Neutral Citation [2016] IEHC 692

THE HIGH COURT

[2013 7 CT]

IN THE MATTER OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT 1997 AND IN THE MATTER OF SECTION 5 (9) (a) AND IN THE MATTER OF SECTION 5 (15) OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT 1997 AS AMENDED BY THE HEPATITIS C COMPENSATION TRIBUNAL (AMENDMENT) ACT 2002

BETWEEN

W

APPELLANT

AND

THE MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

HEPATITIS C & HIV COMPENSATION TRIBUNAL

NOTICE PARTY

JUDGMENT of Mr. Justice Michael Hanna delivered on the 27th day of October 2016.

1. The applicant in this case is Mr. W who was born on the 9th November, 1941. This case arises from the tragic death of his son, B, one of the two significant bereavements with which we have been concerned in this case, the other being of course the tragic death of the applicant's daughter, J, who died in a road traffic accident at the age of four and a half. Her death clearly impacted cruelly upon the applicant and, of course, his wife and family.

2. This matter comes before the Court by way of appeal from the Hepatitis C & HIV Compensation Tribunal ("the Tribunal"). On 16th July, 2013, the Tribunal made an order awarding the applicant no damages pursuant to Section 4(1) (e) and Section 5(3) (3A) (a) and (b) of the Hepatitis C Compensation Tribunal Act 1997 (as amended) in respect of his proceedings for post-traumatic stress disorder and nervous shock following his son's death. The appeal is brought by the applicant by way of notice of motion dated 14th August, 2013, and the motion is grounded on the affidavit of Raymond Bradley, solicitor for the applicant. The Tribunal refused to award damages, finding on the basis of the evidence given that the applicant had not established a claim for damages under s. 5 (3) (3A) (a) and (b) of the 1997 Act as amended. The Tribunal found that the applicant failed to establish that he had suffered a psychiatric injury "above the effects of normal grief, distress and bereavement." Compensation for loss of society was awarded.

3. It would be invidious to set out in detail the mental anguish and suffering that Mr. W and I have no doubt his wife have been through as a result of the unhappy events that have been recited in this Court, but I will set out very briefly the necessary facts.

Background Facts

4. The plaintiff's son was born a haemophiliac. This condition was managed up to a certain point when he was referred to the care of Dr. C. Through circumstances all too familiar to people in this Court and beyond to the tragic victims of this happenstance, he went on to develop Hepatitis C and HIV. As a consequence of all of this, on top of his already profound ill health, he suffered illness of a great and ultimately lethal kind.

5. It is of note that, up to a certain point, he was managing his illness. He was treated into the 1990s, as we know, up to the date of his untimely death on the 3rd November, 1994, and probably was doing reasonably well according to the lights of that time. The applicant's son did not have available to him the wonderful array of medication and treatment since developed, including by Irish doctors and hospitals, to combat the ravages of the infections that have resulted from the pollution of the blood supply given to various members of the population. The precise circumstances surrounding his death are, of course, significant and relevant given that Section 5(3) (3A) (a) of the 1997 Act (as amended) provides that:-

> "Where a dependant referred to in paragraph (e) or (j) of section 4(1) is the child, spouse, father or mother of the person who died ('the deceased') as a result of having contracted HIV or Hepatitis C, or where HIV or Hepatitis C was a significant contributory factor to the cause of death, the Tribunal may make an award to that dependant in respect of post-traumatic stress disorder or nervous shock if he or she satisfies the Tribunal that he or she has suffered or is suffering from that condition as a result of the death."

6. Mr. W described graphically how, when he dropped his son off in the hospital, nothing was untoward. His son, B, had not been well. This was a normal thing to do in the context of the life they led then. Off went Mr. W to work the next day.

7. The applicant wasn't expecting anything particularly unusual. Then came the phone call from his wife telling him he had to go urgently to the hospital. This was in the days before mobile phones. The applicant described the trip to the hospital, and there being told to wait in the day room (in fact waiting in the corridor), then witnessing the emergency transfer of what turned out to be his son, on a bed surrounded with the paraphernalia of hospital and of emergency, into a lift. The anxiety and worry of that was then compounded by being called in to see his son, not being told precisely what to expect, only to find his son being laid out dead. I have no doubt that this was an utterly harrowing vista which confronted him. His depiction struck me as being almost nightmarish.

