

THE HIGH COURT

2009 5 CT

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 5(15) OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT 1997, AS AMENDED BY THE HEPATITIS C COMPENSATION TRIBUNAL (AMENDMENT) ACT 2002**IN THE MATTER OF A CLAIM BY C.M., CLAIMANT; IN THE MATTER OF A HEARING AND DECISION MADE BY THE HEPATITIS C COMPENSATION TRIBUNAL TO THE CLAIMANT, C.M. ABOUT 14TH MAY, 2009, AND IN THE MATTER OF AN APPEAL OF THE CLAIMANT, C.M.****BETWEEN****C. M.****APPLICANT****AND****MINISTER FOR HEALTH AND CHILDREN****RESPONDENT****JUDGMENT of Ms. Justice Irvine delivered on the 18th day of February, 2011****Background**

1. On 6th October, 2000, the applicant applied to the Hepatitis C Compensation Tribunal ("the Tribunal") pursuant to the Hepatitis C Compensation Tribunal Act 1997, ("Act of 1997") for compensation in respect of injuries sustained by her as a result of allegedly contracting Hepatitis C ("HCV") from Human Immunoglobulin administered to her on 9th August, 1977, at the National Maternity Hospital.

2. The applicant's claim was heard by the Tribunal on 14th May, 2009 and it delivered its decision on the same date. The Tribunal concluded that it was satisfied "as a matter of probability, that [the applicant] contracted HCV as a result of the administration of an injection of contaminated Anti-D following the birth of her daughter in 1977 from Batch 244". It went on to make a total award of compensation in her favour in the sum of €400,480. It awarded a sum of €150,000 by way of general damages. In respect of the applicant's loss of earnings claim, the Tribunal awarded a sum of €250,000 for what it described as a loss of employment opportunity. It also awarded the applicant an additional sum of €480 in respect of medical fees.

3. On 11th June, 2009, the applicant, through her then solicitors, Messrs. Corrigan & Corrigan, lodged an appeal against her award. This she did by service of the appropriate originating notice of motion and grounding affidavit. The notice of motion sought an order by way of an appeal pursuant to s. 5(15) of the Act in respect of the decision of the Tribunal of 14th May, 2009. It is clear from the grounding affidavit and also from the fact that causation had been found in her favour that the applicant's appeal was in respect of the award of damages made in her favour. The respondent accepts these facts and has acknowledged that a claimant who successfully establishes that they qualify for compensation having regard to the criteria set out at s. 4 of the Act, can have no reason to challenge that finding in the course of any appeal they may wish to maintain before the High Court.

The Present Application

4. By notice of motion dated 1st April, 2010, the Office of the Chief State Solicitor, acting on behalf of the respondent, issued a notice of motion pursuant to the provisions of O. 122, r. 8, of the Rules of the Superior Courts seeking an order enlarging the time to permit him to "cross-appeal the decision of the Hepatitis C Tribunal of 14th May, 2009". It is this notice of motion that is the subject matter of the Court's judgment. It is clear from the grounding affidavit that what the respondent wishes to cross-appeal is the finding of the Tribunal to the effect that the claimant qualified for compensation under the scheme having satisfied the criteria provided for at s. 4(1)(a) of the Act. Whilst it may not be entirely accurate, I will describe a finding of this nature by the Tribunal as a causation finding for the purposes of this judgment.

5. The respondent's notice of motion is grounded upon the affidavit of Mr. Barry Ryan, solicitor, dated 30th March, 2010, wherein he states that his office was notified of the decision of the Tribunal on 15th June, 2009. He refers to the decision of the Tribunal to the effect that it was satisfied that the applicant contracted HCV from Anti-D Immunoglobulin from Batch 244 in 1977 and states that the respondent's decision to appeal that determination was not straightforward. It involved the assessment of certain legal issues and also the consideration of material of significant scientific complexity.

6. Mr. Ryan in his affidavit states that he received instructions to appeal the decision of the Tribunal on 4th August, 2009, and that he wrote to the appellant's solicitors on 13th August, 2009, notifying them that an appeal would be lodged in due course. At the same time he states that he wrote to Prof. John Crowe, consultant gastroenterologist, seeking his opinion as to whether, on the facts of the case, he was of the opinion that the applicant had contracted HCV as a result of receiving Anti-D from Batch 244 in 1977. He exhibits both the letter to the applicant's solicitors and also the report he subsequently received from Prof. Crowe dated 16th November, 2009. Mr. Ryan maintains that in circumstances where the applicant has been aware since 13th August, 2009, of the respondent's intention to cross-appeal, she will not be prejudiced if the Court extends the time provided for in the Rules to permit the cross-appeal.

