

THE HIGH COURT

[2018/8 C.T.]

IN 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 A CLAIM BY K. B.

AND

IN THE MATTER OF A DECISION OF THE HEPATITIS C AND HIV COMPENSATION
TRIBUNAL OF 23rd JULY, 2018

BETWEEN

K. B.

APPELLANT

AND

THE MINISTER FOR HEALTH

RESPONDENT

JUDGMENT of Mr. Justice Bernard J. Barton delivered on the 18th day of October, 2019

Introduction

1. This is an appeal by the Appellant from the decision of the Tribunal made the 23rd day of July, 2018, whereby she was awarded €85,000 in respect of her claim for post-traumatic stress disorder, €90,000 in respect of her claim for loss of society and €155,000 in respect of her claim for loss of opportunity. The appeal is brought pursuant to s.5 (15) of the Hepatitis C and HIV Compensation Tribunal Acts 1997 to 2006 (the Acts). There is no issue on causation. While the appeal is taken against the amounts awarded in respect of each claim it was very fairly accepted by Ms. McCrann S.C. on behalf of the Appellant that the central controversy between the parties concerns the amount of the award in respect of the claim for Loss of Opportunity. It was acknowledged that the amount of the award in respect of Post-Traumatic Stress Disorder (PTSD) was within the appropriate range of compensation for the disorders of the type suffered by the Appellant as, indeed, was the award for Loss of Society albeit that in the circumstances of the case the award in respect of that claim was at the lower end of the range, particularly having regard to the judgement of the Court in *J.Q. v. the Minister for Health* [2017] IEHC 4.

Background

2. The Appellant was born in March 1983, and is the eldest daughter of her father, who died in August, 2008. He was born in September 1969, and suffered from severe haemophilia A, a life-long condition for which he received blood and blood products within the State, including factor VIII, which was first administered in March 1976. It is known that during the 1970's and 1980's blood and blood products administered in the State were contaminated with the Hepatitis C (HCV) and Human Immunodeficiency (HIV) viruses. Unfortunately for the deceased he contracted co-infection through this route and was first diagnosed antibody positive in 1993. He was found to be virus positive by Polymerase Chain Reaction (PCR) testing in November 1995 and it is accepted HCV was a significant contributor in the cause of his untimely death.
3. Although the appeal is a re hearing *de novo* of the application for compensation, no issue arises in relation to the findings of fact made by the Tribunal in respect of the claim for

PTSD or in respect of the claim for Loss of Society. Indeed, it is apparent from the transcript that the Tribunal accepted the evidence of the Appellant and the experts called on her behalf; the claims were dealt with sympathetically and with sensitivity. It is not intended to summarise the findings and conclusions reached; suffice it to say the Tribunal was satisfied the Appellant had suffered a PTSD and loss of society as a consequence of her father's death. The Tribunal was satisfied, as is the Court that a very close emotional and psychological bond developed between father and daughter, that she adored her father and that his PTSD and the loss of his society had a profound and long lasting impact upon her capacity to function, particularly in her vocational life.

4. While the Appellant also had a loving relationship with her mother it was to her father she turned for advice, particularly with regard to her educational path and subsequently for her career options. He was the 'go to' parent when she had a problem and the one with whom she developed a strong intellectually engaging relationship; she is a highly intelligent individual, as was he. Vocationally there is no reason to suppose she would not have been able to pursue her first choice career, veterinary medicine; she developed an affinity with horses from an early age. Her failure to follow her preferred career path and qualify as a veterinary surgeon is at the heart of the claim for loss of opportunity. Although the claims for PTSD and loss of society fall to be considered as separate claims, the consequences thereof have also had a negative impact on the Appellant's academic and professional achievements.
5. In the years preceding his death the Appellant's father experienced multiple physical and psychological problems associated with his infections; the sequelae were attributed to arthritis. The true cause was never confronted, instead, the Appellant's knowledge of the truth evolved over time, generally indirectly. She first became aware that her father was co-infected with HCV through the fact of his giving evidence to the Lindsay Tribunal, a discovery which coincided with her leaving certificate year. She was very confused and upset; her parents appeared to be constantly stressed. She became distracted and described herself as having "taken her eye off the ball" academically for much of the year. Notwithstanding, she achieved 450 points in the Leaving Certificate, a result with which most pupils would be pleased, however, the result brought disappointment to the Appellant, falling some 100 points below what was required to secure a place in veterinary medicine. She had secured an exceptional Junior Certificate and believes she would have been able to repeat this achievement in the Leaving Certificate had it not been for the emotional turmoil which developed on discovering the seriousness of her father's illness; she certainly had the intellectual capacity to achieve that goal.
6. In this regard Dr. William Kinsella, Educational Psychologist, assessed the Appellant in October 2014; she achieved a full scale I.Q. score of 133. It follows she was performing intellectually at the 99th percentile or top 1% of the population. As a result of the psychological issues with which she was struggling at the time, the Leaving Certificate result fell well short of the Appellant's intellectual and academic ability; addressing these issues is the key to unlocking the door to achieving her full potential.

