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Judgment

Title: AM -v- The Minister for Health

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THE HIGH COURT

[2015 No. 3 CT]

**IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 5 (15) OF THE HEPATITIS C
COMPENSATION TRIBUNAL ACTS, 1997 - 2006**

**IN THE MATTER OF A DECISION OF THE HEPATITIS C COMPENSATION TRIBUNAL TO THE
CLAIMANT, A.M. ON THE 13th OF APRIL 2015, REFERENCE 0968/96**

AND IN THE MATTER OF AN APPEAL OF THE CLAIMANT A. M.

BETWEEN

A. M.

APPELLENT

THE MINISTER FOR HEALTH

RESPONDENT

JUDGEMENT of Mr. Justice Bernard J. Barton delivered the 22nd day of October 2015

1. This matter comes before the court by way of an appeal pursuant to s. 5 (15) of the Hepatitis C Compensation Tribunal Acts 1997-2006 (the Acts) from an award of the Tribunal made to the appellant on the 13th of April 2015 in the total sum of €180,000 and of which €150.000 was in respect of general damages.

2. In the opening before me, senior counsel for the appellant, Mr. Rogers, informed the court that whilst she was satisfied with the grounds for and upon which she may return to the Tribunal at a later date, she was dissatisfied with the award made to her in respect of general damages and that this was the subject matter of the appeal. When due regard was had to all of the evidence and in particular a decision of the tribunal in the case of N.G. delivered on the 2nd of July, 2014,(1445/96) it was the appellant's case that the award was both insufficient and inadequate.

Background

3. The appellant was born on the 9th of April, 1946, is married, and lives with her husband in Blackrock, County Dublin. They have four children and five grand children. An anti D injection, which came from a batch infected with hepatitis C, was administered to the appellant in 1977. She subsequently tested PCR positive with a full viremic load.

4. The affects of the infection on the appellant as regards her social, recreational and vocational life between then and 1998 are set out in the transcript of the evidence and medical reports furnished in connection with the initial application brought by her to the tribunal under the Hepatitis Compensation Tribunal Act 1997 and on foot of which an award an award, dated the 6th of January 1998 was made in the amount of £283,500, of which £120,000 was in respect of general damages.

Statutory Provisions.

5. Section 5 (7) of the Hepatitis C Compensation Tribunal Act, 1997 (since amended to include claims by those who have contracted HIV) provides for the making of what is described in that section as a "provisional award". The Tribunal is empowered to make a provisional award where it is of the view that there is a possibility, but no more than a possibility, that a claimant as a result of having contracted Hepatitis C may suffer particular serious consequences in the future. The section provides that the award is to be calculated in accordance with the principles which govern the measure of damages in the law of tort and any relevant statutory provisions referred to in s.5 (1) but assessed on the assumption that such serious consequences will not occur, identifying those consequences and specifying the period within which the claimant may apply in the event of such occurring.

6. Section 5 sub s 7 provides that where such consequences do occur, the claimant is entitled to apply for an award of further compensation in accordance with the terms of the provisional award.

7. The conditions attached to the award of the tribunal made to the appellant on the 6th of January, 1998 were expressed in the following terms:

"In the event of the applicant's condition deteriorating to decompensated cirrhosis or to hepatocellular carcinoma she will be at liberty to return to the Tribunal for further compensation."

8. The appellant had been hepatitis C virus positive since the time of her infection in 1977 and was still virus positive when in 2013 a decision was made to treat the infection with interferon/ribavirin therapy. It was the appellant's evidence to the Tribunal, and indeed to the Court, that she decided to proceed with that treatment on medical advice. The appellant was very conscious of her medical

condition and was well informed of its potential consequences. She was aware of the significant side effects associated with the combined therapy and in that connection was awaiting the development of further drugs, the trials of which had been extremely positive.