7. The applicant's solicitor, Mr. Raymond Bradley, in his affidavit refers to the fact that he came on record on her behalf on 22nd

March, 2010. He maintains that causation was determined in the applicant's favour by the Tribunal and that as a matter of both practice and policy the respondent has invariably accepted the Tribunal's decision on matters of causation. He states that in his thirteen years of dealing with these cases, the respondent has never served a notice of cross-appeal in relation to causation. In any event, he maintains that the time for a cross-appeal expired on 15th July, 2009, and points to the fact that the decision of the respondent to appeal was made outside the one month period provided for in the Rules. Insofar as reliance is placed by the respondent on the letter of 13th August, 2009, he submits that that letter is not a proper notice of cross-appeal. Order 105A, r. 4(1)(iv) provides that where a cross-appeal is brought by the respondent, the notice of cross-appeal should be verified by an affidavit setting out concisely the grounds of appeal and exhibiting any material relevant to the cross-appeal.

8. Mr. Bradley also relies upon the fact that even after the expert report was belatedly received on 16th November, 2009, a further significant period of time was allowed to elapse before the motion seeking the extension of time to appeal was issued on 1st April, 2010.

9. Mr. Bradley states that the legislation was designed to provide certainty for claimants regarding any potential cross-appeal that might be brought by the respondent and that his delay in seeking to challenge causation in this case has further aggravated the consequences for his client of her past exposure to HCV. As a matter of law, Mr. Bradley maintains that the applicant has at all stages made it clear that only the issue of quantum is to be pursued on her appeal. In these circumstances, he maintains that as a matter of law the respondent cannot rely upon the applicant's notice of appeal for the purposes of seeking to put causation in issue. He contends that the proposed appeal is accordingly misconceived.

The Submissions of the Parties

10. Both parties, in the course of the present application, made oral submissions to the Court and also delivered written legal submissions.

The Respondent's Submissions

11. In urging the Court to exercise its discretion in the respondent's favour, Mr. MacEochaidh S.C., relied upon the seminal decision of Lavery J. in *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170. He referred to the three matters which Lavery J. concluded were proper matters for the consideration of the court on an application to extend the time for an appeal. He submitted that that decision was authority for the proposition that the court's discretion on this application was a free one to be exercised against the backdrop of all of the relevant circumstances of the case. Counsel also relied upon the decision of McCarthy J. in *Bank of Ireland v. Breen* (Unreported, High Court, McCarthy J., 17th June, 1987) where he referred to the three conditions set out by Lavery J. in *Eire Continental* as being a useful guide to the manner in which the court should exercise its jurisdiction, but where he stated the court must look to all of the circumstances of the case including whether or not prejudice would be visited upon the prospective respondent if the application were allowed. Mr. MacEochaidh also relied upon the decision of Geoghegan J. in *Brewer v. Commissioners of Public Works in Ireland* [2003] 3 I.R. 539 and the decision of Henchy J. in *Hughes v. O'Rourke* [1986] I.L.R.M. 538, in support of his submission that the courts have tended to exercise their discretion to extend the time for the bringing of an appeal in a fairly liberal manner.

12. Applying these principles, Mr. MacEochaidh submitted that the fact that the respondent had not formed his intention to cross-appeal within the time permitted by the Rules, and was not in a position to demonstrate the presence of some "mistake" as advised in *Eire Continental*, was not fatal to his application. He submitted that the applicant was on notice of the intended cross-appeal from 13th August, 2009, namely six weeks after the Tribunal's decision, and that she had not demonstrated any additional prejudice which would be visited upon her by reason of the delay of the respondent in bringing the present application.

13. On the facts of the present case, Mr. MacEochaidh submitted that some greater degree of latitude should be granted to the respondent in circumstances where this was the first time he decided to exercise his right to cross-appeal a decision of the Tribunal on causation. He had not been a party to the proceedings before the Tribunal and had required expert medical advice prior to making that decision.

14. Counsel submitted that the wording of s. 5(15) of the Act of 1997 permitted the respondent to cross-appeal the decision of the Tribunal in respect of causation where a claimant appealed his/her award in accordance with section 5(9). If the Court concluded that the wording of the section was ambiguous or equivocal, he submitted that the Court should construe the section having regard to the provisions of the entire Act. The long title, he submitted, makes it clear that the statutory scheme is to be confined to those who have contracted HCV in the manner specified in s.4 and that it could not have been the intention of the Oireachtas to put beyond the scrutiny of the court a decision of the Tribunal on causation. Otherwise a fundamental error made could not be corrected. The right of the respondent to cross-appeal was, he maintained, a critical safeguard particularly in circumstances where the respondent, not being party to the proceedings before the Tribunal, cannot contest whether or not the applicant is a person who properly qualifies for compensation under s. 4 of the Act.

The Applicant's Submissions

15. Mr. Danaher S.C., on behalf of the applicant, submitted that the respondent had failed to satisfy any of the guiding criteria set out in *Eire Continental*. The decision to appeal was not made within the time prescribed. Neither had the respondent established anything in the line of a "mistake" within the meaning of that decision justifying the failure to lodge the notice of appeal within the permitted time. As to the third of the criteria advised of by Lavery J. in *Eire Continental*, he submitted that the report of Prof. Crowe did not demonstrate an arguable ground of appeal as his report did not explain how the evidence of Prof. Hegarty, which had been accepted by the Tribunal, might be reversed on appeal. He submitted that the delay was unconscionable and there were no good reasons which would justify the Court exercising its discretion to extend time. The delivery of the letter notifying of an intended appeal was late. There was then a further delay until such a time as Prof. Crowe's report was obtained on 16th November, 2009. Thereafter, there was a third period of delay namely from 16th November, 2009, to 1st April, 2010, in respect of which no valid explanation has been offered on affidavit.