7. The Appellant discussed her options with her father, either to repeat the leaving certificate or leave school and go to college with a view to taking the graduate entry route to veterinary medicine. In this regard her third CAO choice was science at UCG, where she was offered a place. In order to be sure whether veterinary medicine was really the career she wanted to pursue the Appellant decided to get some practical experience and worked for a year in a rural veterinary practice. Confirmed in her choice, she decided to pursue the graduate entry option to veterinary medicine and accepted the offer of a place UCG, where she read science, qualifying with a 2 (1) honours degree. Like so many of her contemporaries, the Appellant wanted to travel abroad for a year or two before commencing her post graduate studies. Encouraged by her father she decided to take a year or so to travel and work abroad following which her plan was do a masters and sit the GAMSAT.
8. Once on her travels the Appellant kept in touch with home through emails and Skype. As mentioned earlier, her father had hidden from his children the seriousness and extent of his illness. The Appellant was ill prepared for the news of her father's final illness and the need to come home urgently, which she received while travelling on the American continent. Getting home turned out to be a particularly traumatic ordeal and when she eventually got home she was unable to see her father for a few days because of a chest infection, which added to her suffering. Although told at that stage her father would not be coming home from hospital she couldn't accept he was going to die, an event which sadly occurred within a few days.
9. The Appellant was shocked and traumatised by the death. In the months that followed she developed feelings of disassociation, disinterest and despair which she associated in part with living at home. In an attempt to escape the emotional turmoil and get on with life she moved out of home and went to live with her boyfriend, but to no avail, moreover, she became socially withdrawn and abandoned her academic plans. Apart from a severe grief reaction, Professor Corvin diagnosed Post Traumatic Stress and Social Anxiety Disorders. In his opinion the Appellant's bereavement evolved into a severe major episode which lasted for approximately two years categorised by
 - (1) persistent depressed mood
 - (2) marked diminished interest in most activities
 - (3) weight loss,
 - (4) sleep disturbance
 - (5) fatigue
 - (6) feelings of worthlessness/guilt
 - (7) impaired concentration and indecisiveness
 - (8) recurrent thoughts of death.

10. Her psychological sequelae impacted on her relationship with her fiancée and, ultimately, she cancelled her wedding plans. In the belief she would be unable to cope with the demands of a veterinary medicine degree the Appellant decided to study for veterinary nursing. She undertook counselling while attending this course. She freely acknowledges that the college authorities accommodated and supported her in coming to terms with her many psychological problems. Academically, she found herself well able for veterinary nursing and is due to qualify shortly. Nonetheless, her perception is that her father's death has had a profoundly negative impact on her experience of life vocationally and socially; she lost a long term relationship. Feelings of severe guilt became entrenched; she blamed her father for dying and was angry about his death.
11. She became aware he had wanted her to be courageous in facing up to the inevitable, a view which she equated with not breaking down and hiding her true feelings; she found herself unable to deal with the grief and the emotional turmoil which she experienced. The Appellant believes she would never have suffered from depression or lost her confidence had it not been for her father's death, furthermore, she is convinced that by now she would have qualified as a vet and be married with her own family; she is still coming to terms with the vocational, social and personal relationship consequences.
12. In 2013, she went abroad to work for a year, training and breaking horses, returning home when her visa expired. Although she thoroughly enjoyed the experience at the time, as a result of subsequent experiences the Appellant acknowledges that going abroad was a flight from the psychological consequences of her father's death and the loss of his society. On returning home she was once again afflicted by loss of confidence, social anxiety and panic attacks the consequences of which militated against her sitting the GAMSTAT and returning to college to read veterinary medicine, as she felt she would have been unable to tolerate the associated stress and pressure involved. Instead, the Appellant chose to read veterinary nursing a course in which she attained excellent results; she has already been offered employment.

