THE HIGH COURT

[2017 No. 1 C.T.]

N THE MATTER OF AN APPEAL PURSUANT TO SECTION 5 (15) OF THE HEPATITIS C COMPENSATION TRIBUNAL ACT, 1997, AS AMENDED

AND

IN THE MATTER OF AN APPEAL BY B. D.

AND

IN THE MATTER OF A DECISION OF THE HEPATITIS C AND HIV COMPENSATION TRIBUNAL OF THE 30TH MARCH, 2017, REFERENCE 1685/97

BETWEEN

B. D.

APPELLANT

AND

THE MINISTER FOR HEALTH AND CHILDREN

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 19th day of January, 2019

1. These proceedings come before the Court by way of an appeal from a decision of the Hepatitis C and HIV Compensation Tribunal ("the Tribunal") delivered on the 30th March, 2017, whereby the Appellant was awarded €150,000 in general compensation and €50,000 in respect of pecuniary loss for the consequences of decompensated cirrhosis of the liver caused by the Hepatitis C Virus. (HCV). The Appeal is brought pursuant to s. 5 (15) of the Hepatitis C Compensation Tribunal Acts 1997-2006 ("the Acts").

2. The grounds on which the Appellant, B.D, seeks a variation of the award are that it fails to fairly and reasonably reflect the devastating consequences which decompensated cirrhosis has had and will continue to have on every aspect of his life, including the foreshortening of life itself and the probability that he will develop Hepatocellular Carcinoma. He also seeks a variation of the pecuniary loss award on the grounds that the amount thereof was perverse and was founded on an erroneous understanding and application of the law by the Tribunal. The Court will allow the appeal for the reasons that follow.

3. It is accepted by the Minister that B.D is entitled to an award for his pecuniary and non-pecuniary loss; in controversy, however, is the quantification of the loss. The Appeal raises important matters of principle and law regarding the assessment of compensation. In the interest of a comprehensive understanding of the issues it is necessary that these are placed in the factual context on foot of which they arise.

Background

4. B.D. was born on the 17th October, 1958 and resides with his wife and family in the midlands. The couple married in 1990 and have three children, a boy and two girls. The boy was born in August 2006, the eldest girl in April 2009 and their younger sister in December 2012. The two girls were born with Down Syndrome and have special needs. In October 1978, the Appellant was diagnosed with Crohn's disease, a condition which was successfully treated by the late Professor Fielding; the Court is satisfied that the consequences of this condition have no implications for the issues which fall for determination on the appeal.

5. On the 17th March, 1981, B.D. was admitted to Portlaoise Hospital suffering from complications associated with his Crohn's disease. In the course of treatment, he was transfused with three units of blood and subsequently, in January 1982, he was re admitted to hospital where he underwent a right hemicolectomy. Very unfortunately for the Appellant one or more of the transfused units was contaminated with the Hepatitis C Virus (HCV), genotype 3. At all times after the introduction of Polymerase Chain Reaction testing (PCR), his samples were found to be positive for the virus. As a consequence of the infection he developed serious liver disease which was progressive and in 2014 he was diagnosed with decompensated cirrhosis; he was by then a very ill man in need of urgent medical treatment.

Vocational Background

6. The Appellant left school in 1976 with a good Leaving Certificate. He commenced employment almost immediately with Zetor Ireland, processing guarantee claims. He subsequently secured the position of credit controller with Lombard and Ulster Bank before moving two years later to the Leinster Express newspaper where he remained employed until 1983. Following a short period of unemployment, he joined Avonmore Foods as a credit control and sales manager where he became intimately involved in the expansion of the creameries division of the business; the company ultimately merged with Waterford Foods to form the Avonmore group of companies.

7. Had it not been for the consequences of the infection, B.D. would almost certainly have been promoted to the position of group National Sales and Distribution Manager; his illness began to impact on his ability to function in the late 1980's. Although the limiting effects of the disease were gradual he came to accept that he would not be able to cope with the additional demands which come with promotion and when offered the position of National Sales Co-Ordinator for the Liquid Milk Division of the group in 1990, he declined on health grounds. The corresponding worsening of symptoms, particularly fatigue, as the disease progressed resulted in a gradual reduction of working hours, initially to three days a week, until the deterioration in his health forced the Appellant to retire in January 1998, shortly before the first tribunal hearing.

8. Had he been able to take up promotion in 1990, it is clear from the evidence that the new position would have involved an increase in the number of meetings he would have had to attend at different plants and sites throughout the country with a consequential impact on the amount of time spent away from home. As will be seen later this has an implication for the future child care claim, particularly in circumstances where his spouse is a full time career civil servant. Mrs D holds a master's degree in governance and holds a senior position in a government department. Circumstances require her to leave the family home between 6.30 and 7 am on weekdays. She works long hours and on those evenings when she returns home it is rarely much before 8pm; her duties often require her to work late and stay overnight in Dublin, when this occurs she stays with her sister. Now 51, she is not due to retire until she

reaches the age of 65.

Implications of Vocational Commitments on Childcare
9. Had it not been for the awful consequences which his illness has had on every aspect of the Appellant's life, it appears highly likely he would have enjoyed a stellar career in one of the country's largest corporate entities, a path along which his wife has already travelled in her own career. Although they now have three children the couple experienced difficulty starting a family; their first child was not conceived until 2005, following IVF treatment. Having regard to the impact promotion would likely have had on the time available to look after his children, as it has had on the time available to his spouse, in circumstances where both parents were pursuing their respective careers full time, it is probable that the Appellant and his wife would have had to retain carers to meet the bulk of their children's care needs, particularly during the working week.

10. In this regard I consider it to be of some significance in relation to the claim for pecuniary loss that there was no convincing evidence one or other of the parents would have abandoned or modified their careers to look after their children either on a full time or part time basis, particularly after the birth of the children with special needs. Taken at its height the only direct evidence in relation to this matter was B.D.'s assertion he would have done whatever was necessary to look after his children while working and in that regard, had he secured promotion, he believed he would most likely have been facilitated by his employer.

11. Mrs. D did not give evidence to the Tribunal or the Court nor was she interviewed by Nurse Kirby for the purposes of the report which she prepared and on foot of which the capitalised claim for the cost of future child care was based. In all the circumstances the only reasonable conclusion which the Court can reach on the evidence is that but for the Appellant's illness both parents would most likely have remained in full time employment.

First Application to the Tribunal
12. The Appellant made an application to the Tribunal for pecuniary and non-pecuniary losses in 1998. There were no children in being or expected at that time. Accordingly, the pecuniary loss claim was confined to past and future loss of earnings and other employment related pecuniary benefits together with future medical, travel and subsistence costs. The loss of earnings claim was based on the premise that but for his illness B.D. would have been promoted to the position of National Sales Co-Ordinator in 1990, at a gross salary of £40,000 or £47,000 per annum. The capital value of this claim to age 65 was calculated at £397,133 or £463,406 depending on the level of gross salary paid.

13. The application was heard on the 25th November and evidence was given by B.D., the late Professor John Fielding, Paula Smith, Vocational Consultant, and Nigel Tennant, Consulting Actuary. The Tribunal made the award of general compensation provisional upon certain serious consequences in respect of the occurrence of any of which the Appellant was given liberty to return to the Tribunal to have further compensation assessed. As required by s.5 (7) of the Acts, these consequences were identified in the award as follows;

(i) Progression of liver disease to decompensated cirrhosis, and/or

(ii) The development of Hepatocellular Carcinoma.

Award
14. With regard to his pecuniary and non-pecuniary losses, the Tribunal awarded a total of I.R.£647,000 compensation consisting of (i) £120,000, general compensation (ii) £50,000 for past loss of earnings; (iii) £350,000 for future loss of earnings, allowance having been made for *Reddy v. Bates* ([1984] I.L.R.M. 197) contingencies; (iv) £75,000 for loss of a company car and (v) £52,000 for loss of pension benefits and reduction in the level of the death in service benefit; the award was accepted.

Family Circumstances post Award; Progression of Liver Disease;
15. Following the birth of her first child in 2006, the Appellant's spouse was seconded to Brussels in 2007. She was joined by her husband and son shortly afterwards and the family resided there for a number of years until her posting came to an end. During that time 'au pairs' were employed to help with child-minding, though not out of necessity attributable to any inability on the part of the Appellant; relatively speaking although not well enough to work he was still involved in family life at that time. Mrs. D continued to work as a public servant after her return home, initially in the midlands until 2016 when she secured a further promotion that necessitated her having to travel to work in Dublin. This change in circumstances has had and will continue to have an impact on her ability to care for her children during the week and is likely to remain a feature in the family circumstances until her retirement.

16. The Appellant comes from a farming background. The family now live in a four-bedroom house in the cartilage of which there are outbuildings and a large garden together with 30 acres of farm land. After his retirement, B.D. occupied himself by helping out on his brother's farm and by attending to small chores around the house, cutting the grass and tending to his vegetable garden. His participation in family life gradually diminished as his symptoms, particularly fatigue and depression, worsened; by the mid 2000's his general health had deteriorated to the point where he began to experience recurrent infections.