Judgment

8. I have listened to and observed Mr. W giving evidence. Taking account of the totality of the background evidence including the pre-occurring death of his daughter, I am satisfied that he was already a highly vulnerable and susceptible individual when he was thrust into the appalling, unfolding nightmare which brought him to confront his son's body. By any measure this was an immense shock. Lest there be any doubt, I am persuaded by and accept without reservation the evidence offered by Dr. O'Ceallaigh and Dr. Cryan, that this amounted to a shock and that this shock was of a dimension more than capable of surmounting any threshold identified by the Act of 1997.

Dr. Sinanan, under cross examination, suggested that shock could be described as a stressor well outside and beyond the normal range of what one might reasonably encounter. That is a gentle way of describing, and in minimalist terms, what I am satisfied happened to Mr. W on the occasion in which he was confronted with his son's corpse. Such shock was described during the hearing as the "gateway" to engaging the remaining criteria of DSM 5 (the Diagnostic and Statistical Manual of Mental Disorders). I am satisfied on the evidence that this gate was flung open wide.

9. The Act of 1997 enables the Court to award damages for post traumatic stress disorder or nervous shock. It would seem on its face to embrace post traumatic stress disorder, which is of itself a medical diagnosis, informed as it is by the diagnostic aid of DSM (now DSM-5), but also encompasses what has, historically, been referred to in legal cases as "nervous shock", described by Denham J., as she then was, as "……..[a]n old term covering post traumatic stress disorder" in *Mullally v. Bus Eireann* [1992] ILRM 722 at page 730.

10. For many years, the issue of the compensation for psychiatric injury has engaged courts throughout the world, not least in this jurisdiction. It is, perhaps, not too difficult a process to identify some psychological ailment "attached" to a visible, concrete physical injury. But dealing with "stand alone" psychiatric injury is more difficult and complex.

11. During the course of this case, I referred to Chief Baron Palles and the approach of the Irish courts in the 19th Century to dealing with this problem. It is worthwhile perhaps to recall the words of Palles C.B. in *Bell v. The Great Northern Railway Company of Ireland* [1890] 26 LR (Ir) 428. In *Bell,* Palles C.B. criticised the decision of the Privy Council in *Victorian Railways Commissioner v. Coultas* (1888) 13 Appeal Cas 222 (PC), an Australian nervous shock case involving railways, a frequent feature of these cases at that time. Palles C.B. stated at page 441:-

> "The judgment [in *Coultas*] assumes, as a matter of law, that nervous shock is something which affects merely the mental functions, and is not in itself a peculiar physical state of the body."

Palles C.B. succinctly criticised the approach in *Coultas*:

"This error pervades the entire judgment."

Thus did he approach and deal with (some might venture "dispose of") the approach of the Privy Council.

12. As quoted on page 669 of the Fourth Edition of McMahon and Binchy's *Law of Torts*, Palles C.B. went on to express the view that:-

> "…as the relation between fright and injury to the nerve and brain structures of the body is a matter which depends entirely upon scientific and medical testimony, it is impossible for any Court to lay down, as a matter of law, that if negligence causes fright, and such fright, in its turn, so affects such structures as to cause injury to health, such injury cannot be 'a consequence which, in the ordinary course of things would flow from the' negligence unless such injury accompany such negligence in point of time'."

13. As noted by Denham J. in *Mullally*, the Irish courts were among the first to identify such psychiatric injury and to determine same to be compensatable. In Chapter 17 Part II of McMahon and Binchy (op. cit.), the learned authors address the approach of the courts on this issue in this jurisdiction and beyond in a comprehensive and accessible manner, plotting the course of a legal debate which, as one might suspect, is far from closed.

14. Section 5(3) (3A) (a) of the Act of 1997 puts the entitlement of the applicant to be compensated beyond the reach of such legal debate. We are solely concerned with the question of whether or not the applicant has established that he has suffered Post Traumatic Stress Disorder or nervous shock. To that question I answer that I am satisfied on the balance of probabilities that the applicant has been so injured and is therefore entitled to be compensated.

15. I am satisfied from the evidence of Dr. O'Ceallaigh and Dr. Cryan to accept their diagnosis of post traumatic stress disorder in this case. I am fully aware of the views expressed sincerely and with utter propriety by Dr. Sinanan and earlier by Dr. O'Donoghue and Ms. Jo Campion, both of whom I should stress are operating under DSM 4 rather than DSM 5.

