

## THE HIGH COURT

[2004 No. HP16CT]

BETWEEN

D.S.

APPLICANT

AND  
THE MINISTER FOR HEALTH AND CHILDREN AND  
THE HEPATITIS C COMPENSATION TRIBUNAL

RESPONDENT

**Judgment of O'Neill J. delivered the 2nd day of March, 2005.**

1. The applicant in this case applied to the Hepatitis C Compensation Tribunal (hereinafter referred to as the Tribunal) for compensation under two headings first, loss of consortium and secondly for compensation for losses incurred by the applicant as a carer under the provisions of s. 4 sub-s. 1 (d) of the Hepatitis C Compensation Act 1997, (hereinafter referred to as the Act). The applicants claim for compensation for loss of consortium was successful and an award was made to him but his claim for compensation under s. 4 sub-s. 1 (d) of the Act was refused by the Tribunal.

2. The applicant appealed to this court. At the commencement of the hearing of that appeal the Minister for Health and Children (hereinafter referred to as the respondent), surprisingly raised as an issue the question of whether or not the respondent was entitled to cross-examine the applicant in the appeal. I say surprisingly, because appeals as provided for in the Act have been heard by this Court, now, for in excess of five years and I personally have heard in excess of 250 of these appeals, all of which have proceeded on the basis, frequently acknowledged by the respondent that the respondent didn't have an entitlement to cross-examine an applicant.

3. Nevertheless be it late in the day it was quite clear that the respondent had raised an issue of great substance and a separate hearing in relation to same took place on 16th December, 2004.

4. Before considering the submissions of both sides it is well to set out the relevant statutory provisions and part of the Rules of the Superior Courts (No. 7) (appeals from the Hepatitis C Compensation Tribunal) [1998] S.I. No. 392 of 1998.

*"3.(1) On the establishment day there shall stand established a Tribunal to be known as the Hepatitis C Compensation Tribunal to award compensation to claimants referred to in subsection (1) of section 4 in respect of the matters referred to in that subsection or in any regulations made under section 9 in respect of matters referred to in those regulations, in accordance with this Act.*

*(2) The Tribunal may sit in divisions of itself to hear claims before it.*

*(3) The Tribunal shall consist of a chairman ("the Tribunal chairman") and such number of ordinary members as may be prescribed.*

...

*(11) Subject to this Act, the Tribunal shall determine its own procedures and, in so doing, shall as far as is practicable adopt procedures which are informal.*

*(12) The Tribunal shall conduct its hearings otherwise than in public.*

*(13) The Tribunal may appoint its own counsel who may call such expert witnesses to give evidence as the Tribunal may require.*

*(14) The Tribunal may appoint medical or other experts to advise it.*

*(15) In considering and assessing a claim before it, the Tribunal shall rely primarily on written medical or other written reports, and shall make such reports (other than reports submitted by the claimant) available to the claimant concerned at her or his request.*

*(16) The Tribunal may, in addition to hearing counsel for a claimant, in respect of any matter before it seek the assistance of any or all of the following-*

*(a) counsel for any body which represents any class of claimant,*

*(b) counsel for any party against whom allegations alleged to warrant the award of aggravated or exemplary damages are made, or*

*(c) counsel appointed by the Tribunal in relation to any matter which it regards as necessary.*

*(17) Nothing in subsection (16) permits the cross examination of any claimant.*

*(18) A claimant and any witness giving evidence on behalf of a claimant may be asked questions by the Tribunal or by counsel for the Tribunal or by both."*

*"5(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..."*

5. Article 5 of S.I. No. 392 of 1998 is as follows:

*"An appeal or cross-appeal brought pursuant to the Act shall be heard and determined upon affidavit provided that oral evidence may be given to the Court by a claimant or his or her medical practitioner or expert or both or by any other*

*person with the leave of the Court. In relation to any appeal or appeals concerning a joint award made by the Tribunal to a claimant and to his or her spouse, such appeal shall be heard on a joint basis."*

6. Counsel for the respondent submits as follows:

1. That the respondent as the payer of awards has a constitutional right to cross-examine in proceedings in which a substantial pecuniary interest of the State is at stake and in respect of which he is the relevant Minister of State.
2. That the Act is entirely silent in relation to the question of cross-examination of an applicant on appeal to this Court and hence the Act cannot be said to out rule cross-examination by the respondent of a claimant on appeal.
3. Section 5 (17) properly construed has the effect of inhibiting those parties referred to in s. 5 (16) from a cross-examination of the applicant. Cross-examination in this regard is the questioning which attacks a claim for the purposes of identifying the veracity of the claim.
4. Section 5 (18) permits the Tribunal to ask questions for clarification purposes but having regard to the prohibition in sub-s. 5 (17), where the Tribunal appoints Counsel in relation to any matter, questions are confined to questions for clarification and cannot be cross-examination in the sense of the use of information in the possession of the Tribunal to mount an attack on the veracity of the claim.
5. Where the Tribunal does not appoint Counsel pursuant to sub-s. 5 (16), the Tribunal itself may be at large to ask any questions it likes under sub-s. 5 (18).
6. The proceedings before the Tribunal are non-adversarial and single party proceedings. The respondent is not a party to those proceedings but where an appeal is taken by an applicant the Minister is by virtue of Article 3 (2) of S.I. No. 392 of 1998, constituted as the respondent, and for the first time becomes a party to the process.
7. The change on appeal from the non-adversarial procedure in the Tribunal to a normal adversarial procedure in the High Court with the respondent brought in pursuant to the aforementioned statutory instrument as a respondent, and the absence of any express reference in the Act to any curtailment of cross-examination on an appeal, it was submitted all pointed to the Oireachtas intending not to interfere at all with the normal right of cross-examination on appeal.
8. That s. 5 (17) had to be construed consistent with the Constitution, and it was submitted that a blanket removal of the applicant's right to pursue cross-examination on appeal would be unconstitutional, and that insofar as the Act bears on that topic it must be construed in such a fashion as to either not at all interfere with the respondent's right to cross-examine or, recognising that the right to cross-examine is not an absolute right, that any such interference must be proportionate to the objective to be achieved or the interest sought to be protected.