17. In August 2009, he was admitted to the Midland Regional Hospital with viral Pneumonitis/Interstitial Pneumonia and was also diagnosed with Paroxysmal Atrial Fibrillation. His CT scan showed portal hypertension with an enlarged spleen and dilated portal tracks within the abdomen suggestive of liver cirrhosis. Liver function tests were also abnormal. In November 2009, he came under the care of Professor Aiden McCormack, Consultant Hepatologist. He reviewed the Appellant on a number of occasions over the following two years.

18. Blood tests during this period confirmed ongoing infection and deterioration in liver function; the viral load for Hepatitis C in a sample taken on the 10th January, 2011 was 187996 IU/ml. The signs of deterioration were clinically apparent. In addition of chronic fatigue the Appellant developed jaundice, a further indication of a serious progression of the disease which called for urgent medical intervention. Anti-viral therapy was recommended but was contraindicated due to the development of significant psychological difficulties; treatment had to be deferred.

19. The deterioration in the severity of symptoms, particularly fatigue, which accompanied progression of the disease impacted negatively on the Appellant's capacity to function and he became ever more depressed and despondent; depressive episodes of increasing frequency became a feature of life. He eventually became suicidal and in September 2011, had to be admitted to St. John of God's Hospital under the care of Dr Abby Lane, Consultant Psychiatrist. He was treated appropriately and was well enough to be discharged after 6 weeks as an inpatient on increased anti-depressant medication. Dr Lane diagnosed an Adjustment Disorder with recurrent depressive episodes of varying intensity; the Appellant remains on anti-depressant medication.

20. In her report dated 12th November, 2016, Dr Lane expressed the opinion that Hepatitis C had had a profound effect on B.D's mental health. At assessment his speech was slow, he had difficulty with names and words and gave the appearance of a beaten man; he remained somewhat depressed. This assessment has significance in the context of the claim for general compensation since it took place after the completion of a successful course of anti-viral therapy which resulted in clearance of the virus. As will be seen later, while clearance of the virus has resulted in a qualitative improvement in life expectancy and in the symptoms of decompensation relative to his dire pre-treatment prognosis, B.D. remains a comparatively ill man with a very poor quality of life.

Decompensated Cirrhosis; Diagnosis
21. From 2009, the degree of deterioration in liver function was such that by 2014, the signs of decompensated cirrhosis were manifest. A CT scan of the liver and a gastroscopy carried out on the 28th May, 2014 disclosed cirrhosis with multiple calcified gallstones and small distal right oesophageal varices; liver function tests were grossly abnormal. There was an even more urgent need for medical intervention. Given the improvement in his psychological status which followed the treatment afforded by Dr Lane, the Appellant was referred for assessment to Dr Diarmuid Houlihan, Consultant Hepatologist, with a view to undergoing antiviral treatment.

22. At consultation on the 17th September, 2015, he noted that B.D. was exhibiting memory and concentration difficulties and his speech was slurred; he was also complaining of sleep disturbance. The clinical impression was of Grade 1–2 (A-B) Encephalopathy, consistent with the Appellant's biomechanical profile; a low platelet count and an albumin reading of 30. Prognosis without successful antiviral treatment was for liver transplantation with 50% mortality within two years.

23. There are well documented risks, including death and other side effects, associated with the treatment which was communicated to the Appellant in what Dr. Houlihan described as a 'very frank conversation'. Given the stark choice, he decided to proceed and commenced Direct Acting Antiviral (DAA) therapy in September, 2015, successfully completing the course 24 weeks later on the 25th February, 2016.

Second Application to the Tribunal
24. Having progressed to decompensated cirrhosis, B.D. was entitled to return to the Tribunal on foot of the provisional award. His application was heard on the 8th February, 2017. In addition to the Appellant, Dr Diarmuid Houlihan, Dr Abbey Lane, Dr Vivek Mahadev, G.P., Mrs. Jo Campion, Clinical Psychologist, and Mr. Nigel Tennant, gave evidence. A care report prepared by Nurse Kathy Kirby, (5/12/16) together with an addendum (7/2/17) was admitted in evidence. Medical reports were prepared for those proceedings by Dr. Houlihan (11/11/15 and 5/9/2016) by Jo Campion (26/4/16) by Dr Lane (12/11/16) and by Dr Mahadev, (14/11/16). An actuarial report was prepared by Nigel Tennant (6.2.17). These reports, which were admitted in evidence before the Tribunal and on the Appeal, have been read and considered by the Court.

25. The claim for pecuniary loss on the return application included claims for (i) Domestic assistance, (ii) A gardener, (iii) DIY, decorating and home maintenance and (iv) Case management. Depending on the assumption used, the cumulative capital value of these heads of claim was calculated at €638,783 or €736,866. Since 2005 B.D. has been in receipt of a monthly homecare allowance from the HSE for his own care and assistance. Following the deterioration in his health status, the hours allowed for his care increased from 24 to 42 per week in respect of which he receives a payment of €2,493 per month. The capital value of the care allowance payment, depending on the assumption used, was calculated at €610,075 or €702,650.

26. Having regard to the capital values of the care allowance, it was indicated at the outset of the hearing before the Tribunal, as it was on the Appeal, that the Appellant was not preceding with the four heads of claim in respect of his own care and assistance. For the same reasons the claim for past care was also withdrawn. In the course of the hearing an issue arose as to whether the Appellant was incurring expense under these headings and if not whether credit fell to be given against the child care claim. The Court ruled that the Appellant was entitled to proceed as indicated, payments received from the HSE being for his own care and not that of his children.

27. In the event, the pecuniary loss claim was limited to the cost of providing future care for the three children. The claim was based on the premise that but for the deterioration in his liver disease to decompensated cirrhosis, the Appellant would have been in a position to look after the care needs of his children. Instead, it has been necessary to retain the services of a nanny whose services will be required until the youngest child reaches the age of 18 from which time it was claimed a live-in carer would be required.

28. The capital value of these two claims, depending on the assumptions of standard mortality or mortality improvements, was calculated at €792,365 or €958,085. A claim was also advanced for 33.5 hours per week additional care which the nanny would not be in a position to provide for the children in respect of certain activities and requirements set out in the addendum to the report of Ms. Kirby, the capital value of which was calculated at €709,000.

Award: General Compensation
29. The Tribunal delivered its decision on the 30th March, 2017. Allowing the claim for non-pecuniary losses the Tribunal determined that "*…the Applicant is being compensated today for the pain and suffering that can be attributed to his past deterioration, his probable future deterioration and specifically for past and future decompensated cirrhosis. Associated encephalopathy, associated mental and emotional effects and also probable future hepatocellular carcinoma. For this the Tribunal awards the Applicant €150,000."*

30. The award was made provisional on six eventualities which included deterioration necessitating liver transplantation, the cost of transplantation in Ireland or the UK, together with all ancillary costs, disorders of the lymphatic system, including lymphoma and all leukaemia disorders, and/or terminal care costs associated with Hepatitis C, the occurrence of any of which entitled the Appellant to return to the Tribunal.

Award: Pecuniary Loss Claim
31. It is evident from the transcript of its decision that in approaching the claim for pecuniary loss the Tribunal was guided by the precept that illogicality, inconsistent awards and double compensation is not permissible and must be avoided. Accordingly, when carrying out the assessment of the future care costs claim regard was had to the amount for future loss of earnings in the sum of IR£350.000 comprised in provisional award, based as it was on the premise that but for his injuries B.D. was likely to have pursued a career in corporate sales until an expected retirement at age 65.

32. The Tribunal considered that it also followed necessarily that the claim could only be for a portion of the total childcare costs the Appellant was required to bear and for no more than the effect which his injuries would have "*…on his capacity as a co-parent to care for his children in the hours he would have had available to discharge that care himself if also engaged in a fulltime career until 65 years."* Noting the appropriateness of the *Reddy v. Bates* (supra) deduction for contingencies in the provisional award at 30%, the Tribunal decided that "*in the special circumstances of the case, however, … the applicant is entitled to be compensated for the*

effect his deteriorated condition has had and will have on his ability to provide the childcare he would otherwise have provided himself within the legal and factual context of this case," on foot of which finding it made the award of €50,000.

33. In reaching its decision, the Tribunal identified a number of matters to which it had regard including the following:

> (i) The responsibility borne by the Appellant's spouse for the care of the children,
>
> (ii) The increased weekly care allowance received from the HSE,
>
> (iii) The services and supports which the Appellant may be expected to receive into the future under the Acts or equivalent legislation,
>
> (iv) The fact that the capital value of the claim was based on the assumption of a normal or standard mortality whereas on the medical evidence there was a probability of further severe progressive deterioration in the condition and a consequential diminution in life expectancy.

34. On an appeal this Court is not concerned with a review of the reasoning and decision of the Tribunal since it follows from the provisions of the Acts and the regulations that an appeal from a decision or order of the Tribunal to the High Court proceeds de novo. Nevertheless, I pause to observe here that in assessing the claim for future child care costs the Court has necessarily taken a different approach to that of the Tribunal in a number of important respects.

35. It is evident that the Tribunal took account of benefits which are not, in my view, assessable on a claim for the cost of child care since these are paid to or are received by B.D. for his own care and not for the care of his children. Moreover, discounting the capital value of the claim to reflect the probable diminution in life expectancy penalised him in respect of a loss caused by the infection for which he is entitled to be compensated. For completeness, I should add that as the appeal proceeds *de novo*, the onus of proof rests on the Appellant to establish his claim on the balance of probabilities in accordance with the ordinary rules of evidence.