16. Leaving aside the Court's discretion to grant an extension of time to allow for a cross-appeal, Mr. Danaher submitted that the Act does not invest the High Court with jurisdiction to entertain, by way of cross-appeal, an appeal against a decision on causation made in favour of a claimant. He maintained that the provisions of s. 5(15) of the Act confine the respondent to a right to cross-appeal, the issue which is made the subject matter of the appeal which in this case was the award of compensation.

The Principal Issue to be Determined by the Court

17. The principal matter that the Court must consider on this application is whether or not the respondent enjoys a legal entitlement to maintain a cross-appeal in respect of the causation finding made by the Tribunal, having regard to the claimant's decision to appeal the award made in her favour by the Tribunal on 14th May, 2009. If the Court does not have jurisdiction to entertain such a cross-appeal then the issue of the Court's discretion, which normally arises for consideration under O. 122, r. 7, is irrelevant. The Court can

only grant an extension of time if it is satisfied that the intended appellant has a good ground of appeal which he/she cannot have if the Court has no jurisdiction to entertain that appeal.

The Act of 1997 and the Relevant Provisions

18. A non-statutory scheme to compensate those who had contracted HCV from the use of Human Anti-D Immunoglobulin or whole blood or other blood products in Ireland was established on 15th December, 1995. That scheme was replaced on 1st November, 1997, by the statutory scheme provided for in the Act of 1997, that being the Act under consideration in this judgment. It is important to note that the a claimant under the non-statutory scheme enjoyed no right of appeal in respect of any decision made by the non-statutory tribunal and neither had he/she a right to claim aggravated damages in any circumstances. These facts had given rise to publicly expressed grievances by many of those entitled to compensation. The purpose of the Act of 1997, which rectified both of the aforementioned deficiencies, was to deliver a fairer and more just method of compensating those infected with HCV through no fault of their own.

19. The Rules of the Superior Courts relevant to all appeals from decisions of the Tribunal, as provided for in the Rules of the Superior Courts (No. 7) (Appeals from the Hepatitis C Compensation Tribunal) 1998 (S.I. No. 392 of 1998), are to be found in Order 105A. These came into effect on 23rd October, 1998. The Act of 1997 was later amended in 2002, principally for the purpose of extending the statutory scheme to persons who had contracted HIV from blood products in the State. That legislation also significantly widened the nature of the claims that could be maintained before the Tribunal.

20. Since the issues before the Court are largely concerned with the interpretation of the Act of 1997, I feel that it may be of some assistance to refer briefly to certain aspects of that Act prior to considering the provisions of s. 5(15) thereof.

21. The persons who may maintain claims under the Act of 1997 are identified at s. 4, as are the types of claims that may be brought before the Tribunal. That section makes it clear that a claimant is only entitled to an award of compensation if he/she has been positively diagnosed as having HCV and he/she must satisfy the Tribunal, on the balance of probabilities, that the HCV so diagnosed resulted from the use of Human Immunoglobulin Anti-D within the State. A claimant is also entitled to apply to the Tribunal to have it assess the aggravated or exemplary damages to which he/she is entitled as of right under the Act or he/she may opt, in the alternative, to accept an amount equivalent to 20% of their total award as aggravated damages in accordance with the provisions of s. 11 thereof.

22. Of further interest to the issue under scrutiny by this Court is the fact that the Tribunal, under s. 3, is given wide ranging powers. These include the right to appoint medical or other experts to give it advice and to appoint its own counsel who may then call such expert witnesses to give evidence as the Tribunal may require. It is also entitled to seek the assistance of counsel for any party against whom allegations alleged to warrant the awarding of aggravated or exemplary damages are made. In addition, the Tribunal can also make decisions which are not awards within the meaning of s. 5(9) of the Act and these include decisions to require the attendance of witnesses and/or the production of documents. Of further significance is the fact that the respondent is not a party to any claim for compensation made under section 4. Hence, insofar as causation is concerned, this issue is dealt with on the basis of the evidence advanced on behalf of the claimant, subject to such advice as the Tribunal may receive or evidence that it may direct be called by counsel retained on its behalf.

23. It is s. 5 of the Act which deals with the rights of those affected by any decision or award made by the Tribunal. The section also deals with the various appeals provided for within the statutory scheme.

24. Section 5(9)(a) provides as follows:-

“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)*.”

The right of appeal provided for in this section is confined to an appeal against an award of compensation and does not include the right of an unsuccessful claimant to bring an appeal against the Tribunal's decision to refuse to make an award.

25. Of critical significance to the present application is the wording of s. 5(15) which includes the right of cross-appeal relied upon by the respondent as the basis for the present application. The section provides as follows:-

“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.”