7. For the applicant it was submitted by Counsel as follows:

1. Section 5 (17) clearly and unambiguously prohibits the cross-examination of any claimant. The reference in sub-s. 5 (17) to sub-s. 5 (16) is there so as to remove any doubt that might have arisen from the right of the Tribunal to seek the assistance of Counsel for various parties, that that assistance might, as it would in the ordinary course, include a right to cross-examine.
2. The respondent is at all times a party to the procedure even before the Tribunal, though absent from its hearings. This is clearly implied in s. 5 (15) where it provides that the "Minister may cross-appeal any such appeal".
3. That this court on appeal cannot assume a larger jurisdiction than the Tribunal had and in this regard reliance is placed on the case of *M.O'C. v. Minister for Health* [2001] 1 I.R. 234. It was submitted that the powers of the Tribunal do not include cross-examination of an applicant therefore such a right could not be extended to counsel for the respondent in an appeal. If a respondent had such a right it would be such a significant procedural advantage as compared to the proceedings in the tribunal, as to amount to a greater jurisdiction, which would be contrary to principle and impracticable.
4. As the cross-examination of the applicant is prohibited in the Tribunal, therefore it is prohibited in the appeal, in because that would involve the appellant giving evidence under such conditions, which were not available in the original hearing by the Tribunal, and would be contrary to the spirit of the Act and the appellant cannot be placed in a different position on appeal to that of the original hearing.

**Decision**

8. I am satisfied applying the literal approach to its construction, that s. 3 (17) does prohibit cross-examination in the Tribunal hearing, of a claimant and that the reference to sub-s. 3 (16) in sub-s. 3 (17) is there to remove any doubt that might arise from the availing of the assistance of Counsel by the Tribunal under s. 3(16), as to the extent of that prohibition.
9. The question of whether and to what extent that prohibition effects the position of a party referred to in sub-s. 3 (16) (a), must be reserved to a case in which any of these parties raises that issue.
10. However it could be said that it is unnecessary for me to decide whether the appropriate construction of sub-s. 3 (17) is the one contended for by the applicant or the narrower construction contended for by the respondent because the real issue here is not the extent of the prohibition of cross-examination in the Tribunal but whether or not a similar prohibition on cross-examination in an appeal, exists.
11. The Act itself does not refer at all to cross-examination in an appeal nor is there any reference to this topic in S.I. No. 392 of 1998, i.e. Order 105 A of the Rules of the Superior Court.
12. It was submitted for the applicant that this court on appeal couldn't assume a greater jurisdiction than the Tribunal had and hence if the facility of cross-examination was denied in the Tribunal, it could not be permitted on appeal.
13. In my view this submission confuses jurisdiction and procedure. The jurisdiction of this court on appeal is exactly similar to that of

the Tribunal in the sense that it has the same jurisdiction to make awards of compensation as provided for in s. 5 of the Act, as amended. A right of cross-examination in appeal would not alter that jurisdiction at all. Such a right of cross-examination on appeal would of course be a different procedure to that permitted in the Tribunal, and no doubt the existence of such a right of cross-examination, on appeal in the respondent might be seen as a deterrent to appeal. I would be easily persuaded that for persons who have hepatitis C or HIV infection, the vast majority of whom suffer from a sense of stigma and many of whom have kept their infection secret from all but their closest relatives, the prospect of having to face cross-examination with all that goes with that, namely the building of a case by the respondent against them, would indeed be a very real deterrent to exercising their right of appeal.

14. No doubt it was considerations such as these that led the Oireachtas in the first place to prohibit cross-examination as was provided for in s. 3 (17) of the Act.

15. However as the Act is entirely silent on the subject of cross-examination in an appeal and as the right of cross-examination would not at all enlarge the jurisdiction of this court on an appeal as compared to the Tribunal and bearing in mind the fact that the respondent like every other litigant has a constitutional right to cross-examine in defence of his interest, it would seem to me that it is not open to this court to conclude that the Act of 1997 or S.I. No. 392 of 1998 have had the effect of prohibiting that right on an appeal to this court. It would seem to me to be quite impermissible to construe the complete absence of statutory provision on this subject as having the effect of either eliminating entirely or substantially curtailing a right which though not an absolute right is in general terms a right protected by the Constitution.

16. Accordingly I must conclude that the respondent does have a right to cross-examine the appellant in this case.