Evidence on Appeal

36. All of the evidence available to the Court was adduced by or on behalf of the Appellant. Evidence as to fact was given by B.D., his sister O.D. and S.H. a nanny who has been employed to care for the children since the hearing before the Tribunal. Expert evidence was given by Dr. Diarmuid Houlihan, Mr. Nigel Tennant, Nurse Kathy Kirby, and Ms. Jo Campion. As mentioned previously the expert reports prepared by these witnesses and the report from the Appellant's GP were admitted in evidence and have been read and considered by the Court.

37. When B.D. was assessed by Dr Houlihan in September 2015, he exhibited the signs of marked encephalopathy. The synthetic function of his liver was markedly deranged and prior to starting antiviral therapy he was classified as having Child-Pugh B Cirrhosis. (The Child-Pugh score or grade is a system of classification developed by Child and Pugh in the 1970s to assess the prognosis in cirrhotic patients where each patient is assigned a grade, A, B or C depending on degree of severity). Medical prognosis was extremely poor and, as we have seen, in the absence of successful anti-viral treatment, his chance of requiring liver transplantation or of death occurring within two years was estimated at 50/50.

38. The marked risks associated with anti-viral therapy referred to earlier include further deterioration in the condition of the liver and death, risks which were heightened for B.D due to the prolonged course of the treatment (24 weeks instead of 12), necessitated by the virus he had contracted, genotype 3. Although he tolerated the treatment it was not without personal cost in the form of very severe side effects. The symptoms of fatigue, despondency, depression, anxiety, low self-esteem and encephalopathy were all magnified or aggravated, a price B.D. considered worth paying.

39. Success is relative and in the particular circumstances of this case is best measured by the practical consequences of the treatment. Of the positive outcomes the most significant are: (i) an improved biomechanical function of the liver which has resulted in a reclassification of the cirrhosis from Child-Pugh B to A; (ii) an improved mortality an 80% to 90% chance of ten year survival from two years and (iii) a significantly reduced risk of developing lymphoma.

40. Nevertheless, while the progression and worst effects of the decompensation have been halted, B.D. is left with permanent and irreversible liver damage which continues to impact negatively on his wellbeing and capacity to function, particularly his ability to care for himself and his children. Apart from short distances, he no longer drives a car and when he does so is generally accompanied. Indeed, whether he should be driving at all is now open to question. Fatigue, depression, anxiety, and low self-esteem remain features of a life complicated by encephalopathy, described by Dr Houlihan as a "low grade brain fog", caused by toxins in the blood which would otherwise be cleared in an individual with a healthy liver.

41. Indeed, it was manifest from the way in which he gave evidence that the Appellant was having difficulty with memory and concentration. Although slurring of speech was not evident, as it had been on medical assessment, there were occasions where he seemed to have difficulty articulating his thoughts; he conveyed the impression of a man who is daily oppressed by the impact which the awful consequences of the illness has had on every aspect of his life. Worried by what the future may hold and how his children will be cared for, he cut a rather sad figure consistent with ongoing depression. It was quite apparent that he found having to come to Court and having to give evidence far more than a great inconvenience: it was very evidently a personal ordeal.

42. Turning to the future, while the clearance of the virus has undoubtedly halted the progression of the decompensation and has resulted in an improvement in the bio-mechanical profile of his liver *pro tem*, transplantation remains a possibility. Furthermore, while it is now highly unlikely that lymphoma will occur, there is a very real risk that Hepatocellular Carcinoma and/or further decompensation will develop within the next decade. While expressing the hope that he may experience some further symptomatic improvement in the meantime, Dr. Houlihan was at pains to stress that the Appellant's quality of life remains and is likely to remain very poor, an opinion corroborated by Ms. Campion.

Conclusion

43. I accept the evidence adduced by and on behalf of the Appellant and the Court finds that the combination of ongoing psychological and physical sequelae as a consequence of decompensated cirrhosis has had and as a matter of probability will continue to have a devastating effect on every aspect of his life rendering him very substantially, though not completely, incapable of meeting and providing for the care needs of his children.

Assessment of General Damages / Compensation: The Law

The Appellant's Submissions
44. In summary, Mr Fitzpatrick submitted that in all the circumstances of the case a substantial increase in the sum for general compensation ought to be made if the award was to fairly and reasonably reflect the magnitude of the Appellant's injuries and in this regard he cited the decision of this Court in *A.M. v. Minister for Health and Children* [2015] IEHC 660, where an award of €150,000 general compensation for decompensated cirrhosis on a return application was increased to €250,000.

45. On behalf of the Minister, Ms Gayer S.C. submitted that there was no proper basis to disturb the award of the Tribunal, quite the contrary. There had been recent decisions of the Court of Appeal in which principles to be applied to the assessment of damages in personal injury actions had been enunciated on foot of which general damages had to be 'recalibrated' having regard to a maximum figure for 'pain and suffering' set at or about the amount for general damages in catastrophic injury cases to which a limit or 'cap' applied ('cap' cases). In short, damages in any given case had to be measured or benchmarked against a maximum figure on a notional scale which terminated in or about the 'cap' amount. In support of this proposition, the attention of the Court was drawn to number of authorities including *Nolan v. Wirenski* [2016] 1 I.R. 461, *Payne v. Nugent* [2015] IECA 268 and *Shannon v. O'Sullivan and others* [2016] 1 I.R. 313.

46. Furthermore, it was contended that where the Tribunal, or the High Court on appeal, was carrying out an assessment of compensation in respect of serious consequences identified in a provisional award, the application of the principals of tort law as modified by the Acts necessitated regard being had to the heads of loss and amounts of compensation comprised in the provisional award, if any, to ensure no element of double recovery would arise, whether in respect of pecuniary or non-pecuniary loss. In this regard, the Court was referred to the recent decision of the Court of Appeal in *L. O'S v Minister for Health and Children* [2017] IECA 7.

Conclusion
47. Implicit in the first of these submissions is the proposition that *Nolan v. Wirenski* (supra), *Payne v. Nugent* (supra) and other recent decisions of the Court of Appeal laid down principles the object or purpose of which was to *'recalibrate' downwards* the level of general damages (emphasis added), a view which appears to have gained some traction not only amongst personal injury practitioners but also amongst some members of the bench best exemplified in *Kampff v. Minister for Public Expenditure and Reform* [2018] IEHC 371, where it was also decided that the ranges of damages in the Book of Quantum, if being relied on by the court, also fell to be 'recalibrated' downwards, the ranges having been drawn up before, and thus not reflective of, the more recent decisions of the court.

48. For reasons which are set out in *O'Hara v. Minister for Public Expenditure and Reform* [2018] IEHC 493, it seems to me on authority that the entire premise on which *Kampff v. Minister for Public Expenditure* (supra), appears to be founded, leading as it has to the conclusion that the levels of general damages in personal injuries actions must be reduced or assessed at a lower level, is mistaken. At the heart of this proposition is the factually erroneous assertion that the maximum amount which may be awarded or should be awarded for general damages in actions for personal injury is a figure in or about the "cap" or limit on general damages in cases involving catastrophic injury where there is a substantial claim for pecuniary loss.

49. While no issue arises in this case on the applicability or otherwise of the 'cap' in relation to the level of general compensation, it appears to me that an integral part of the proposition which is being advanced is that, within the legal scheme of awards for other personal injuries, the 'cap' amount is the upper bench mark against which the principle of proportionality is to be applied: in short, the level of award in any given case must be proportionate to the so called 'cap' amount, currently in a range of €450,000 to €500,000. It follows that the award to be made by the Court on this appeal must be proportionate within a scheme of awards for general damages where that figure is the upper limit.

50. I cannot accept this proposition since not only does it fail to properly reflect the relevant jurisprudence on the matter but also because to do so would necessitate the exclusion of awards in very serious personal injury cases to which the 'cap' does not apply from the scheme (non 'cap' cases), where, as we shall see, the level of general damages may exceed the 'cap' amount. Nor can I accept the proposition advanced on behalf of the Minister that the object, purpose or intention of the principles enunciated in *Kearney v. McQuillan* [2012] 2 I.L.R.M. 377, *Nolan v. Wirenski* (supra), and *Payne v. Nugent* (supra), relied on in *Kampff v. Minister of Public Expenditure* (supra) was to recalibrate downwards the level of general damages in personal injuries actions; scrutiny of those decisions warrants a quite different conclusion.

51. There is nothing new about the principles which are to be applied to the assessment of general damage nor is there any basis to suggest that the Court of Appeal has adopted a policy and embarked on a mission the object of which is a reduction in the level of awards for personal injuries in general, quite the contrary. In any event, as was made clear by the court in Russell v. HSE [2015] IECA 236, the jurisprudence on the subject does not admit a public policy approach to damages.

52. About this there is no ambiguity, delivering the unanimous judgment of the court in Shannon v. O'Sullivan (supra), the learned judge expressly rejected the proposition, also advanced in that case and stated, when referring to *Nolan v. Wirenski* (supra) and *Payne v. Nugent* (supra), "*Those decisions do no more than clarify the principles to be applied and the proper approach to be taken by the trial judge when making an award for damages for personal injuries so as to ensure that the award made is just, equitable and proportionate*." Furthermore, it is abundantly clear from a careful reading of the judgments in these decisions that there were particular case specific reasons why the appeals were allowed and the quantum for general damages reduced.