This section embraces the right of a claimant to appeal an award made by the Tribunal under s. 5(9)(a) of the Act. It also gives them the right to appeal against any other decision made by the Tribunal such as a decision to reject a claim on the grounds that it was not satisfied he/she had been diagnosed positive for HCV in a manner entitling him/her to compensation under the Act.

26. Section 5(16) is also of importance insofar as, save for the right of cross-appeal referred to, this is the only right of appeal given to the respondent under the Act. The section provides:-

“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.”

27. Under s. 8 of the Act, the respondent is given a right to make arrangements to provide for the settlement of any claims brought before the Tribunal.

Rules of the Superior Courts

28. The relevant rules governing the appeal's procedure as provided for in the Act came into effect on 23rd October, 1998, and are to be found in O. 105A of the Rules of the Superior Courts. Whilst these rules cannot be used for the purposes of seeking to interpret the Act, I will refer to them as they are of relevance to the submissions of the parties, to my conclusions and also to the decision of Geoghegan J. in *D.B. v. Minister for Health* [2003] 3 I.R. 12, to which I will later refer.

“ ORDER 105A

APPEALS FROM THE HEPATITIS C COMPENSATION TRIBUNAL

1. An appeal to the High Court under section 5(15) or under section 5(16) of the Hepatitis C Compensation Tribunal Act, 1997 ('the Act') shall be brought by way of originating notice of motion.

2. (1) Where an appeal against an award is brought by a claimant, such notice of motion shall be issued within one month from the date of receiving notice of the making of the award or within such greater period as may be prescribed by the Minister.

(2) Where an appeal against a decision of the Tribunal is brought (other than an award) such notice of motion shall be issued within one month from the date of the decision.

(3) Where an appeal is brought by a claimant, the Minister may cross-appeal within one month of the date of service of the notice of motion upon the Minister. Such cross-appeal shall be taken by way of a notice of motion. An appeal by any party shall put the matter appealed against fully in issue and a notice of cross-appeal shall not be required on that issue by any other party.

(4) Where an appeal is brought under section 5(16) of the Act by the Minister or a relevant agency, such appeal shall be brought within one month of the date of the making of the award of aggravated or exemplary damages.

3. (1) Any notice of motion appealing any award or other decision or cross-appealing an appeal brought by a claimant shall be served by pre-paid ordinary post.

(2) Where an appeal is brought by a claimant or by a person who is appealing an award under section 6(3)(e) it shall be served upon the Minister and also upon any relevant agency, where appropriate. The Minister and such relevant agency (if any) shall be the respondent(s) in the appeal.

(3) Where an appeal is brought by the Minister or by a relevant agency it shall be served upon the claimant and upon the Minister if he is not bringing the appeal or upon the relevant agency if it is not bringing the appeal, as appropriate.

(4) In every appeal the person bringing the appeal shall serve a copy of the appeal on the Tribunal.

4. (2) Every notice of motion bringing an appeal shall be grounded upon the affidavit of the appellant, and on such other affidavit or affidavits as appears appropriate and every cross-appeal by the Minister shall be grounded upon such affidavit or affidavits as may be filed on the Minister's behalf. Any respondent to an appeal may file an affidavit in reply thereto within 28 days of receipt of such notice of appeal or within such further time as the Court may allow.

(4) Where a cross-appeal is brought by the Minister, it shall be verified by affidavit which shall set out concisely the grounds of any such appeal and shall exhibit the relevant material relating to such cross-appeal. The appellant may file a replying affidavit within 28 days of the receipt of notice of such cross-appeal."

29. It is noteworthy that in the aforementioned rules the statutory time limit provided for in s. 5(9) of the Act, which applies to a claimant who wishes to appeal their award, is carried through in O. 105A, rule 2(1). That time limit, being one which is prescribed by statute, may not be extended by the court in the exercise of its discretion. Consequently, if a claimant is late in appealing their award the court cannot grant him/her an extension of time within which to appeal. By way of contrast, no statutory time limit has been set for the cross-appeal provided for in s. 5(15) and it is governed by the period set out in O.105A r.2 (3) which, not being a period prescribed by statute, can be extended by the court in the exercise of its discretion.

Interpretation of Sections 5(9) and (15)

30. The central question that falls to be decided on this application is the extent of the cross-appeal afforded to the respondent under s. 5(15) of the Act. Can the respondent challenge by way of cross-appeal the preliminary causation finding of the Tribunal which qualifies a claimant for compensation if he/she decides to appeal their award?

31. In seeking to construe the provisions of s. 5(15), the first decision I have to make is whether or not that provision is obscure or ambiguous or whether, on a literal interpretation, it can be considered either to be absurd or amounts to a provision which fails to reflect the plain intention of the Oireachtas. If it falls into any of these categories, the Court should then try to construe the provision in a manner that reflects the clear intention of the Oireachtas if that can be gleaned from the Act as a whole. If the interpretation of the provision is still at that stage unclear other rules of construction may be deployed. If, however, the provision is not obscure or ambiguous and the words are clearly capable of only one meaning, even if the provision may prove to be harsh or perhaps contrary to common sense, I must nonetheless apply the law as it stands. To do otherwise would be to usurp the role of the legislature. I am not entitled to commence my interpretation of the section by looking at the entirety of the Act and then, having considered concepts such as fairness or equity, to adopt my own subjective view as to the meaning of the words in the provision.

