

THE HIGH COURT

[2021] IEHC 129

[2CT/2020]

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 J. C.

AND IN THE MATTER OF A DECISION BY THE HEPATITIS C AND HIV COMPENSATION
TRIBUNAL OF THE 11th DECEMBER 2020

BETWEEN

J. C.

APPELLANT

AND

THE MINISTER FOR HEALTH

RESPONDENT

Judgment of Mr. Justice Bernard Barton delivered on the 26th day of February, 2021

1. This is a judgment of the Court on an appeal by the Appellant against the award of the Hepatitis C and HIV Compensation Tribunal (the Tribunal) made on the 11th December, 2020, in respect of the Appellant's claims for compensation pursuant to s. 5 (3A) (a) and s. 5 (3B) (b) of the Hepatitis C and HIV Compensation Tribunal Acts 1997 to 2006 (the Acts). The appeal is brought pursuant to section 5 (15).

Relevant Statutory Provisions

2. The causes of action in respect of which the Tribunal may make an award and the categories of persons who may make claims for compensation are set out in sections 4 and 5 of the Acts. The Appellant is a 'dependant' within the meaning of s. 1(1) and is the only daughter of M.C., who died in 2003 as a result of complications of Hepatitis C and HIV infection. He was co-infected through the administration of contaminated blood products received in the course of treatment for Haemophilia. Section 4 (1) paras (e) and (j) confer a right of action on the dependants of the persons mentioned in s. 4 (1) paras (a), (b), (c), (f) and (g) whose death was caused by Hepatitis C or HIV or where Hepatitis C or HIV was a significant contributory factor to the cause of death.
3. Section 5 (3A) (a) provides for the making of an award in respect of post-traumatic stress disorder or nervous shock to the limited class of dependants mentioned in s. 4 (1) (e) and (j): namely the child, spouse, father or mother of a deceased person whose death was caused by or where Hepatitis C and or HIV was a significant contributory factor in the cause of death. It is clear from the wording of the provision that, as her father's death was caused by Hepatitis C and HIV, the Appellant is a claimant to whom an award in respect of post-traumatic stress disorder may be made. The provision reads as follows:

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

In making an award under this provision, the Tribunal is required to have regard to any decisions of the Superior Courts setting out the principles of law relating to the award of damages for post-traumatic stress disorder or nervous shock. Section 5 (3A) (b) provides:

"In determining whether to make an award under this subsection, the Tribunal shall have regard to any decisions of the High Court or the Supreme Court, enunciating principles of law relating to the award of damages for post-traumatic stress disorder or nervous shock, as the case may be."

It appears that this provision has not been amended to include a reference to the Court of Appeal, created after the 2006 Act. The Court is aware that in practice the Tribunal has regard for the decisions of that court when opened to it; it would, however, be better if the Oireachtas addressed the lacuna.

4. Section 5 (3B) (b) provides for the making of an award in respect of 'loss of society' on the dependent child, spouse or parent of a person whose death was caused by having contracted Hepatitis C or HIV or where one or other or both of these infections were a significant contributory factor to the cause of death, and reads as follows:

"Where a dependant referred to in paragraph (e) or (j) of section 4(1) is the child, spouse or parent of the person who died ('the deceased') as a result of having contracted Hepatitis C or HIV, or where Hepatitis C or HIV was a significant contributory factor to the cause of death, the Tribunal may make an award to that dependant in respect of loss of society of the deceased including the loss of the care, companionship and affection of the deceased as a result of the death." (Loss of Society claim)

Appellant's Claims; Tribunal Award

5. In addition to bringing claims for general compensation (damages) for 'loss of society' and for 'post-traumatic stress disorder/psychiatric injury, the Appellant also made a claim for special damages for lost of opportunity arising as a consequence of the psychiatric injury. The Tribunal awarded the Appellant €120,000 for loss of society, €70,000 for the psychiatric injury and €15,000 by way of special damages for loss of opportunity, making in aggregate a total award of €205,000. The Court has been furnished with and has read the transcript of the evidence given at the hearing before the Tribunal on the 23rd November, 2020 as well as the transcript of the Tribunal's decision delivered the 11th December, 2020.
6. The Court notes the reasoning of the Tribunal with regard in particular to the Appellant's claim in respect of loss of opportunity which led to the conclusion that the psychiatric symptoms identified in its decision "...affected the applicant's educational and work trajectory to some degree but modestly which we take to co-relate with the delay of short and temporary duration". While the Court has had the advantage of reading the transcripts of the evidence and the reports of the experts introduced into evidence before the Tribunal, the appeal proceeds by way of a *de novo* rehearing of the Appellant's claims.