53. By way of example, in *Nolan v Wirenski* (supra), the Court found that the trial judge had made two erroneous findings, the effect of which would have been to significantly increase the award of damages to which the Plaintiff would otherwise have been entitled in law. Commenting on the objective of these principles in that case, Irvine J. stated, at para 31, "*Principle and authority require that awards of damages should be (i) fair to the plaintiff and the defendant; (ii) objectively reasonable in light of the common good and social conditions in the State; and (iii) proportionate within the scheme of awards for personal injuries generally. This usually means locating the seriousness of the case at an appropriate point somewhere on a scale which includes* everything *from the most minor to the most serious injuries.*" (emphasis added).

54. Notwithstanding this statement, the court went on to hold that the upper end of the scale should terminate at approximately €450,000 (the maximum amount for general damages in cases involving catastrophically injured Plaintiffs to which the 'cap' applied), even though the court had also recognised, as it has done in other decisions, that there are cases in which higher awards have been made. The legal foundation upon which awards in non 'cap' cases are not to be included within the ambit of a notional scale is not explained in the judgments, a significant lacuna which, it appears to me, deserves examination.

Proportionality; Notional Scale; Measurement of Damages
55. The concept of proportionality within the scheme of awards for personal injuries has long been accepted as an essential

component in the assessment of general damages. See *McGrath v Bourne* (1876) I.R. 10 C.L. 160; *Foley v. Thermocement Products Ltd* (1954) 90 I.L.T.R. 92; *Rossiter v Dun Laoghaire Rathdown County Council* [2001] 3 I.R. 578; and *Kearney v McQuillan* (supra). However, correctly understood, if the measurement of general damages in any given case is to involve positioning on a notional scale at the top of which is a maximum amount it would seem to follow that the appropriate figure must be one which necessarily reflects the whole spectrum of awards and not just the amount in cases to which the 'cap' applied, particularly as the quantum in non 'cap' cases, may exceed, occasionally by a very considerable sum, the 'cap' amount.

56. Accordingly, to exclude from the range of the notional scale non 'cap' cases where awards may exceed the 'cap' amount would result in the introduction of an artificially lower limit or level against which to apply the principle of proportionality, a consequence which, in my judgment, is neither warranted in principle or by law. See the decision and very useful observations of Cross J. on this topic and on the 'cap' in general in *Woods v Tyrell* [2016] 355 at para 29 *et seq*.

57. Indeed, inherent in the consequential distortion of the range of general damages for personal injuries and thus the scale which would result from setting the maximum tariff at or about the 'cap' amount is the risk of working an impermissible injustice on a deserving Plaintiff through a lower award than would otherwise obtain if the principle of proportionality was applied to a notional range of damages where the upper end figure reflected awards for general damages in non 'cap' cases that exceed the ' cap' amount; such a scale would fully and properly reflect "…everything *from the most minor to the most serious injuries.*" (emphasis added). In this regard the potential for an award of general damages in a non 'cap' case to exceed the prevailing 'cap' by a very considerable sum is not to be discounted or underestimated; by way of example see *A.B. v. B.C* and Anor [2011] IEHC 88, a non 'cap' case where general damages for very serious but not catastrophic personal injuries were assessed at €700,000, together with special damages of € 75,478.

58. The plaintiff suffered horrific burn injuries in a fire which resulted in dreadful sequelae including excruciating pain and permanent scarring to 75% of his body and left him permanently and profoundly affected. Although unable to do the manual work he did prior to the fire, the plaintiff was able to continue at work and earn a living, moreover, he did not require ongoing medical care nor did he require nursing care. Nevertheless, it is abundantly clear from the judgement that Clark J. had no difficulty in arriving at the award given the consequences of the wrong for the plaintiff in respect of which compensation could properly be recovered.

Conclusion
59. In my judgment, if a notional scale is to be a constituent part of an overall scheme of awards for general damages in personal injury cases where the court is also required to take into consideration the appropriate ranges of damages, if provided in relation to the case, set out in the Book of Quantum, (s. 22 of the Civil Liability and Courts Act 2004), and distortion of the scale to which the principle of proportionality is to be applied in the course of an assessment is to be avoided, the scale must necessarily reflect the total spectrum of awards for general damages in personal injury cases, including awards in non 'cap' cases where the 'cap' amount is exceeded.

60. It appears that the rationale underlying the introduction of a limit or 'cap' on general damages in certain types of case and the difference between those cases and non 'cap' cases as well as the consequences which flow from the difference are not always appreciated or fully understood and may explain why the 'cap' amount has come to be considered, in some decisions, to be the maximum which can be awarded for general damages for personal injuries. The apparent confusion or ambiguity over whether or not the 'cap' was applicable to all personal injury cases was expressly recognised by Geoghegan J. in *Gough v. Neary* [2003] 3 I.R. 92 at 132.

61. Notwithstanding the succinct clarification set out in his judgment, subsequently adopted by Quirke J. in *Yang Yun v. MIBI* [2009] IEHC 318 and Irvine J in J.*R. v. Minister for Health and Children*, High Court, Unreported, 24th February, 2011, a conflation between 'cap' and non' cap' cases regarding the maximum amount of general damages which may be awarded for personal injuries persists in some decisions; why this should be so given the clear statements in these decisions is puzzling and merits examination, albeit at the cost of lengthening this judgment.

62. Following a considered review of the relevant authorities it seems to me that the factors that distinguish these types of case best explain how and why awards of general damages in non 'cap' cases, such as *A.B. v. B.C*. (supra), may be assessed at a level which exceeds the 'cap' amount. The route to a clear appreciation of the differences and the impact on and the implications for the assessment process which flow from them commences with the nature and meaning of damages.

The Meaning and Nature of Damages / Compensation
63. 'Damages' is a descriptive legal term for a sum of money payable by a wrongdoer to the victim of the wrong and when utilised in the context of personal injury actions means the compensation assessed by the court to cover the past, present and prospective losses suffered or likely to be suffered by the Plaintiff as a consequence of the wrong. It is for this reason that words such as 'compensation' or 'financial award' are used in legislation establishing statutory schemes for the provision of financial redress to victims of wrongdoing where the State is a not a wrongdoer though made responsible to meet the award such as the Garda Siochana (Compensation) Acts, the Hepatitis C and HIV Compensation Tribunal Acts and the Residential Institutions Redress Act. See *Murphy v. Minister for Public Expenditure and Reform* [2015] IEHC 868.

The Compensatory Principle
64. The first and foremost principle underlying the assessment of damages at common law is best expressed in the Latin phrase *restitutio in integrum*, the object of which is to restore the plaintiff, through a money award, to the same position which was enjoyed at the time when the wrong was committed. The amount of the damages must be (i) fair and reasonable to the Plaintiff and the Defendant and (ii) commensurate with and proportionate to the injuries and loss sustained. Whereas the precise assessment of pecuniary loss is an exercise by which the objective may be realised effectively, money is clearly an inadequate medium of recompense for non-pecuniary loss. As Lord Morris of Borth-y-Gest observed in *H. West and Son Ltd v Sheppard* (1964) A.C. 326 (HL) at 346, "*money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation*". See also *Rushton v. National Coal Board* [1953] 1 Q.B. 495 at 502; *M.N v. S.M* [2005] 4 I.R. 461 at 473; *Bennett v. Cullen* [2014] IEHC 574 at para 37 *et seq;* and *Woods v. Tyrell* (supra), at para 21.

65. To talk of meeting the restorative objective by a money award, particularly in a case involving very serious or catastrophic injuries, is to talk of what O'Higgins C.J. described in *Sinnott v. Quinnsworth* [1984] ILRM 523 at 532 as "*assaying the impossible"*. Nevertheless, that is the task which the Court must undertake, damages being the remedy for the consequences of the wrong provided by law to the victim.

Lump Sum Awards

66. In seeking finality to litigation, the common law requires damages be assessed on a once and for all basis in a lump sum award. Provisional or stage payment awards are not part of the common law and, absent agreement between the parties, are possible only where provision has been made by statute. In arriving at a lump sum award the court may only compensate the plaintiff for past, present and prospective losses; recovery of compensation for loss that might possibly occur in the future is not permissible. See *A. B. v. B.C.* (supra) and *L. O'S. v. Minister for Health and Children* (supra). As we shall see later, the Acts modify the common law in this regard by giving an applicant the right to return to the tribunal in certain circumstances to have further compensation assessed for a serious consequence of infection envisaged and identified as no more than a possibility at the time when what is described as the 'provisional award' was made.

General and Special Damages; Meaning
67. Past and prospective pecuniary losses such as loss of earnings, medical and care costs and other out-of-pocket expenses which are ascertained or are ascertainable and are specified, for example, by way of actuarial calculation, are commonly referred to as 'special damages' and are said to be in addition to 'general damages'. This categorisation has potentially important consequences in the context of carrying out an assessment in a case involving very serious or catastrophic injuries to which, depending on the circumstances, the 'cap' on general damages may or may not apply. Other than actual pecuniary loss which has been ascertained, specified and claimed by way of 'special damages', the term 'general damages' in personal injury actions covers all pecuniary and non-pecuniary loss, past, present and prospective, and includes compensation for 'pain and suffering', 'inconvenience', and 'interference with the pleasures of life and loss of amenity'.