9. It appears that during a medical review in 2013, her consultant Hepatologist, Professor John Hegarty, informed the appellant that it was no longer advisable to delay treatment since it appeared that test results had confirmed a serious deterioration in what was progressive liver disease suggestive of possible cirrhosis.

10. With some reluctance the appellant commenced treatment in September 2013, as a result of which she developed significant but well known side effects including spasms, shakes, sweats, dry skin, rash, fatigue and problematic synsopal episodes. Shortly after commencing the therapy the appellant also developed abdominal symptoms. An ultra sound, carried out on the 14th of October 2013, confirmed the presence of ascites in the liver. This was shocking news for the appellant since not only did it confirm the presence of cirrhosis of the liver but that this condition had progressed to decompensated cirrhosis.

11. At about this time Professor Hegarty retired from his consultant post and was succeeded by Dr. Diarmaid Houlihan, consultant hepatologist, who thereafter took over the management of the appellant's hepatitis.

12. Apart from his medical reports, Dr Houlihan gave evidence to the Tribunal and to the Court. It transpired from testing carried out early on that the appellant was responding very positively to the treatment; consequently, Dr. Houlihan advised her that, notwithstanding the awful side effects which she was experiencing, she ought to remain on the treatment, advice which was accepted. The treatment was effective; the appellant cleared the virus and has since remained PCR negative.

13. Doctor Houlihan had hoped that as a result of becoming PCR negative that there was a prospect of liver tissue regeneration to the point where the appellant's liver would no longer be decompensating. Regrettably that did not happen and his evidence to the Court was that as she continues to have decompensated cirrhosis it is a matter of medical probability that she will continue to do so. He also confirmed that the development of ascites was itself evidence of decompensated cirrhosis.

14. It was also his evidence that one of the recognised consequences of decompensated cirrhosis is the development of hepatic encephalopathy. He explained that this condition arises because the cirrhotic liver is no longer able to filter toxins and ammonia from the blood stream with the result that the brain is affected by swelling of the astrocytes, which are the cells that make up the brain.

15. He explained that encephalopathy is divided into four grades, the first of which involves increased sleepiness and forgetfulness; the second by those and slurred speech, the third by those and drowsiness and finally, the fourth by coma. It was his opinion that the appellant could be categorised as being between grade 1 and grade 2.

16. Although the condition is irreversible, there are treatments which work by flushing the toxins out of the bowel or neutralising the bacteria that produce the toxins. One of the therapies is rifaximin which acts by sterilising the bacteria in the blood which produce the toxins, however, and again rather unfortunately for the appellant, this treatment was not of benefit to her. She has, however, been treated with other medications and modalities to help clear the toxins from her body, including laxatives.

17. The fact that the appellant will, as a matter of probability, remain PCR negative and that the risk of recurrence of the virus being, in the opinion of Dr. Houlihan, no more than one of a low possibility, is of some prognostic significance. The appellant is not at a point in terms of her medical condition where she would be offered a liver transplant. In that regard Dr. Houlihan's evidence was that in the ordinary way patients would not be offered a liver transplant in circumstances such as those of the appellant before reaching stage two/three encephalopathy because of the risks associated with

transplantation. The appellant is now sixty-nine years old. Were she to progress to stage two/three or if the ascites was to return it is unlikely, for a number of reasons not the least of which was the increased risk of mortality in individuals over seventy, that the appellant would not be offered the option of liver transplantation.

18. Doctor Houlihan explained that had the appellant been suffering from decompensated cirrhosis prior to the commencement of her treatment she would not have been commenced on the treatment since that is one of the potentially negative consequences. Regrettably, in her case it was the treatment which whilst effective in clearing the virus, triggered the decompensation.

19. A recent EEG carried out by Prof. Tubridy confirms the clinical assessment that the appellant continues to suffer from encephalopathy at a point between stages one and two, and consistent with the clinical signs of fatigue, forgetfulness and poor concentration. Dr. Houlihan thought that the appellant had a 20% chance of progressing to stage two. However, he hoped with treatment to be able to maintain the appellant's status at its present level and which, in his view, was as much as could be expected. He thought, as a matter of medical probability, that the appellant's life expectancy to be approximately 75 years.