7. It was accepted at the outset that no issue of causation arises in respect of any of the claims, either at the hearing before the Tribunal or at the hearing of the appeal. It was very fairly accepted by Ms. McCrann, in her opening of the application on behalf of the Appellant, that the award of €120,000 for 'loss of society' was within the parameters of the guidelines laid down in earlier decisions of the Court and that no issue arose on the appeal in respect of that award. There was no cross appeal and no demur by the Respondent; accordingly, the Court will affirm the award of €120,000 made by the Tribunal in respect of the Appellant's claim for 'loss of society' and will so order.
8. With regard to the award of €70,000 general compensation in respect of the claim for post-traumatic stress disorder/psychiatric injury Ms. McCrann submitted that this was "... *somewhat light* ..." which I took to be an acceptance by the Appellant that the award was within a range of compensation appropriate to the psychiatric injuries, but at the lower end thereof. I am fortified in this view by the very fair observation that while the level of award was somewhat out of kilter, on its own it might not have warranted an appeal. However, I did not take this to mean that the Appellant was not proceeding with her appeal in respect of this claim and this was confirmed in evidence. It is fair to say, however, that Ms. McCrann identified the award made in respect of the 'loss of opportunity' claim as the main focus of the appeal on the grounds that it was wholly insufficient, was not a fair reflection of the evidence and was wholly inconsistent with previous court awards made in respect of such claims and with the jurisprudence on which those awards were founded.

Background

9. To contextualise the issues which arise on the appeal it is convenient at this juncture to set out the background from which they emerged. The Appellant was born on the 12th June, 1993 and resides at an address in County Dublin. She is engaged to her long-time partner, whom she has known for a decade. However, she has resisted setting a wedding date for reasons which are associated with the psychological sequelae suffered as a result of her father's death. The couple have one daughter, a girl aged 7 years. The Appellant is the youngest of two children. She was just 9 and her brother 14 years old when their father, M.C., died in 2003. He was just 34 and was a haemophiliac. He contracted Hepatitis C and HIV through the administration of contaminated blood products within the State, and in 2000 the Tribunal made substantial awards to him in respect of both general and special compensation (damages).
10. He was going through a separation from his wife at the time of the Tribunal hearing in May of that year. It is evident from the transcript of the evidence in his application, included amongst the papers furnished to the Court, that despite the consequences of Hepatitis C and HIV infection he did his best to remain in remunerative employment. He had an established work ethic which was recognised by the Tribunal in the award made in respect of his claim for loss of earnings. This profile, while also relevant to the loss of society claim now determined, is particularly significant in the context of the claim for loss of opportunity. It enhances the probability that the Appellant's father, had he lived, would

have sought to inculcate in his daughter the same approach he himself had in relation to advancing a career.

11. The separation of her parents was formalised by a decree of divorce made on the 11th July, 2000. The Appellant's mother brought claims for loss of consortium up to the date of divorce, for loss of society, which was truncated to a certain extent but not completely by the divorce, a claim for post-traumatic stress disorder and a care claim for financial losses. What is clear from the transcripts in those proceedings is that despite their separation and ultimately their divorce, the Appellant's father and mother remained on good terms; her mother encouraged and facilitated regular and close access by her father to the Appellant.
12. The closeness of the bond which developed between them is not in issue; indeed, it is evident from the expert testimony given on the appeal and the transcript of the evidence given before the Tribunal that a very close loving and caring relationship was fostered. It is also apparent from the transcripts that a significant contributory cause to the separation was a desperation which grew out of M.C's progressively deteriorating medical condition as well as their deteriorating economic circumstances that ultimately led to the unfortunate position in which the Appellant's mother found herself; in the end she just could not cope anymore.
13. As if these familial circumstances were not bad enough, tragedy struck the global family in the most awful way imaginable; the women carried the gene and haemophilia haunted the men. Three of M. C's siblings, as well as himself, became infected with Hepatitis C and HIV. Two of whom had already died, one in a single car accident, by the time of M.C.'s application in spring 2000. His remaining brother predeceased him by a number of weeks; M.C was the last of his mother's four sons to die in January 2003. The Appellant's paternal grandmother, with whom she also had a close and loving relationship, had supported her children in every conceivable way that she could throughout their illnesses. She suffered a mental breakdown on the death of her last son, M.C; she collapsed psychologically as well as emotionally. She died some years later and is buried with her children.
14. Notwithstanding that she was unaware of the consequences, it appears that one of the torments M.C.'s mother had to suffer was the guilt she experienced from the fact that it was she who had unknowingly administered the contaminated blood products to treat her children for their haemophilia and through which they became infected. One does not need to be a psychologist to understand how in these circumstances she simply withdrew into herself. One devastating consequence was that the Appellant and her mother were completely cut off from any social contact with her father's family; she was devastated not only by this development but by the immediacy with which it occurred.
14. The abrupt and unexplained termination of this relationship added further to the devastation the Appellant experienced on the sudden and unexpected death of her father. The resulting hurt, bewilderment and continuing impact on her psychological health was still evident when she gave her evidence. I pause to observe here that counsel for the