'Pain and Suffering';Meaning
68. Before the abolition of the citizen's right to trial by jury in personal injuries actions (see s.1 of the Courts Act 1988), damages were assessed by the jury. Questions on the issue paper habitually divided the assessment of general damages between the past, present and future by inviting the jury to assess damages for 'pain and suffering' to date and, if appropriate, damages for 'pain and suffering' into the future. The instructions on the law given to the jury in the course of the trial judge's charge served as a useful reminder to practitioners and judges alike of the nature, meaning, purpose and ambit of an award of general damages and when used in that context, all were familiarised with the heads of loss covered and left in no doubt as to the meaning of 'pain and suffering'.

69. In this regard the jury were instructed that damages for 'pain and suffering' not only meant compensation for the neurological experience of physical pain and/or mental suffering but also for other heads of non-pecuniary loss such as inconvenience and interference with the amenities and pleasures of life enjoyed or as might likely be enjoyed by the plaintiff at the time when the wrong was committed.

General Damages; Meaning and Purpose
70. In *Sinnott v. Quinnsworth* (supra), at 531, O'Higgins C.J. succinctly encapsulated the instruction given to the jury on the meaning and purpose of general damages where he stated "*General damages are intended to represent fair and reasonable monetary compensation for the pain, suffering, inconvenience and loss of the pleasures of life which the injury has caused and will cause to the Plaintiff*." *Sinnott* is generally recognised as the seminal authority for the rationale and introduction of the limit or 'cap' on the amount of general damages in certain types of case.

Rationale for a Limit or 'Cap' on General Damages in Certain Cases
71. The rationale for the recognition and existence of a limit or "cap" in such cases was explained by O'Higgins C.J. in *Sinnott v. Quinnsworth* (supra) at 532, a case where the jury had awarded total damages of £1,484,591.72, £ 800,000 of which was for general damages,

> *"In my view a limit must exist, and should be sought and recognized, having regard to the facts of each case and the social conditions which obtain in our society*. In a case such as this, (emphasis added) *regard must be had to the fact that every single penny of monetary loss or expense which the Plaintiff has been put to in the past or will be put to in the future has been provided for and will be paid to him in capital sums calculated on an actuarial basis. These sums will cover all his loss of earnings, past and future, all hospital and other expenses in relation to the past and the future and the cost of the special care which his dependence requires, and will require, for the rest of his life. What is to be provided for him in addition in the way of general damages is a sum, over and above these other sums, which is to be compensation, and only compensation. In assessing such a sum the objective must be to determine a figure which is fair and reasonable. To this end, it seems to me, that some regard should be had to the ordinary living standards in the country, to the general level of incomes, and to the things upon which the Plaintiff might reasonably be expected to spend money. It may be that in addition, on the facts of a particular case, other matters may arise for consideration in assessing what, in the circumstances, should be considered as reasonable."*

It is clear from the context and the remarks preceding this extract from the judgment and the nature of the case under consideration that when referring to the desirability and necessity for a limit on general damages the Chief Justice was speaking about a case where there was a very substantial claim for special damages or an 'omnibus' sum as it has variously been described in subsequent decisions.

Distinction between 'Cap' and non 'Cap' cases;
72. The existence of a very substantial pecuniary loss claim to cover all aspects of the plaintiff's past and future requirements is the most significant distinguishing feature between 'cap' and non 'cap' cases which may impact the amount to be awarded for general damages and the approach to be taken by the court to the assessment. Suffice to say that where a substantial claim is mounted by way of special damages for past and future pecuniary losses in the case of a very seriously or catastrophically injured plaintiff sufficient to provide for the future care and all the bodily needs of the plaintiff, such a claim is a factor to be taken into account by the court in determining the level of general damages and should be reflected in the amount to be awarded. See *Reddy v Bates* (supra) at 202.

Consequences
73. The most significant but by no means the only consequence which flows from the difference between a 'cap' and non 'cap' case is the jurisdiction of the court to award a sum for general damages which exceeds the 'cap' amount. Following a review of case authority culminating with *Kealy v Minister for Health* [1999] 2. I.R. 456, Irvine J. commented on this jurisdiction in *J.R. v. Minister for Health and Children* (supra) at para 48; having held that the 'cap' did not apply the court went on to award the appellant a net €500,000 general compensation.

74. In *E.K v N.P.* (unreported), H.C. delivered *ex tempore* 1st July 2015, another non 'cap' case, the court awarded €500,000 to a plaintiff whose life was blighted in every way as a result of persistent sexual abuse perpetrated by the defendant, a family friend and neighbour, between the ages of 9 and 13 as a result of which he suffered a very severe post-traumatic stress disorder involving permanent lifelong sequelae.

In the overall scheme of awards whilst cases where general damages exceed the 'cap' amount are relatively rare they are, nevertheless, well recognised. See *Kealy v. Minister for Health* (supra) at 458; *Gough v. Neary* (supra) at 132; M.N. v S.M. (supra), at 468; *Yang Yun v. MIBI* (supra); *J.R. v. Minister for Health and Children* (supra) at 48; *Kearney v. McQuillan* (supra) at 388 and *Nolan v. Wirenski* (supra) at 471.

Approach of the Court

75. The approach to be taken by the trial judge in such a case, or on an appeal by the appellate court, is to consider whether the total sum for damages to be awarded is, in all the circumstances of the case, fair and reasonable compensation for the plaintiff for the injuries suffered or whether it is out of all proportion to such circumstances. The reasoning and decision to this effect which, significantly, is part of the *ratio* decidendi in *Reddy v. Bates* (supra) was followed in *Cooke v Walsh* [1984] ILRM 208 at 220; in *Sinnott v. Quinnsworth* (supra) at 531 and M. N. v. S.M. (supra) at 468.

76. The proposition that a substantial claim for future pecuniary losses is a factor to be taken into consideration by the court and reflected in the amount of general damages explicit in these decisions was criticised by White in *Irish Law of Damages* (Chap.3.3.06 *et seq*), questioned by McMahon and Binchy in *Law of Torts* (4th ed, Chap. 44. 238) and expressly rejected by the Court of Appeal in *Nolan v. Wirenksi* (supra), as being contrary to principle. Acknowledging that there were *dicta* in support, at para 36 Irvine J. rejected as "…unjust and even perhaps irrational…" the proposition that an injured plaintiff is to have his general damages reduced because he has received due recompense for his out of pocket expenses and future needs, moreover, the court considered that Sinnott did not appear to be authority for that approach, noting that the Chief Justice had been careful when expressing the principle underlying compensatory damages to ensure a proper distinction was drawn between sums to be provided for special and general damages.

77. However, in *Cooke v. Walsh* (supra), the Chief Justice concurred with the judgement of Griffin J. following his judgement and the decision to this effect in *Reddy v. Bates*, moreover, this statement of the law was cited with approval and repeated verbatim by the Chief Justice in *Sinnott v. Quinnsworth* (supra). Furthermore, it is clear from subsequent decisions of the High Court and the Supreme Court that this approach, first enunciated in *Reddy v. Bates* (supra), continues to enjoy support and has been consistently followed and adopted in cases to which the 'cap' applies. See *Gough v. Neary; Yun v. MIBI; JR v Minister for Health and M.N v. S,M.* (supra), where the subject was revisited and dealt with expressly by Denham J. (as she then was) at p 468. In so far as there appears to be a conflict in this respect between those decisions and *Nolan v. Wirenski* (supra), this Court is, of course, bound by the decisions of the Supreme Court. See also *Woods v. Tyrell* (supra) at 59.

Non 'Cap' Cases

78. In cases involving very serious personal injury where no such pecuniary claim is advanced, the limit or 'cap' does not apply. See *Kealy v. Minister for Health* (supra), *Fitzgerald v. Tracey* [2001] 4 I.R. 405 and, although obiter in *Gough v. Neary* (supra), the very clear exposition of the reasoning for this proposition set out by Geoghegan J. at p. 132 *et seq*; followed by Quirke J. in *Yun v. MIBI* (supra); Irvine J. in *J.R. v. Minister for Health* (supra), at para 44 *et seq*, and more recently in Mu*llen v. Minister for Public Expenditure and Reform* [2016] IEHC 295; and *Woods v. Tyrell* (supra), at para 43 et seq. The inapplicability of a cap in a case involving very serious personal injury where no substantial claim for future pecuniary loss or 'omnibus sum' falls to be considered has a particular significance with regard to the quantification of general damages which is relevant to the overall scheme of compensation for personal injuries.

79. As we have already seen, the level of general damages in a non 'cap' case can be very substantially higher than the sum which might otherwise be awarded in a case to which the cap applies. In non 'cap' cases there may be a number of heads of damage not amenable to precise assessment or quantification, such as, by way of example, loss of employment opportunity, diminution in capacity to work or inability to participate in other activities recovery of damages for which, subject to rules against remoteness, is permissible.