20. The appellant gave evidence that prior to commencing her treatment she had lived a life which was as full as was possible given her hepatitis C condition but notwithstanding which was a life of social and personal confidence, independence and control but each of which had been effectively destroyed by the development of encephalopathy. She had become very forgetful, confused, fatigued, more socially withdrawn and dependant on her 75 year old husband. Practical examples of the change in her life were of an inability to drive, carry out normal household chores, or to go shopping. She gave evidence of a tendency to trip, and that whilst she could go out alone on short walks from her house such as into a neighbouring park or to walk on a short section of the pier at Dun Laoghaire, she would not attempt anything else unless accompanied; she would generally take her husband's arm for support when they were out together.

21. Dr. Houlihan had advised her to talk as much as possible for the purposes of maintaining fluency in the context of her encephalopathy but she gave evidence of talking less and socialising less with her close friends who whilst they were understanding of her condition she felt were nevertheless irritated by her tendency to be repetitive. She described how she felt that she had lost a whole sense of herself, her joy in living life, her confidence and her independence and in particular the loss of being in control of all aspects of her life.

22. The appellant gave evidence that she was aware of the necessity to keep herself fit, that she enjoyed going to hydrotherapy for that purpose and of the medical necessity of keeping herself, as she put it, flushed out but that as a result of the necessity of having to take medication to assist with that she was left with a constant feeling of her body being dehydrated together with bloating of her tummy in the evening time which was also painful.

23. Despite her fatigue, loss of independence and forgetfulness the appellant gave evidence that she was aware and determined to keep herself looking as well as possible and was clearly conscious of and had a desire to live her life with dignity insofar as that too was possible. In this regard she described as one very important reason for keeping up her appearance a wish, to put it in her own words, "not to frighten my grandchildren" who range in age from sixteen to twenty months and who are still an important part of her life.

24. Having had an opportunity to observe the demeanour of the appellant in the witness box, it was also evident that this unfortunate woman, despite her encephalopathy, had a clear insight and understanding of what she described as her "predicament". She contrasted that with the life which she led prior to commencing treatment and which she described as one of complete independence, self confidence, and an ability to make plans and put those into effect of her own accord. Rather sadly, I thought, she did not think that there was now much left anymore to her life. She knew that these proceedings meant that things were very serious and that whilst she wished she could be more optimistic she did not really think about the future but rather lived from day to day.

25. Miss Jo Campion prepared a report arising from her various assessments of the appellant and which was available to the Tribunal and the court. In addition she gave evidence in which she emphasised how completely different the appellant's presentation was to the court from the lady whom she had seen and assessed prior to the commencement of her treatment. It was obvious to her that the appellant had become very upset and frustrated at the effect on her brain of the encephalopathy. She was an extremely intelligent woman, very well read and very well educated too, and despite her condition was still aware of her brain's memory and capacity but frustrated by the inability to act upon and process information which whilst there she could no longer reach. By nature she is a realist; prior to her treatment she had studied psychology and had helped others who had suffered with hepatitis C. All of that was now denied to her. Her cognitive abilities were unquestionably important to the appellant and she grieved for the way in which these had been progressively affected and are likely to be so in the future. The progressive loss of her mental faculties was nothing short of devastating.

26. I have had the benefit of reading the transcripts of the evidence given before the Tribunal on foot of the applications in January 1998 and April 2015 as well as the medical and other expert reports prepared for those applications together with the evidence of the appellant, Dr. Houlihan and Miss Campion given during the course of the hearing of this appeal and which the court accepts.