Respondent, Mr O'Scanáill, conducted his cross examination of the Appellant in a very fair and sensitive manner; indeed, it was also very appropriately acknowledged by Ms McCrann that the Respondent had facilitated the prosecution of the appeal given the medical opinion that it was in the Appellant's best interest that these proceedings be brought to a conclusion as soon as possible. Finally, I consider it appropriate to note here that the Tribunal also approached the hearing of the claims in a most sympathetic and courteous manner.

15. The Appellant's close contact with her paternal grandmother was partly facilitated by the proximity of her home to that of her grandmother and partly because after the separation, her father moved there to live; father and daughter saw a lot of one another. As a child she did not understand her father's illness, though she was vaguely conscious that he was unwell. Despite his illness and deteriorating health he did his best to live as normal a life as possible. He encouraged the Appellant in her studies, in her sporting pursuits- she was athletic and played camogie competitively- and in her favourite hobby, Irish dancing, in which she was proficient and regularly competed in competitions. Her father was in all respects an integral part of her emotional, recreational and social life. The depth and significance of the loss of that relationship and the support which came from it is fairly acknowledged and evidenced by the award for 'loss of society'. This loss also had a deeply negative impact on the Appellant's education and career paths.
16. The news of her father's death came as a terrible shock. In Christmas 2002 the family had spent Christmas day together. The Appellant spent New Year's Eve in her grandmother's house, where her father had returned to live. They were joined by the extended family. The following day she was in the car with her mother when a call came through to say that they should go straight to the hospital. On arrival they found the Appellant's brother in a distressed state. When they enquired what was wrong he said that 'Dad was gone'; the Appellant's mother collapsed, and a chaotic scene ensued. The Appellant became frightened. She suffered from shock and did not want to see her father on his death bed; she remembered some tension between her mother and other members of the family at the time.
17. At Christmas, the Appellant's father had given her a teddy bear which had an internal tape recording of his voice reading a story called "Dear Grace". He also gave her a book about a little girl who died but wrote letters to surviving members of her family. After his death the teddy bear recording became particularly precious to her. She used it as a means of remaining in touch with her father. She liked to hear his voice; it comforted her. Unfortunately, she unintentionally deleted the recording; she was beside herself with sorrow and wracked with guilt. She experienced a very profound and unresolved grief reaction. She regularly visited her father's grave and, like the little girl in the book, she started writing letters to her father as a means of helping her to stay close to him. She left the book at her grandmother's house when staying over at new year but was unable to recover it subsequently due to the complete break in family contact.

18. The Appellant kept the letters safely. I have had an opportunity of reading a selection of these. The following extract from one of the letters conveys very well, I think, the general theme which features to a greater or lesser extent throughout the correspondence and merits repetition as follows;

"Daddy I miss you so much, I still wish upon the stars every night wishing to see you again but one day my wishes will come through. You are the only person I could ever trust Dad, I told you everything, I still do. Everything sucks without you here. Still staying away from drugs and doctors and tablets especially for you Dad. N's Dad is very bad in hospice, take care of him won't you. I had a dream last night and you were in it. It was just me and you on the beach like old days humming, how I miss them so much. You really were my favourite ever person, I promise. I suppose you already know about me having (I cannot read this word; it is KAOBS) that sucks too but I know you will help me through that. I still go to the grave every day, I love going to see you but not on my own, I get too upset. Daddy, please come back, I will do anything, please. I love you lots and lots like jelly tots very ever Daddy, miss you".

This letter was written on the 24th April, 2009 just after 7pm in the evening, six years following her father's death.