16. I feel part of the reason why I should prefer the evidence of Dr. Cryan and Dr. O'Ceallaigh is the fact that firstly, there is collateral reportage from Mrs. W which I think has had a significant and reinforcing effect on their views, which was not previously available to Dr. O'Donoghue, nor was the evidence of Mr. W or Mrs. W available to the Tribunal when they heard this matter.

17. Ultimately, it would appear that the unanimous view of the doctors is that the DSM is an invaluable protocol and tool, but it is not a mere checklist. It is not like the use of mnemonics to try to remember the Settled Land Acts or who succeeded who in the pre-Succession Act days under intestacy. It is not that or anything like that. It is a valuable tool, but in my view, one must weigh heavily the essential and important ingredient of the diagnosis of an experienced medical professional coming to an informed view aided, as I say, by the collective wisdom and guidance to be found in DSM 5 in this case, or indeed in ICD 10 which is occasionally mentioned, but seems to lag somewhat behind DSM-5 in popularity of reference when evidence is given before this Court..

19. The views of Drs. Cryan and O'Ceallaigh, as noted, are informed and fortified by the collateral evidence of Mrs. W; the DSM 5, and indeed their review of the earlier reports of Ms. Jo Campion and Dr. O'Donoghue, whose views are not that widely different to what they gave in evidence here themselves.

21. I am not in any way inferring or suggesting that the opinions and diagnosis of Dr. O'Donoghue, Ms. Campion or Dr. Sinanan are wrong, far from it, but it seems to me that the views expressed by Dr. O'Ceallaigh and Dr. Cryan more easily accord with and explain my understanding and reading of Mr. W on hearing his evidence.

22. As I have already noted, due to reasons beyond anyone's control, the Tribunal did not have the advantage of hearing the evidence of Mr. W, or indeed that of Mrs. W who was taken ill around that time.

23. This is a rehearing and it is entirely appropriate and correct that I receive fresh evidence. However I am conscious of guarding against abuse where the Tribunal might be used as a practice run for cases where someone, disappointed by the outcome there, shops around for views that were not forthcoming before the Tribunal. The Court must of course guard against any abuse of that nature. This particular case is far from that. What happened here was in my view, an illuminating and vigorous debate with the professional witnesses being of great assistance to the Court, and I am quite sure to everybody else in it, in debating this complex issue.

24. I am satisfied, without going through it in detail, that the various indices set out in DSM 5 have been met and I accept the diagnosis in this case. In those circumstances, that diagnosis is attributable to the shock or the experience that Mr. W had, and entitles him, in my view, to compensation.

25. I do not want to dwell on the difficulties that the applicant has experienced but he has now lived over 20 years with the awful reality of what occurred. He has had his own coping mechanisms, but I am satisfied that he has suffered sleeplessness, irritability, interference with the quality of his life and his ability to do his work, in that he was visiting the bottle too often too rapaciously over the years, and that his life was genuinely, seriously and significantly affected by this. It is perhaps a mark of the man that he was that through his own inner strength he was able to cope at all, given the awful experience, set against the tragedy of previously losing his daughter. That is the man who came to this particular tragedy and it is part of the character that I have to compensate.

26. I am satisfied that the applicant suffered moderate post traumatic stress disorder. It is not the most serious case, but it is a significant case. In the circumstances, it appears to me that I should measure the compensation in the sum of €125,000.

27. There was a point made during the course of the hearing that it having been suggested to Mr. W that he undertake therapy to assist him in his difficulties, he did not do so. I think this was a valid point to make, albeit the suggestion did come very late in the day, again through nobody's fault. One can understand and accept that given older views on counselling and therapy, that there might be a certain reluctance among people to undertake therapy. Hopefully that reluctance is now diminishing.

28. Nevertheless, even though it came late in the day, I am satisfied on the evidence that adopting this treatment would have been of some benefit to Mr. W. He is obligated like any other applicant to take steps to mitigate his own loss. The fact that he failed to do so, though understandable, is nevertheless something that must be borne in mind in terms of damages. To that end, I would propose to reduce his damages by the sum of €15,000 and therefore to award damages in respect of post traumatic stress disorder in the sum of €110,000.