27. It was submitted by Mr. Rogers on behalf of the appellant that the court should have regard by way of a guide in the assessment of damages to the decision of the Tribunal in the case of N.G. where the Tribunal made an award of €250,000 in respect of general damages for cirrhosis. As to the inadequacy and insufficiency of the award of the Tribunal in this case, it was his submission that the award of the Tribunal made to the appellant had failed to properly or adequately reflect the effect which the encephalopathy had had and was likely to have on the appellant, a condition which was a direct result of a treatment which itself had become an absolute medical necessity due to the progressive deterioration of the appellant's liver disease caused by hepatitis C infection.

28. Senior counsel for the respondent, Mr. McCullagh, submitted that the decision in N.G. had to be distinguished. It was a different case to that of the appellant. In that case it was clear from the award of the Tribunal that the appellant was being compensated for the development of cirrhosis and which would also likely result in a transplant but which had been no more than a possibility at the time of the provisional award made in 1998.

29. It was also submitted on behalf of the respondent that the treatment which was afforded to the appellant was not itself compensatable falling as it did outside the conditions set out in the provisional award, and such treatment having commenced prior to the development and diagnosis of decompensated cirrhosis.

30. In reply to that Mr. Rogers submitted that the treatment was compensatable since it was a necessary consequence of the liver disease caused by the hepatitis C infection. The risk of decompensation was an ever attendant risk on an untreated cirrhotic liver. Untreated her mortality risk was higher. Viewed objectively she really had no effective choice but to undergo the advised medical treatment which had triggered the very condition the development of which entitled the appellant to return to the tribunal.

Decision

31. It is evident from a reading of the transcript of the proceedings before the tribunal that the development of the encephalopathy was found to be responsible for causing the appellant significant psychological sequelae and that there was also the possibility that the appellant would require liver transplantation at some stage in the future.

32. Whilst it is apparent, for the reasons given in the evidence of Dr. Houlihan to the court, that it is unlikely that the appellant would be offered transplantation in the future, it is also clear from his evidence that the consequences of the encephalopathy went far beyond the psychological. They were organic directly affecting the brain so as to have resulted and likely to result in ongoing functional impairment. The significance of that for the appellant cannot be understated particularly and

especially in circumstances where, although impaired, her cognition is such that she has an appreciation, to use her words, of the predicament in which she now finds herself. Psychologically, the mental anguish and effect that that has had on the appellant was abundantly clear from her evidence and the way in which that evidence was given.

33. Under the scheme established by the Acts the court is required when applying the principles of tort law concerning the assessment of compensatory damages in the circumstances of a case such as the present, involving as it does a return to the tribunal, to have regard to the fact that an award of general and special damages has already been made in respect of the injuries and loss suffered and likely to be suffered by the appellant as a result of having contracted hepatitis C and which included cirrhosis .

34. The court is concerned on this appeal, as was the tribunal on the application before it, with the assessment and making of an award of general damages in respect of the present and future pain and suffering arising as a result of the development of decompensated cirrhosis of the liver which, at the time of the original hearing in 1998, was considered, on the evidence as it then was, to have been no more than a possibility and for which the applicant was not compensated in 1998.

35. Accepting as I do the evidence of the Appellant, and Ms. Campion in relation to the mental and physical status of the appellant prior to commencing the anti viral treatment, albeit PCR positive, she was leading a wholly independent resourceful and satisfying life up to that time. As against that, it is unquestionably the case that her liver disease was progressing and that without treatment would have progressed most likely to the point of failure the likelihood of which is, in my view, corroborated by the medical advice given by Prof. Hegarty in 2013, that the appellant should not any longer delay commencement of the treatment.

36. That was something of a Hobson's choice for the appellant because of the known side effects of the treatment on patients and of the risk of other negative consequences such as the development of decompensated cirrhosis.

37. Unfortunately for the appellant, the preferred medical option of treating the gastro-intestinal consequences of decompensation by a particular antibiotic was not successful. Whilst the build up of toxins and ammonia in her body as a result of the decompensation has been treated, so far as possible, by other medicines and modalities this failed to prevent the development of encephalopathy which is now a present and will be a permanent feature of the appellant's life; though Dr Houlihan is hopeful that the treatments will prevent further progression of that condition.