19. It is not in issue that quite apart from a profound grief reaction as a result of her father's death, that the Appellant suffered a significant post-traumatic stress disorder/ psychiatric injury. She developed an anxiety disorder and feared that her mother would die, a fear that led her to sharing her mother's bed until she was about thirteen years of age. She found school and interpersonal relationships with her classmates difficult. She experienced regular sleep disturbances and suffered from frequent nightmares. She suffered from panic attacks, hypervigilance, anxiety, depression and social withdrawal. She lost interest in her sporting life and in her favourite hobby and did not develop normal interpersonal relationships for her age. As she grew older and gathered a full appreciation of her father's illness and how he had come to be infected with HIV and Hepatitis C she found it impossible to disclose this information or to talk to anyone about it.

She was ashamed and invented explanations for his death. Although she attended bereavement counselling, recommended by a teacher, in an effort to address her very obvious emotional and psychological difficulties she could not interact in a meaningful way, due in part to her sense of shame. However, she did manage to form a relationship with her fiancé and she eventually became pregnant. Her daughter is now 7. In evidence she described pregnancy as 'a nightmare' and worried herself sick that if the baby was a boy it would become ill like her father and her uncles. She travelled to the UK to obtain specialised imaging and gender clarification in relation to the sex of the baby, investigations that went beyond the baby having haemophilia. She associated haemophilia with HIV/ Hepatitis C and death. She does not feel that she could go through another pregnancy.

Experts

21. Expert evidence in relation to the impact which the loss of her father had on the Appellant psychologically, emotionally and vocationally was given to the Tribunal by Ms. Jo Campion, Consultant Psychologist; by Professor William Kinsella, Educational Psychologist and Course Director of the MA and PhD in educational psychology at the School of Education in University College Dublin; by Ms. Susan Tolan, Vocational Consultant; by Dr Elizabeth Cryan, Consultant Psychiatrist and by Mr. John Logan, Consulting Actuary. With the exception of Dr Cryan, whose reports were admitted, these witnesses also gave evidence to the Court.

Career History; Hairdressing

22. The background facts recited herein are not in dispute. The Appellant found secondary school particularly difficult. She started to lose interest, she could not concentrate on her school work and she fell behind. She felt that she had done reasonably well on the entrance exam to secondary school, but as the year went on she did not progress and was moved down to a lower class for a second year. By the time she got to the end of third year she had lost all interest in education and wanted to leave school altogether. Her mother would not let her leave unless she committed to some form of vocational training. Her mother was a hairdresser and got her into hairdressing. She agreed to do this because it meant she would be able to leave school at sixteen. This, however, was not a vocational decision of choice but was made so that she could simply get out of school. It also transpired to be a career mismatch which did not suit her skill subsets.

23. The Appellant continued to suffer with anxiety, particularly if she found herself in any situation involving large numbers of people. In social conversation she would often find herself forgetting what it was that she had been speaking about, which made her feel that she must have looked silly. She really had no interest in hairdressing. Even though she had training, she did not apply herself or implement what she had learned. She did not progress and other trainees who had come in after her quickly passed her by and moved ahead. She ultimately got an opportunity to move to what she described as a trendier salon, extending over three floors, which was very busy. However, she tried to stay out of the way and avoid circumstances in which she would have to interact with people. She became moribund in this position and ultimately decided to give up hairdressing altogether. She did not finish her apprenticeship.

Career History; Gym Receptionist

24. Through the good offices of her fiancé, the Appellant subsequently found work as a receptionist in a gym. She worked mornings, 8 am to 3 pm. Initially she was able to cope with this work and even derived job satisfaction from it which she never experienced when working in hairdressing. She also found that the administrative duties required in this role suited her, but then her duties extended to doing night-time reception. The gym was much busier at this time and she felt challenged by having to interact with the number of people involved. She received no training in the resulting duties. She progressively struggled in this regard and it fed into her anxiety and she ultimately quit her job. It is significant in light of the evidence given by Professor Kinsella and Ms Susan

Tolan that a career as a receptionist or administrator would play well to the Appellant's underlying skill sets.