32. In construing s. 5(15) of the Act, the Court must be guided by the provisions of s. 5 of the Interpretation Act 2005 ("the Act of 2005") which provides as follows:-

"(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction) –

(a) that is obscure or ambiguous, or

(b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of –

(i) in the case of an Act to which *paragraph* (a) of the definition of 'Act' in *section 2(1)* relates, the Oireachtas, or

(ii) in the case of an Act to which *paragraph* (b) of that definition relates, the parliament concerned,

the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

33. Prior to the enactment of the Interpretation Act 2005, Denham J. took much the same approach as is now required by statute when construing various sections of the Act of 1997 in the course of her judgment in *D.B. v. Minister for Health* [2003] 3 I.R. 12, where she described her approach in the following manner:-

"In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blayney J. in *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the Acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are clear and unambiguous they declare best the intention of the legislature. If the meaning of the statute is not plain, then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes should be construed according to the intention expressed in the legislation and that the words used in the statute declare best the intent of the Act. I took a similar approach in *M.O'C. v. Minister for Health* [2002] 1 I.R. 234, holding that it was well established that in construing statutes, effect should be given to clear and unambiguous words, for the words of the statute best declare the purpose of the Act. In addition, in that case, I noted that a purposive approach would have yielded a similar result."

34. In *D.B.*, Geoghegan J., in considering the very same section of the Act of 1997, also considered the extent to which reliance might be placed by the court, when interpreting provisions of the Act, upon the earlier non-statutory scheme. At p. 58 of his judgment, he stated as follows:-

"In my opinion when a legislative scheme replaces a non-legislative scheme and where there are obvious similarities of wording between the two schemes, the non-statutory scheme is for all practical purposes a legislative antecedent and part of the legislative history. It can, therefore, be considered in aid of interpretation."

35. Having considered the provisions of s. 5 and in particular s. 5(15) of the Act of 1997, I have come to the conclusion that s. 5(15) is somewhat obscure and ambiguous such as to require it to be construed, if possible, by reference to the plain intention of the Oireachtas to be ascertained from the Act as a whole.

36. One of the reasons why the provision is ambiguous is due to the use of the term "cross-appeal" in section 5(15). The concept of a cross-appeal is something which is borrowed from civil procedure and I know of no example in civil proceedings before the courts where a party enjoys a right of cross-appeal when he/she does not in any event enjoy the same right by way of appeal. It is usually the timing of the steps taken by the opposing parties after a decision is made that ends up determining whether an aggrieved party becomes the appellant or the cross-appellant. It is common case that the respondent, under the terms of this Act, has been given no right to appeal any decision made by the Tribunal, save for his right to appeal an award of aggravated damages as specifically provided for at section 5(16). To me, the words in the section do not clearly demonstrate the right of the respondent to raise an issue on a cross-appeal or so to speak by the backdoor, which he is not clearly entitled to do by way of stand-alone appeal or by the front door.

37. Section 5(15) specifically provides that the "Minister may cross-appeal any such appeal". What constitutes the "appeal" as referred to in that phrase is not particularly clear and to my mind the section is capable of ambiguity.

38. On one interpretation, what the respondent appears to have been granted is the right to cross-appeal the claimant's "appeal", rather than the "decision" of the Tribunal. The wording of the section can be interpreted as confining the respondent to a right to engage with the claimant on his or her complaint rather than affording him an opportunity to open up any other aspect of the Tribunal's decision. Following this line of thought, it can be asserted that an appeal against an award under s. 5(9) is an assertion or complaint that the amount awarded was insufficient and does not include any appeal against or complaint about the preliminary finding of the Tribunal on causation. The fact that the appeal results in the award being rejected does not mean that the decision of the Tribunal on causation is negated. Even, which is doubtful on any interpretation of the section, if causation has to be established before the High Court on appeal, the respondent has been given no right to challenge the claimant's evidence on that issue but may, if he lodges a notice of cross-appeal, make any case he wishes on quantum including one for a lesser sum than was initially awarded by the Tribunal.

39. The alternative interpretation of the section is that once a claimant serves a notice of appeal against their award, he/she are deemed to have rejected that award as per the provisions of section 5(9)(b). If it can be stated that the rejection of the award amounts to the rejection of the whole decision of the Tribunal, then the claimant's "appeal" under s. 5(15) may then be construed as an appeal by the claimant against that decision including causation, thus opening the section to the interpretation that the respondent may then cross-appeal on that issue.

40. There is only one case which is of some assistance to the Court in its decision as to the correct interpretation of the respondent's right to cross-appeal as provided for in section 5(15). That is the decision of the Supreme Court in *D.B.* to which I have earlier referred. In that case, the judgments of the Court scrutinise the nature of an appeal against an award of compensation by a dissatisfied claimant both in the context of the Act itself and the Rules of Court that govern such appeals.