38. The combined treatment, which commenced in September 2013, was initially well tolerated by the appellant and at an early stage showed positive results in terms of dealing with the virus. It did not take long, however, before the well known side effects, which were described by the appellant and considered by the appellant to be a horrendous, began to take hold. Despite this, medical advice was that the appellant should persist, if at all possible, with the treatment because she was a responder. No doubt buoyed up by the effective clearing of the virus to her credit the appellant, notwithstanding the awful side effects, persisted with the treatment which was successful and as a result of which she remains PCR negative to date.

39. There was also the hope that, as explained by Dr. Houlihan , clearing the virus would reduce the appellant's mortality risk in percentage terms significantly below that which would otherwise have been the case had she not commenced treatment, moreover, although the disease had progressed to decompensated cirrhosis, it was his opinion that in the absence of the insult to her liver caused by the virus there was the prospect of tissue regeneration resulting in her liver function improving to the point where it was again compensating. As if the appellant had not already suffered enough that hoped for outcome was not achieved and having regard to the time which has already elapsed since she first became PCR negative it is now unlikely ever to occur which means that the consequences of her decompensated cirrhosis, including her encephalopathy, will persist.

40. Insofar as the provisional award of 1998 was concerned with the assessment of general damages

that clearly did not include any award for the occurrence or consequences of decompensated cirrhosis. One of the conditions of the provisional award and upon which the appellant was entitled to return to the Tribunal was the development of that condition. I accept the medical evidence of Dr. Houlihan that had the appellant already developed and had been diagnosed with decompensated cirrhosis of the liver in 2013 she would not have been offered the treatment since one of the risks of that is decompensation.

41. The treatment was afforded in circumstances which, on any reasonable objective assessment, amounted to medical necessity. There is no doubt but that on the evidence, although the treatment commenced before the diagnosis, it was the trigger for a condition which is now likely to be permanent. In such circumstances were the court to accept the submission of the respondent it would be tantamount to depriving the appellant of compensation for the pain and suffering resulting from a treatment that itself triggered the condition specified in the provisional award of 1998 and which entitled her to return to the Tribunal.

42. Although the trigger was pulled, so to speak, by the treatment before the development and diagnosis of the condition, it is in my view inextricably bound up with it; accordingly, I cannot accept the respondent's submission that the court has no jurisdiction to compensate the appellant for the pain and suffering associated with and caused by the treatment. In my view the tribunal was correct in taking those consequences into consideration when assessing general damages and as so appears from its award.

43. For the sake of completeness I would add that there is nothing from the findings of the tribunal in the provisional award of 1998 which would warrant a conclusion that that tribunal had considered never mind made provision for the consequences of the treatment in anticipation that as a matter of probability the appellant would be so treated for cirrhosis at some time in the future.

44. It has to be observed that the respondent, very fairly and properly, conceded that the court is entitled to compensate the appellant for the consequences of decompensated cirrhosis, including the encephalopathy. In that regard the court accepts the submission of the appellant in relation to the inadequacy of the assessment of general damages by the tribunal.

45. I am satisfied that as a direct result of her decompensated cirrhosis the appellant developed encephalopathy which has and is likely to permanently affect her both psychologically and functionally, moreover, I am satisfied that this condition is, as a matter of probability, irreversible. It follows that apart altogether from the suffering caused by the other side effects of the anti viral treatment, the appellant has suffered a serious and permanent injury to her brain.

Ruling.

46. In the circumstances of this case, and having due regard to the findings made herein, it is the judgment of the court, applying as it must the well established principles of tort law to the assessment of compensation, that a fair and reasonable sum commensurate with the appellants decompensated cirrhosis and the consequences of that for her, is €250,000 and the court will so order.

47. The court will allow the appeal and will discuss with counsel the final form of the order required.