Determination; Claim for Loss of Opportunity

13. I am satisfied and the Court finds that her first choice career choice was veterinary medicine and that it was her father's illness and ultimate death that 'blew her off course'. All things being equal it seems to me that she would have achieved the required points in the Leaving Certificate for a college place in veterinary medicine; she undoubtedly had the intellectual capacity to do so. I am fortified in this view by the fact that she had achieved an outstanding Junior Certificate, consistent with the results of the IQ assessment carried out by Dr. Kinsella.
14. Accepting the medical and other expert evidence which has been as I do the Court finds that the Appellant's academic underperformance in the Leaving Certificate was attributable to the consequences of the emotional turmoil and disruption she experienced by as a result of and the means or manner by which she found out about her father's illness. Critically, had it not been for the death of her father and the consequential loss of society involving as it did the loss of his love, emotional support and advice, I am satisfied on the evidence of the Appellant and the expert evidence that she would have

been well capable of qualifying and reading for veterinary medicine and the Court so finds.

15. In reaching this conclusion the Court has not lost sight of the very forceful submission made by Mr O'Scanaill S.C., namely, that the Appellant never tried to read for veterinary medicine, rather, she went abroad to work on a ranch, training and breaking horses, an experience she thoroughly enjoyed, returning home to college where she excelled in veterinary nursing. Had she really wanted to pursue her first choice career there was really no substantive and certainly no lasting reason why she should not have done so; for the reasons already indicated I cannot accept this submission.
16. I am not satisfied that this is a case where the Appellant's decision to abandon her chosen career is attributable to a subjective decision divorced from the consequences of her father's death. Nevertheless, while the Court does not accept the proposition advanced, the submission is not without merit, particularly in the context of the claim for pecuniary loss, when it comes to assessing the Appellant's future vocational capacity, in respect of which her evidence is material. In this regard, and to her credit, she believes that in time she will achieve her full potential; she is determined not to let what has happened prevent her from pursuing a career as a vet. In the circumstances it would be unjust to approach the claim for loss of opportunity on the basis that the Appellant is likely to remain employed as a veterinary nurse rather the claim must be approached having due regard to her stated aspirations and intentions for the future.
17. The claim for pecuniary loss is advanced as a claim for general compensation for loss of opportunity rather than an actuarialised capital loss claim. However, actuarial figures, prepared by Mr Logan, Consultant Actuary retained on behalf of the Appellant, were made available by way of assistance to the Court in assessing the appropriate level of general compensation for loss of opportunity. The figures are indicative of the differential loss in earnings based on certain assumptions between a veterinary nurse and a veterinary surgeon. Account is taken, as it had to be, of the Appellant's income derived from different employments since she left school as well as the delayed qualification dates arising from the planned deferral of college entry until return from her international travels.
18. At this juncture it might fairly be said that had things gone to plan the assumption made is that the Appellant would have qualified 4 to 5 years ago; as appears from the actuarial report there is a significant difference in salary between being a vet and a veterinary nurse. Depending on the assumptions taken the capital loss value of the salary differential, without allowance for *Reddy and Bates* contingencies, ranges between €600.000 and just over €900.000, however, as already mentioned the Appellant does not advance her pecuniary loss claim on a capital loss basis.
19. The Court must approach the carrying out an assessment of general compensation for the loss of opportunity claim in accordance with certain well settled principles of law; compensation must be fair and reasonable, meaning it must be commensurate with and proportionate to the loss. It follows in the circumstances that the claim must be

approached on the basis of what is reasonably likely to occur in terms of the Appellant's career. While she is undoubtedly well able for and enjoys working as a veterinary nurse, I am satisfied on her own evidence she will find a way, in due course, to achieve her full potential and reach her stated goal of becoming a veterinary surgeon, a finding which has significant implications for the pecuniary loss claim.

Conclusion

20. Having considered the indicative material contained in the actuarial report, the income received from previous employments, the findings made herein and applying the principles to which I have already alluded, I am satisfied that the sum awarded by the Tribunal for loss of opportunity falls considerably short of what is fair and reasonable. In all the circumstances of the case the sum which the Court considers appropriate in respect of this claim is € 255.000, an increase of €100.000; the award of the Tribunal will be varied accordingly.

21. In relation to the other two claims, I did not understand the opening remarks of Ms. McCrann SC to be an abandonment of the appeal in relation the awards, particularly the award for loss of society, accordingly, these claims fall to be assessed. In this regard when account is taken of previous decisions of the court in respect of such claims I consider that a fair and reasonable the award for loss of society in the circumstances of the case is €100,000. I do not propose to disturb the award for post traumatic stress disorder. Accordingly, the Court will allow the appeal and will vary the awards in respect of the claims for loss of opportunity and loss of society by substituting therefore the amounts assessed herein and will otherwise affirm the terms of the orders made.