41. In *D.B.* the claimant had sought to appeal his award to the High Court well outside the one month statutory time limit provided for under section 5(9)(a). He maintained that his award was actually made up of a bundle of decisions each of which he was entitled to appeal under section 5(15). Accordingly, he maintained that his appeal was not caught by the one month statutory time limit which is confirmed in O. 105A, rule 2(1). He argued that the relevant decisions were entitled to the benefit of the time limits prescribed for appeals against other decisions of the Tribunal under section 5(15). These were governed not by a prescribed statutory time limit but by the time limit provided for in O. 105A, r. 2(2) and which time limit could be extended by the court under Order 122.

42. McGuinness and Geoghegan JJ. considered in some detail the nature of an award made by the Tribunal under section 5(9). Each concluded that an award of compensation under s. 5(9)(a) was a single decision which resulted in one award. The fact that an award might include separate amounts in respect of general damages and other categories of special damages still resulted in a single award under the section. The award could not be considered to comprise a "bundle of decisions". Geoghegan J. concluded that the only "appealable decision" which the claimant was entitled to maintain was against his award and that appeal was subject to the statutory

time limit. He went on to support his decision by reference to the rules governing the appeals procedure which, insofar as time limits are concerned, treat an appeal against an award entirely differently from other appeals under the section. The learned judge pointed to the fact that O. 105A, r. 2(1) follows the intention of the legislature insofar as it specifically requires a claimant who wishes to appeal his/her award to do so within one month or within such greater period as might be prescribed by the respondent. Appeals against awards are subject to rules which are different from those that apply to other categories of appeal which get the benefit of the time limit fixed by O. 105A, r. 2(2) which may be extended by the court in the exercise of its discretion.

43. Taking some guidance from the decisions of the Court in *D.B.*, it is certainly arguable that if an "award" is a single decision, and not a bundle of decisions, then that single decision must be the quantum of the award. Hence, the "appeal" within the meaning of s. 5(15) must be confined to the issue of damages only, thus restricting the respondent's cross-appeal to that same issue. However, that construction seems somewhat at odds with the fact that s. 5(9)(b) provides that where a claimant appeals his/her award he/she is deemed to reject that award. If an award is a single decision, can it then be said that the award includes the preliminary finding of the Tribunal on causation such that in rejecting the award, the matter of causation is at large on the appeal, thus permitting the respondent to cross-appeal on that issue?

44. For the aforementioned reasons, I have come to the conclusion that the words used in s. 5(15) are somewhat obscure and ambiguous. Indeed, counsel for the respondent, in his submissions to the Court, did not seriously seek to contend otherwise. This being so, and having regard to the provisions of the Act of 2005, I have sought to interpret s. 5(15) by paying particular regard to the intention of the Oireachtas insofar as it can be gleaned from a consideration of the Act as a whole and its long title. Having done so and having paid particular regard to the submissions made by Mr. MacEochaidh, I am satisfied that it was never the intention of the Oireachtas that the respondent would enjoy a right to cross-appeal a decision of the Tribunal on causation where a claimant lodged an appeal against his/her award. I will briefly now set forth my reasoning.

45. The first and most basic point to be made is that if it was the intention of the legislature, as suggested by Mr. MacEochaidh S.C., to provide the respondent with a procedure which would safeguard against flawed or irrational decisions of the Tribunal on causation then it would have been a straightforward matter for the Oireachtas to have given the respondent a right to appeal any decision made by the Tribunal in respect of causation. It is agreed that there is no such provision in the Act. Ideally, such a right might conveniently have been inserted immediately prior to the present section 5(16).

46. Secondly, the Oireachtas quite clearly considered what rights of appeal it was going to afford to the respondent and this is clear from s. 5(16) which sets out the respondent's sole freestanding right of appeal, namely, his right to appeal an award of aggravated damages. Why, if the safeguard described by counsel was required, would a like provision not have been inserted to permit the respondent appeal any decision on causation?

47. It is further the case that the provisions of s. 5(15), if interpreted as suggested by Mr. MacEochaidh, S.C., do not provide the respondent with the type of safeguard which he relies upon to support his submissions. Without a right to cross-appeal on causation, he submitted that fundamental errors made by the Tribunal in respect of causation would be put beyond the scrutiny of the High Court and that this could never have been the intention of the legislature. However, it is clear that s. 5(15) fails miserably to afford the protection required even if interpreted in the manner suggested. The right of the respondent to cross-appeal can only be triggered if the claimant decides to appeal his/her award. Accordingly, irrespective of how flawed or fundamental any error of the Tribunal may be as regards causation, unless the claimant by happenstance decides to appeal his/her award, that error has, in any event, been put beyond the reach of the High Court. Accordingly, to interpret the Act as invited by counsel for the respondent would be to create an anomaly in the legislation. It is also the case that there is simply no logic as to why the Oireachtas would have confined the respondent's right to cross-appeal a decision on causation to those cases where a claimant appealed his/her award of compensation. These two issues have simply no bearing upon each other.