80. It is the presence of these and other related factors which, together with the impact that the injuries have had or are likely to have on the person and life of the plaintiff when incorporated in award of general damages in a non 'cap' case that provides the explanation for how an award in such a case may exceed the 'cap' amount. That these factors have an impact on the assessment process and on the amount of the award in such cases was expressly recognised by Denham J. in *M. N. v. S.M*. (supra) at 468 where she observed that whilst special damages, including medical expenses, had not been quantified, these were nevertheless heads of loss which the jury or the court was entitled to take into account when assessing general damages.

81. In the interest of completeness, I should add that nothing which has been said herein is to be taken as suggesting that the amount of the 'cap' has no relevance to the carrying out of an assessment in a non 'cap' case, quite the contrary: the amount may be taken into account in a general way. However, it is not the determinant of the award nor is it the upper bench mark against which the principle of proportionality is to be applied.

Adjusting the 'Cap'

82. From the outset it was recognised in *Sinnott v. Quinnsworth* (supra, see the judgement of O'Higgins C.J. at 532) that the 'cap' amount would need to alter over time to reflect changes in money values, economic circumstances, social conditions and contemporary standards. The rationale for revision of the 'cap' in order to reflect these factors is succinctly set out in the judgement of Quirke J. in *Yun v. MIBI* (supra), a decision which also illustrates the impact which at any given time the interaction between these factors is capable of having on the level at which the 'cap' is set. Depending on prevailing circumstances the effect may result in an increase or decrease in what would in other circumstances have been the appropriate amount; in Yun they had a depressing effect which resulted in a reduction of the figure from €500,000 to €450,000.

83. The need to keep the 'cap' under review is driven to a large extent by the degree of change in the constituent factors which influence the level at which the figure for the 'cap' fixed. In my judgment, if these factors are to be reflected in the 'cap' amount as the jurisprudence suggests they must it is not only desirable but necessary that the 'cap' be reviewed once an objectively observable change or alteration in these factors has occurred since the time when the 'cap' was last assayed.

84. Accordingly, if account is to be taken of the very different and changed economic circumstances and social conditions which have occurred since the prevailing 'cap' amount was fixed it seems almost inevitable that a significant upwards recalibration of that figure would now ensue from applying the same reasoning and carrying out the same revision exercise undertaken in Yun v. MIBI (supra).

85. If one was to accept the official public pronouncements by the ECB and OECD, Ireland is now classified as the fastest growing economy in the EU approaching almost full employment with rent and house prices in some areas returning to levels last seen prior to the crisis in the world's financial markets during the last decade. This is a very different climate to that in which *Yun v. MIBI* and *Kearney v. McQuillan* (supra) were decided. See also *Mullen v. Minister for Public Expenditure* (supra) at para 33; and *O'Hara v. Minister for Public Expenditure* (supra) at para 70.

86. Quite apart from the proposition that the scheme of awards in personal injury cases and any scale within that scheme should properly reflect the full spectrum of general damages, including awards which exceed the 'cap', if distortion of the appropriate range of damages is to be avoided and the principle of proportionality is to be properly applied, it is also necessary that the 'cap' amount must reflect the prevailing economic and social conditions, especially as these cases form an important part of the spectrum of damages in the overall scheme of awards.

87. Finally, I should add for the purposes of clarity that the reason these factors have particular relevance in a case to which the 'cap' applies is that they influence the appropriate level at which to fix the 'cap' amount and must therefore be ascertained as part of that exercise. See the dictum of Quirke J in *Yun v. MIBI* (supra). It would be an impossible and unwarranted financial burden on litigants if evidence of factors such as prevailing social conditions had to be given in every other type of case in order to satisfy the requirement of proportionality and I do not understand the judgment of the Supreme Court in *Kearney v McQuillan* (supra) at 387 to be suggesting such is necessary.

Assessment of Compensation under the Acts

88. The Acts provide the basis upon which the Tribunal, and on appeal, the Court is to assess compensation. The relevant statutory provisions are very helpfully set out and reviewed in detail by Irvine J. in the unanimous judgment of the Court of Appeal in *L. O'S. v. Minister for Health* (supra). Suffice to say that, subject to certain significant statutory modifications, compensation is to be assessed by reference to the principles which govern the measure of damages in the law of tort and any relevant statutory provisions. The most significant difference between the position of an applicant for compensation under the Acts and a litigant pursuing proceedings in the courts for damages is the ability of the applicant to seek to have compensation assessed otherwise than on a once and for all lump sum basis.

89. For those applicants who can bring themselves within the provisions of s. 5 (7) of the Act, it is possible to apply for and obtain a provisional award instead of a lump sum award. Commenting on the differences and the consequences between one award and another and the consequences of electing to have a provisional award, Irvine J. stated in *L. O'S. v. Minister for Health* (supra) at para. 28:

> *"In such a case the applicant would likely receive a lower award than their counterpart who opted for a lump sum, because the Tribunal / Court must, in making a provisional award, exclude from its consideration any damages for the risk that the serious complications identified in the provisional award might occur. However, if the applicant were to go on to develop cirrhosis or liver cancer they would then be compensated in full in respect of such condition and its consequences."*

90. The particular serious consequences of Hepatitis C or HIV infection have to be identified in a provisional award. The court was required to construe the phrase "particular serious consequences in the future" as used in s. 5(7) of the Acts. Finding that the words were clear and unambiguous, the court rejected an interpretation restricted to serious medical consequences and held that used in the context of the provision the phrase embraced any identifiable serious potential consequence of the infection, including financial loss. Mr. Rogers S.C submitted that where a serious medical condition identified in an award subsequently develops, entitling the applicant to return to the tribunal, and financial loss is incurred as a result of that condition, the loss in question is recoverable.

91. Ms. Gayer S.C. submitted that there must be no element of double recovery either in relation to general compensation or in relation to any claim for financial loss and that in making provision for general compensation to the Appellant regard had to be had to the amount of provisional award and to those aspects of his injuries for which he had already been compensated, a proposition about which she is undoubtedly correct. However, in my judgment, there is no risk that double recovery will occur, because the Tribunal or the Court as the case may be, is obliged to adopt an approach which avoids the risk of double recovery.

92. Where an applicant seeks and obtains a provisional award, when the Tribunal or the Court on appeal is carrying out an assessment, there is a statutory obligation to exclude from the award any compensation for the possible serious consequences of the infection identified in the award. It is only if and when those consequences become a reality that the applicant may return to the Tribunal for a further award in respect of those consequences, in which event the applicant is entitled to be fully compensated in accordance with the principles of tort law governing the measurement of damages.

93. It follows that in assessing compensation on the basis of a provisional award for the Appellant in 1998 the Tribunal was obliged to exclude from its consideration the possible consequences of HCV infection, including decompensated cirrhosis, which were identified in the award. Unfortunately for him, as we know, the Appellant's liver disease progressed to decompensated cirrhosis for the consequences of which, physical, psychological and economic he is now entitled to be fully compensated in accordance with the principles already discussed.

Conclusion: General Compensation

94. In assessing compensation the Court viewed the Appellant holistically, having due regard to the physical and psychological consequences of the infection for which he has already received compensation in the amount of IR £120,000. The impact which the development of decompensated cirrhosis has had and is likely to have on every aspect of the Appellant's life has already been described. The manner and extent to which his life has been blighted and foreshortened, even allowing for the improvement in mortality consequent upon clearing the virus, is devastating to the point of being catastrophic. In my judgment, borrowing the phraseology used by Irvine J. in *J.R. v. Minister for Health* (supra), to deprive the Appellant of the right to have his injury so described would be to fail to recognise the extent, intensity and duration of his suffering which dates back to the 1980s and which will continue for the foreseeable future.

95. Dr Houlihan gave evidence in the case of another patient, N.C., whom he treated for the consequences of decompensated cirrhosis and whose application also came before the Court on appeal (See *N.C. v. Minister for Health and Children* [2017] IEHC 696). He considered the Appellant's position to have been even more serious than that of *N.C. v. Minister for Health* (supra) at the time when he commenced DAA therapy. Although there may be significant similarities between one case and another, particularly where the same condition is involved, the consequences flowing from the development of decompensated cirrhosis and impact those will have on the life of the victim will vary to a greater or lesser extent from one person to another.

Conclusion on General Compensation

96. Having due regard to the findings made and conclusions reached and to the decisions in *N.C. v. Minister for Health* and *A.M. v. Minister for Health* (supra), within the scheme of compensation established under the Acts, the Court considers, in all the circumstances of the case, that a fair and reasonable sum to compensate the Appellant which is commensurate with and proportionate to the development of decompensated cirrhosis and the consequences thereof, physical, psychological and emotional to date and in the future, is €220,000.

Claim for Pecuniary Loss
97. The pecuniary loss claim is confined to the capital cost of providing future child care, the Appellant having set off the capital cost of the claim for his own maintenance, care and assistance against the capital value of the monthly care allowance to which he is entitled and paid monthly by the HSE. The claim is advanced on the premise that but for the development of decompensated cirrhosis the Appellant would himself have been in a position to provide for his children's care requirements during his lifetime.

98. Having considered the evidence of the Appellant, his sister O.D., the nanny S.H., Nurse Kirby and the actuarial evidence and having considered the submissions made on behalf of the parties, the Court will make a number of findings on foot of which an opportunity will be afforded to make further submissions and, if necessary, adduce further actuarial evidence.

