.

With this in mind, nevertheless, I was greatly assisted by Ms. Susan Tolan. In giving evidence, she drew upon her formidable experience as an occupational therapist. She described L as "rudderless", undoubtedly possessed of far greater ability than his current level of employment would indicate. Since he left university, however, employment imperatives have moved on. Now progressing the intended career path, which the Applicant sought to follow, would require post graduate qualifications to Masters or even PhD standard. Without these, he would have difficulty moving into any more expert line of work than the retail area in which he is currently engaged. Notwithstanding his potential an employer would be inclined to look on past performance as indicative of future performance.

This would undoubtedly count against him.

A retail sales assistant currently earns between €9.15 and €13 per hour depending on experience. An environmental scientist can

expect to earn between €32,000 and €52,000 per annum. Research Scientists can earn between €30,000 and €65,000 per annum. Given the fact that the Applicant is now 41 years of age,

Ms. Tolan is of the view that future employers are, alas, not likely to be impressed by his potential, however significant that might appear on paper.

Again, as ever, Mr. Logan, the Consultant Actuary gave most helpful evidence and presented us with figures to indicate a broad range of sums that might be considered in terms of the actual financial loss to date and the loss to be incurred in the future by the Applicant as a consequence of and related to the injuries which he has suffered.

I now turn to the issue of damages. Having considered all of the matters and bearing in mind all of the medical reports, it appears to me that appropriate sum of general damages to date is a sum of €75,000 and a further sum for general damages in the future of €75,000, giving a total award of general damages in the sum of €150,000.

Turning to the question of loss of earnings to date and to the future. I am satisfied, firstly, that the appropriate actuarial rate of interest in this case is one and half percent and I accept the suggested figure from the evidence of Mr. Logan. It also seems appropriate to me, taking account of the various exigencies of life that I adopt the figure of €52,000 per annum in his calculations as representing a fair figure for potential earnings on the part of the Applicant. In this regard, as I have said, I accept the calculations set out in Mr. Logan's report and I feel assuming this lower figure balances the justice of the situation between both parties. Therefore, that would assume a present loss of earnings in the order of €361 per week.

What I propose to do is to take account of the following matters. Firstly, the exigencies of life. Secondly, the possible frailties indicated in the Applicant's personal, psychological "make up" which might preclude the security of employment which is suggested by some of his expert witnesses. I will also assume that the Applicant will work and would have worked to age 68 rather than age 65 and in order to meet the justice of the situation to take account of all matters, I propose to discount Mr. Logan's figures by a total of one third.

Accordingly, and allowing Courts Act interest, in effect in full, I award loss of earnings to date in the sum of €330,000. I award future loss of earnings in the sum of €275,000. The issue of pension was also raised. This is somewhat more speculative than the loss of earnings claim and I am not entirely persuaded that the Applicant would have made provision to the extent postulated by Mr. Logan. Nonetheless, given the realities with which we all have to deal with today, in particular people working in the private sector, I think it appropriate to make allowance in the sum of €60,000 to meet any shortfall in his future pension.

With regard to future medical costs, the figures already canvassed still reflect what would be a reasonably generous assumption as to job security and it is fair to equally assume that someone in such secure and relatively well paid employment would not be the first in the queue to get any breaks as far as allowances against medical experiences in the future is concerned. So, for that reason I propose to allow a sum of €50,000 against future medical expenses.

The foregoing figures have already been discounted significantly and the overall sum requires no further adjustment to reflect the requirements of *Reddy v Bates*[1983] IR 141 therefore the total award is €865,000.

END OF JUDGMENT