48. I reject Mr. MacEochaidh's submission that the long title of the Act supports his interpretation of section 5(15). The long title reads as follows:-

"An Act to provide for the establishment of a Tribunal to be known as the Hepatitis C Compensation Tribunal to award compensation to certain persons who have contracted Hepatitis C within the State from anti-D immune globulin other blood products or blood transfusion and to provide for connected matters."

49. It does not follow that because only those infected by contaminated anti-D or other blood products may be compensated under the Act that the legislature necessarily intended the respondent to have the right to cross-appeal on causation in the limited category of cases to which I have referred. In looking at the entirety of the statutory scheme, it is clear that the Oireachtas conferred upon the Tribunal very significant investigatory powers. Unlike the High Court, the Tribunal was given the power to appoint its own experts, to take its own medical advice and to engage counsel where appropriate. It seems to me far more likely that it was the intention of the legislature that the Tribunal would be fully equipped to determine the issue of causation subject to the right of appeal afforded to a claimant who was unsuccessful on causation, a right campaigned for by those aggrieved by the non-statutory scheme which had no such provision.

50. Having regard to the powers of the Tribunal, it seems to me that the safeguard which I have been asked to rely upon as a basis for interpreting s. 5(15) in the manner suggested by Mr. MacEochaidh is to be found in the significant powers which the statute has afforded to the Tribunal to ensure that it is in a position to make medically informed decisions on causation. Those powers provide a safeguard in every case that comes before the Tribunal. They have experts available to them to advise them and if necessary question medical evidence advanced by any claimant. There is no logical basis upon which I could conclude that the Oireachtas intended to provide a safeguard against a potentially erroneous decision of the Tribunal on causation in only the small number of cases where a claimant happens to appeal the level of his/her award.

51. The fact that the respondent is not represented before the Tribunal does not strengthen the submission made on the respondent's behalf that s. 5(15) was intended to safeguard against decisions of the Tribunal which might be fundamentally flawed and which were made in the respondent's absence. This argument, once again, must fail because the right of the respondent to redress those decisions cannot be triggered by the respondent himself and he is a hostage to fortune unless coincidentally in the same case the claimant for some reason decides to appeal his/her award.

52. As stated earlier in this judgment, the statutory scheme was introduced in 1997 to seek to redress certain deficiencies that existed in the non-statutory scheme, one of which was the failure to afford a claimant a right to appeal his/her award. The statutory scheme was introduced by the Oireachtas to afford claimants a fairer and more just procedure. Am I now to conclude that, having decided to afford a claimant who is aggrieved at the level of his/her award a right to appeal, the Oireachtas intended that in the event of that right being exercised, the respondent should have the right to respond with an application by way of cross-appeal

destined to deny him/her any compensation at a High Court hearing? Did the Oireachtas intend that a claimant, knowing nothing of any concerns of the respondent regarding causation, might reject his/her award only later to discover that the respondent, on the basis of evidence unknown to the claimant when they rejected their award, would be permitted to submit that evidence to the High Court with a view to disentitling the claimant to any compensation under the scheme? Could the Oireachtas have intended that the respondent should be entitled, so to speak, to hold the 'sword of Damocles' over a claimant because he/she has elected to exercise the right of appeal newly afforded to him/her under this allegedly fairer and more just legislation? I find nothing in the Act as a whole or its long title which would justify me concluding that this was the intention of the Oireachtas.

53. It seems to me that to interpret s. 5(15) in a narrow manner is to build on the rationale for the establishment of this particular statutory compensation tribunal which, as advised by McGuinness J. in *D.B.*, was intended to provide a scheme that could deal with a large number of claims for compensation in a consistent, orderly and reasonably expeditious manner.

54. I am satisfied that there is no rationale to interpreting the section in a manner that permits the respondent to reopen causation on a cross-appeal where an applicant appeals his/her award. This would hugely increase the costs of the statutory scheme which appears to have been designed to reduce litigation before the courts to a minimum.

55. For all of the aforementioned reasons, I have concluded that the section was intended to permit the respondent to cross-appeal in only limited circumstances. Firstly, where a claimant appeals his/her award, the respondent may cross-appeal in the hope of convincing the court to afford a lesser sum than that which was awarded by the Tribunal. In such circumstances, the respondent is cross-appealing the claimant's appeal or complaint that the award was insufficient. Secondly, where a claimant who is unsuccessful before the Tribunal appeals that decision to the High Court, the respondent may cross-appeal that appeal. In such circumstances, the claimant's complaint is that he/she was not qualified for compensation by the Tribunal. The respondent's cross-appeal is directed to that complaint and permits him to contend for the contrary proposition in the course of the appeal. Once again, whilst it might not appear to be necessary under the Act for the respondent to lodge a cross-appeal merely to stand over the decision of the Tribunal, the wording of the section is such that the cross-appeal is to be in respect of the claimant's "appeal" rather than the "decision" of the Tribunal. In such circumstances, the respondent is engaging with the complaint of the claimant rather than the decision of the Tribunal. Hence, the need for the cross-appeal.