99. In my judgment the most appropriate approach which the Court should take to the pecuniary loss claim is to ascertain what the future would likely have held for this family had the Appellant not been unfortunate enough to develop decompensated cirrhosis. A number of findings in this regard have already been made earlier in this judgment. In approaching the claim for pecuniary loss, as with the claim for general compensation, the Court is also mindful of the necessity to avoid any element of double recovery.

100. In this regard no element of the pecuniary loss claim comprised in the original award related to the cost of childcare as there were no children in being, accordingly, to that extent the claim for the capital cost of future childcare is untrammelled by the award in 1998. Given that the claim arises as a direct consequence of decompensated cirrhosis it follows from the construction of the relevant statutory provision in *L.O'S. v. Minister* (supra) that it is recoverable in principle.

101. However, although there were no children in being at the time of the original award, it was submitted on behalf of the Minister that the recovery of a substantial sum for loss of earnings on foot of that award is relevant to the claim for the cost of future childcare since the Appellant would have been expected to meet the ordinary and normal expenses of living, including household expenses, out of net earnings for which he has been fully compensated.

102. It was contended that had B.D. been in the full of his health and his children arrived when they did the cost of their care would also have had to have been met out of his income and that this fact must to be taken into account in carrying out the assessment. In this regard the attention of the Court was drawn to the decisions in *Davison v. Leitch* [2013] EWHC 3092 (QB) and *McCarthy v. Rowland & Anor* [2014] IEHC 42. The case presented on behalf of the Appellant proceeded on the basis of the financial cost of child care which he incurs today and will face in the future. He had already retired in 1998 and so it was contended that had it not been for the development of decompensated cirrhosis he would have been available and able to provide for the care needs and requirements of his children.

Conclusion; Loss of Earnings; Relevance of 1998 Award and Age of Retirement.
103. I accept the submission made on behalf of the Minister in this respect; accordingly, the Court finds that the sum for loss of earnings recovered on foot of the 1998 award is relevant in the context of addressing the claim for the cost of future childcare. I shall return to this aspect of matters shortly, however, before doing so it is necessary to deal with a number of submissions which were made in relation to the age at which the Appellant was likely to have retired since that event has a bearing on the actuarial computations.

104. It was submitted on behalf of the Minister that the Appellant may well have continued to work beyond the age of 65, perhaps up to the age of 70. As against that suggestion, Mr. Fitzpatrick submitted that the Appellant had only been compensated for loss of earnings to the age of 57, the Tribunal having applied a 30% deduction for *Reddy v. Bates* (supra) contingencies. While it is clearly possible that the Appellant may have continued to work beyond his 65th birthday had he not contracted HCV and had otherwise remained in good health, it seems to me, on the balance of probabilities, more likely he would have retired on reaching 65.

105. The Court has reached this conclusion on a number of grounds (i) it is currently the legal, normal and generally accepted age of retirement in our society as well as in (ii) corporations such as Avonmore, the Appellant's previous employer, and (iii) 65 was the retirement age on foot of which the claim for loss of earnings was based and allowed by the Tribunal in 1998. For these reasons the Court will proceed on the premise that the Appellant would have retired on his 65th birthday.

106. In my judgment, the proposition that the 30% deduction for contingencies meant that the Appellant had only been compensated for his loss of earnings to age of 57 is misconceived; this is not the basis on which *Reddy v. Bates* (supra) contingencies are applied. Rather, the Appellant was awarded loss of earnings on the basis that he would have been promoted to a certain position commanding a certain salary and that he would have continued to work in that capacity until his 65th birthday. The 30% deduction was applied to take account of contingencies such as accident, illness and unemployment risks that could occur over that time; absent his illness there could be no certainty the Appellant would have worked in the assumed position with Avonmore plc without missing a day until the date of his retirement.

107. The Court has already found that but for the consequences of HCV the Appellant would have continued to work in his chosen career on a full time basis until he reached retirement age and that, as is the case, Mrs D would have done likewise. The award for loss of earnings was calculated on a once and for all lump sum basis in accordance with common law and from that amount the Appellant would have been expected to provide for himself and meet the household and normal living expenses habitually encountered in the course of life including any expenses associated with the care and education of their children.

108. In order to avoid any question of double recovery I am satisfied and the Court finds that account must be taken of the financial provision which the Appellant would have had to make for his children's care out of net earnings until the date of his retirement, a liability which will likely continue to that age, at least to some extent, and quite possibly beyond in circumstances where two of the children have special needs.

109. While both parents were working there would have been two salaries in the household out of which, given their career commitments, they would have had to make provision for their children's needs and care requirements including the necessity to retain a carer or carers. The Court has no reason to conclude other than that in good health both parents would, during their free time, have shared the responsibility of looking after their children during the week, particularly before and after school, in the evenings and at weekends. During the week most of that burden would have fallen on the Appellant because Mrs D. leaves the home very early and does not return until approximately 8 pm. He is the one who would likely have had to get them dressed, fed and ready for school each day, likewise he is the one who would likely have had to bring them to afterschool extra-curricular activities, therapies, and to help them with homework, give them their supper and get them ready for bed. During the week more or less all of these needs and requirements are now met by S.H. and the Appellant's siblings.

110. Particularly having regard to the special needs of the two girls, in circumstances where both parents would have been working a

carer would have had to start work in the morning. Although the children are picked up by bus around 9 or 9.15 their nanny, S.H., collects them and brings them to various therapies which they have to attend during school hours, moreover, because of their ages, there are different pick up times from school during the afternoon. Once home they have to be helped with their homework as well as with the special exercises they have to undertake and they also have to be taken to therapies and extra mural/curricular activities following which they have to be fed and got ready for bed.

111. In circumstances where both parents would have been working, all of the care requirements and needs of the children between 9 am and 4.30 pm would have had to have been met by a carer or a combination of a carer and one or other of the Appellant's siblings who, I note in passing, are currently very involved in the children's lives, of these one brother and one sister are unmarried and live close by and as part of a close knit family I am quite satisfied that they would have been just as involved if the Appellant had never become ill. The contribution of family members and the Appellant's inability to make any worthwhile contribution to the care of his children in present circumstances other than going, generally accompanied, to a football match with his son or sitting with his children on a sofa in the evening pending the return of their mother from work was very well portrayed by O.D. whose evidence in this regard the Court accepts.

112. S.H. arrives early in the morning, around 7 to 7.30 a.m. and gets the children washed, dressed and ready for school. She gets their breakfasts and presents them for collection by the school bus between 9 and 9.15 in the morning. Although there are hours during the week when she is in a position to leave the Appellant's family home mid-morning and not return until lunchtime she is committed from then until at least 6.30 or 7 pm in the evening and on some evenings during the week will remain in the house by arrangement until 8 pm.

113. The Court has already found that by reason of his illness the Appellant is not in a position to provide any effective care for his children. The Court also finds that but for the consequences of decompensated cirrhosis he would have provided for his children's care needs on weekday mornings until they are picked up by the school bus and again in the late afternoon and evening after work. Furthermore, I am satisfied, and the Court finds that following retirement he would also have participated in his children's lives and provided care for them during the rest of the day in a way and for the time now expended by S.H., together with additional hours of care arising in respect of therapies and extra curricular activities and that to a great degree this obligation would have fallen on his shoulders for so long as Mrs D. remained employed and posted to Dublin.

114. The Court also finds that although the two girls have special needs all the children attend mainstream schools and all enjoy and participate in extracurricular activities. This has significance for the claim in respect of a live in carer to look after the children instead of a nanny once the youngest child reaches her 18th birthday in 2030. The two girls in particular attend a series of different types of therapies, although I understand their older brother also attends physiotherapy. Details of these therapies and extracurricular activities are set out in an addendum dated the 2nd February, 2017, to the care report of Nurse Kirby.

115. Not all of these are year round activities, a factor which must also be taken into account in the assessment as must the fact that some of the therapies and/or extra-curricular activities occur at the same time in different places. On the occasions when this clash occurs two adults have to be available in order to meet the care and travel commitments; even in the full of his health the Appellant couldn't be in two places at the same time and so account must also be taken of this fact in determining the additional care hours to be allowed to him.

116. Having already found that the Appellant would have been promoted and that he would have done whatever was necessary for his children's care so far as was possible within the confines of a full time career, the Court also finds that had he been promoted to a senior executive position at Avonmore, the Appellant would have been facilitated with flexitime during the working week which would have enabled him to bring one or other of the children to therapy classes/ extra-curricular activities in the late afternoon or early evening. However, I think it unrealistic and unlikely that he would also have been able to get time off during the morning or early afternoon to undertake school runs or bring the children to therapy sessions at those times.

117. It is apparent from the 7th February addendum to the care report that on Monday one of the girls attends speech and drama therapy from 4.30 pm to 6.30 pm and that on Tuesday she attends from 4 pm to 6 pm. On Wednesdays she has handwriting classes from 5.30 to 7 pm. On Thursday she has horse riding from 9am to 12.30 pm and Irish dancing from 6 pm until 8 pm. On Friday she swims from 4 pm to 6.30 pm and on Saturday she attends a gym from 1.30 pm to 3.30 pm. Her sister attends therapy in Dublin on an intermittent basis between 7 am and 4 pm on a Tuesday and on Friday she goes swimming from 4 until 6.30. Their brother attends physiotherapy on a Wednesday followed by soccer from 5.30 to 7.30 pm which he also plays on a Thursday between 6.30 pm and 8.30 pm. On a Saturday one of the girls attends gym between 1.30 pm and 3.30 pm and at the same time her brother plays a soccer match.

Conclusion: Additional Care Claim to Retirement

118. The activities set out in the letter of the 7th February, allowing for travel, amount to 33.5 hours per week and comprise what is described as an additional care claim over and above the hours provided by the children's nanny, S.H. It seems to me that the appropriate way to deal with this claim up until the Appellant's 65th birthday is to allow for the activities which, with some flexibility from his employer, he would most likely have been in a position to attend, namely those activities or therapies commencing at 4.30 or 5 pm during the week together with three hours on a Saturday. Accordingly, in respect of this claim, the Court will allow a total of 13 hours, that is, two hours in each weekday and three hours on a Saturday which, in the fullness of health, the Appellant would most likely have been in a position to give to his children until reaching retirement.

Conclusion: Morning and Evening Child Care to Retirement

119. I am also satisfied that but for his illness the Appellant would have been in a position to provide two hours of care for his children in the morning before collection by the school bus and two hours in the evening until the return home of Mrs. D. However, allowance must be made for the fact that on a Thursday he would either have had to take one of the children to Irish dancing from 6 to 8 or the other child to soccer from 6.30 to 8.30 pm. Either way, he could not also be at home looking after the remaining child, so that too must be taken into account. Accordingly the Court will allow 18 hours in respect of this aspect of the claim.

120. In passing, I should note in regard to the claim which was made in respect of a nanny to the 18th birthday of the youngest child that this was capitalised at just short of €35,000 per annum on the premise that a nanny would also be paid additional expenses. S.H. gave evidence that she rarely, if ever, got paid anything over and above a net sum of 550 per week. She works flexitime. It suits her very well and in aggregate I am satisfied that she works a 40-hour week as against which the Court has allowed 18 hours. If allowed in full the capital value of the child care claim to the Appellant's 65th birthday is €150,000. As it happens the capital value of the claim from age 65 until the 18th birthday of the youngest child is also €150,000, giving a total capital value of €300,000 before account is taken of the hours which would have had to have been provided by a nanny and met out of income so long as the Appellant (had he been well) continued working until he reached retirement at age 65 and his wife also remained in full time

employment.

Conclusion: Child Care Claim from Retirement
121. With regard to the claim from age 65, in the fullness of his health the Appellant would have been able to provide the care now being provided by S.H. as well as the additional hours other than to the extent there is a clash of therapy/activity times as aforesaid. Accordingly, this too will have to be taken into account and appropriate provision made by way of reduction in the capital value. Accordingly, from age 65 until the youngest child reaches her 18th birthday the Court will allow the hours per week currently provided by S.H. (40 hours) less two hours per week to take account of the time on a Thursday when the Appellant would, in the fullness of his health, have been able to take his daughter dancing from 6 to 8 or his son to soccer from 6.30 to 8.30 pm.

Claim for Live in Carer
122. The pecuniary loss claim for a live in carer after the youngest child reaches the age of 18 is substantial, amounting to €352.275, but which I am satisfied cannot be allowed on a capitalised basis. This is not to say that there won't be a need for care after the youngest child's reaches her18th birthday. The difficulty which faces the Court was exemplified on the cross-examination of Ms. Kirby. No indication was given to explain why Mrs D did not give evidence to the Tribunal or to the Court or why she wasn't interviewed by Ms Kirby in preparation of her care report. However, it is evident from the reports of Ms. Campion that the Appellant blamed himself for what is described as a serious deterioration in the marital relationship; there was also some reference to this in the transcript of the evidence before the Tribunal. This may or may not be the explanation or reason for the failure to give evidence; indeed, there may be other perfectly good reasons why Mrs D chose not to do so or otherwise participate in the proceedings.

123. None of these remarks are in any way to be taken as a criticism of Mrs D. or for that matter as a criticism of anybody else for the resulting lacuna in the evidence, nevertheless, I am left in the position that the Court has absolutely no idea what Mrs. D.'s plans are in relation to her career or her retirement or what her plans are in relation to her children's future care needs. Nevertheless, it seems reasonable to proceed on the premise that whatever the circumstances of the marital relationship Mrs. D. is a loving mother who will do whatever she can for her children and in the ordinary course of events after her own retirement will look after their care needs and requirements as much as is feasible for her and that she would have done as much if not more so than her husband would have done had he not become ill.

124. The deficit in detail as to what plans, if any, the Appellant and his wife have for their children after they attain their majority was compounded in his own evidence. There was a certain amount of speculation and I think, in fairness to Ms. Kirby she agreed, it was speculation as to what the children would likely do once they attain their majority. She gave evidence that some parents like their children to continue to live with them whilst others strive to try and get their children ready to go out into the world especially insofar as that is possible for children with special needs, for example through assisted living, so that they are relatively independent and able to fend for themselves.

125. In this regard the Court has already noted that the girls attend mainstream school and in terms of disability are at the mild end of the spectrum for Down Syndrome; both are relatively independent. The efforts made to assist them develop their full potential are laudable and no doubt the therapies and extracurricular activities which they attend are of benefit. So, in the absence of any evidence as to actual planning, it seems reasonable to infer from the forgoing that as they approach and after they attain their majority, B.D. and his wife will more likely than not do whatever is necessary to encourage and assist their children live as independent a life as possible, to include facilitating them in whatever way necessary to leave home and to attend third level education.

Conclusion: Claim for Live in Carer.
126. Nevertheless, without falling into the realm of speculation but given they have special needs, it would seem reasonable to accept that one or other or both of the girls may have to stay at home after they attain their majority and that, possibly indefinitely, some level of ongoing care will be required. In all the circumstances I consider that the most appropriate way to deal with this aspect of the claim is to make provision by way of general compensation, as to which the sum of €100,000 would be fair, reasonable and proportionate in the circumstances and the Court will so order.

127. Having afforded an opportunity to consider these findings the parties made further submissions and provided revised actuarial computations taking the findings into account and on foot of which I have reached the following conclusions.

(i) The Appellant will reach his retirement age in 2023;

(ii) His eldest child will attain his majority the following year, in 2024;

(iii) Between then and 2030 the two girls will attain their majority;

(iv) It seems to me that the current schooling, care needs and requirements of the children are going to change as they grow older and that this process will be accelerated through their teenage years as they approach adulthood and complete secondary school.

Previous observations concerning the independence of the children and the likelihood that support for this would be a feature in the attitude of the parents made when addressing the care claim after the 18th birthday of the youngest child in 2030 apply not only from then but are also apposite for a period commencing prior to the Appellant's 65th birthday in 2023 through to 2030. I am satisfied that this feature in their lives will be progressive as they reach the end of secondary school as well as after they attain their majority and head into third level.

Conclusion; Other Care Claim Awards
128. Having regard to the finding that Mrs. D. will not retire until she is 65, or is unlikely to retire until she is 65 and that this will be a date after the 18th birthday of the youngest child and provision by way of general compensation having been made for the care claim after the 18th birthday of the youngest child, the only aspect of the claim with which the Court is concerned are the amounts which should be allowed for the future cost of the children's care to the eighteenth birthday of the youngest child. Mr. Tennant provided revised figures for the capital value of these claims by reference to an hourly rate of €13.70 per hour. The hours for the care of the children per week allowed by the Court until the Appellant reaches his 65th birthday total 31, the capital value of which, at €13.70 per hour, is €125,712 and the Court will so order.

129. Turning to the claim for the future cost of childcare from the Appellant's 65th birthday and having regard to the findings made in relation to the independence of the children and the change in their care needs and requirements as they reach adulthood and leave secondary school the Court finds that the demands on the time of the parents are likely to lessen both at the weekend and during the

week. For example, the necessity to undertake two school runs in the middle of the afternoon will gradually disappear.

130. Once the eldest child reaches his majority in 2024 and finishes secondary school he will in all likelihood want to progress to third level education which, given his rural location will probably involve leaving home. He does not have any special needs and there is no evidential basis which would warrant the Court reaching a conclusion other than that, like other children, he will want to achieve as much independence as possible, preferably by way of third level education in some form.

131. Having regard to the findings already made in relation to the two girls with special needs and the findings that their parents will probably support and encourage them to attain as much independence as possible and further allowing for the change in their needs and circumstances as they progress towards their majority, the Court considers 42 hours per week for care should be allowed from the Appellant's 65th birthday until the youngest child reaches her eighteenth birthday. Applying the revised figure of €4,165 per hour, the capital value of this aspect of the claim amounts to €174,930 and the Court will so order.

Ruling

132. The Court will make an order varying the order of the Tribunal by substituting for the sum of €150,000 general compensation the sum of €220,000 and by substituting for the sum of €50,000, the aggregate sum for pecuniary loss of €400,642. Otherwise, the Court will affirm the terms of the award of the Tribunal which, as to general compensation, will be provisional on the events identified in the award.

133. I will discuss with counsel the orders to be made with regard to costs of the proceedings above and below.