56. For these reasons, the Court concludes that it has no jurisdiction to entertain an application by the respondent to extend the time to cross-appeal under section 5(15).

The Court's Discretion

57. Had I been satisfied that the Act gave the respondent a right to cross-appeal the decision of the Tribunal on causation, I would have granted the extension of time sought for the reasons to which I will now refer.

58. The parties do not dispute that the Court has jurisdiction under O. 122, r. 7 to enlarge the time provided for in O. 105A, r. 2(3) for any cross-appeal brought by the respondent. The question for this Court is whether it should exercise its discretion in the relevant circumstances.

59. In *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170, Lavery J. stated that there were certain matters which ought to be properly considered by the Court when deciding whether or not to extend the time to appeal. These were as follows:-

- "1. The applicant must show that he had a *bona fide* intention to appeal formed within the permitted time.
2. He must show the existence of something like mistake and that mistake as to procedure and in particular the mistake of counsel or solicitor as to the meaning of the relevant rule was not sufficient.
3. He must establish that an arguable ground of appeal exists."

60. In addition to the three matters referred to in the last preceding paragraph, Lavery J. stated that the Court must also consider all of the other circumstances of the case and advised as follows:-

"The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."

The conclusion of Lavery J. that the Court's discretion was ultimately a free one to be exercised having regard to the circumstances of any particular case was supported by McCarthy J. in his decision in *Bank of Ireland v. Breen* (Unreported, High Court, McCarthy J., 17th June, 1987), where he described the three guiding criteria set out in *Eire Continental* as being a useful guide for the Court in deciding whether or not to exercise its discretion. He also referred to how the Court ought to exercise its discretion but confirmed that the Court was obliged to consider all of the relevant circumstances of the case, including the issue as to whether or not the putative respondent would be prejudiced should the extension of time be granted.

61. I am satisfied that the matters which were alluded to by Lavery J. in *Eire Continental* and which have been widely discussed in more recent cases, including the decision of Henchy J. in *Hughes v. O'Rourke* [1986] I.L.R.M. and the decision Geoghegan J. in *Brewer v. Commissioners of Public Works in Ireland* [2003] 3 I.R. 539, are of less weight in a case where an application to extend the time to appeal is made by a person who was not a party to the decision which he/she wishes to appeal.

62. If the respondent is entitled to cross-appeal a finding of the Tribunal on causation, his position cannot be equated to that of a party to proceedings before a court who is late in lodging his/her appeal against the court's decision. That party will have been fully engaged in those proceedings. He/she will know what evidence was given, what submissions were made and he/she are likely to have been present with his/her legal advisors when the decision was delivered. In such circumstances the losing party ought to be able to make a relatively speedy decision as to whether or not an appeal should be brought. Accordingly, I accept the submission made by counsel on behalf of the respondent that if he is entitled to cross-appeal in the manner alleged, he should be afforded a degree of latitude in respect of the time limit imposed for the appeal.

63. The respondent, not having been a party to the proceedings before the Tribunal, prior to being in a position to make a decision as to whether or not to appeal, undoubtedly had to seek independent medical and legal advice to enable him to make that decision. Presumably, that advice was sought based upon the transcript of the evidence before the Tribunal. The procurement of the medical report, in this case which is the basis for the cross-appeal, only became available on 16th November, 2009, after a period of delay not within the respondent's control. After receipt of that medical opinion, the respondent presumably, had to take legal advice on the

matter. Accordingly, I believe the respondent in such circumstances should be afforded the type of latitude suggested by Mr. MacEochaidh.

64. In addition to the foregoing matters, whilst there has been substantial delay on the part of the respondent in bringing the present application before the Court, the claimant has been on notice of his intention to cross-appeal since 13th August, 2009. She has not demonstrated, in the course of the present application, any additional prejudice which will be visited upon her if the Court extends the time for the bringing of the appeal. All of her witnesses are available, there has been no loss of evidence and the trial will not be delayed.

65. If it be the case that s. 5(15) permits the Minister to raise causation by way of a cross-appeal, there will be a rehearing on that issue. The hearing will not be an appeal on the transcript from the Tribunal requiring the respondent to establish where the Tribunal went wrong in its original finding. This being so, the report of Prof. Crowe, which has been exhibited in the course of the present application, is sufficient to establish that the respondent has a good ground of appeal insofar as he has demonstrated that he can put evidence before the Court such that could lead the High Court to conclude that, notwithstanding the evidence of Prof. Hegarty, the applicant did not contract HCV by reason of the administration of Anti-D.

66. For all of the aforementioned reasons, if the respondent does, contrary to my interpretation of s. 5(15), enjoy a right of cross-appeal in respect of the issue of causation, I am of the view that on the evidence before the Court that the justice of the case would justify the Court exercising its discretion to grant the extension of time sought. However, as I am satisfied that the respondent does not enjoy that right, this issue does not arise for the Court's determination.

67. For all of the aforementioned reasons, I will decline the respondent's application.