25. She met her fiancé about ten years ago. They developed a good relationship and after three years she became engaged. As mentioned earlier, they have been unable to plan a wedding date. The evidence given by the Appellant in this regard is that she just cannot face a wedding. The explanation offered for this was that she could not face having her wedding without her father being there and in particular without her father giving her away. She acknowledges that while her brother could fulfil that role it just would not be the same. Her fiancé is a builder. He built the house in which they now reside with their daughter. Although she left work in the gym and decided to stay at home and look after her daughter, her evidence to the Court was that she would like to go back to work for her own sake and also as a role model for her child. She realises that she needs to do something. She also realises that she cannot live the rest of life in the same way as she has to date and that she needs to try and come to terms with her father's death, along with the consequences that event has had for her, and to get on with her life.
26. She enjoyed administrative duties and working with computers in particular; however, she could not cope with the added stress in her role as a receptionist, in part by issues which arose with regard to payment of her salary. She started looking for a way out and wanted to spend more time with her daughter. Throughout her evidence, and indeed when being assessed, it is fair to say that the Appellant has repeatedly expressed the desire to be able to work. Her belief is that with the supports and encouragement she hopes she will get from counselling by Ms. Champion in the initial stages and subsequently on referral these will equip her to move on with her life in all respects.
27. As mentioned earlier, the Appellant's relationship with members of her father's family, and in particular her paternal grandmother, ceased after her father's death. As a result, she was unable to retrieve personal belongings and mementos, particularly the book which had been given to her by her father just before their last Christmas as a family together and which inspired her to write letters to her father after his death. However, years later the Appellant learned that her grandmother was ill and she went to see her in hospital. She got a loving and warm welcome, an experience repeated before her grandmother's death, and an experience which means a lot to her.

Academic Assessment; Professor Kinsella

28. Professor Kinsella is a very well-known and highly qualified educational psychologist. He assessed the Appellant and gave evidence to the Tribunal and to the Court. In his opinion the Appellant was functioning generally within the average range of intellectual ability but with poor visual perceptual skills. His expectation was that had the Appellant remained at school her predicted Leaving Certificate outcome was at pass level but sufficient to equip her to participate in vocational training and obtain a vocational qualification which would enable her to compete in the marketplace for meaningful employment. He was aware of the medical diagnosis that the Appellant suffered a post-traumatic stress disorder for a prolonged period of time following her father's death and in his view this impacted negatively on her academic and subsequently on her career performance.

29. Given the results of his assessment, particularly the sub scores regarding her visual perceptual skills, hairdressing as a career option was not an appropriate choice, if a choice at all, since the Appellant was not optimally using the skills and abilities that she possesses. In his opinion, the effect of her father's death and the prolonged posttraumatic stress disorder from which she suffered together with a lack of support and guidance from her father resulted in a significant level of academic underachievement, restricted career opportunities, further education options and ultimately the failure to qualify as a hairdresser or make progress in that career. The Appellant has good verbal processing and memory skills. Professor Kinsella accepted that with the benefit of therapy and given the skills which she does possess the Appellant undoubtedly has vocational potential but whether she would be able to achieve that in time was still open to question.
30. Whilst the Appellant undoubtedly wanted to return to the workforce and had the skill-set to do so, given the depth of the psychological sequelae and the period of time for which she had experienced these symptoms he thought that the weight of this upon her -even with therapy- would continue to affect her. Despite her wishes he was not very optimistic that the Appellant would ever be able to compete in the marketplace for open employment. He did acknowledge, however, that despite all her problems she had taken up employment as a gym receptionist, that she had left that employment voluntarily, and that amongst the reasons for doing so were difficulties with getting paid and because she wanted to spend more time with her daughter; the other reasons being struggling with new duties which were assigned to her for which she had not been trained and the anxiety she experienced through increased contact with club members.

Vocational Assessment; Susan Tolan

31. Ms. Tolan gave evidence concerning the Appellant's work history and the effect the pattern of avoidance behaviour adopted in response to situations which she perceives, or which cause an increase in her anxiety or even panic attacks have had on her. The Appellant left school in 2010 and ten years later she was still not qualified in anything. She took up the employment at the gym in August 2018 but only remained there until December of the same year. The period of time during which the Appellant's psychological sequelae remained unresolved was significant in terms of her ability to compete in the open marketplace. The main barriers to work were persistent high levels of anxiety, low self-esteem and self-confidence, impaired concentration and attention, lack of marketable work skills and qualification and low educational standards. She was in complete agreement with the evidence of Professor Kinsella.
32. Even if the Appellant has successful counselling to the point of improving her mental health problems, the Appellant would then have to face a period of vocational training; any course would have to be very carefully chosen. Whatever else, if she gets to the point of being able to participate or attend a vocational training situation it will need to be one where she will feel that she can fit in and where she will be able to get on with people, preferably a small group of people. Even if she secures employment in the open market, which was questionable, she was likely to need huge levels of support from an

employer to cope with her work duties because of her vulnerabilities. Critically, had she had the support of her father and the necessary encouragement to remain at school, Ms. Tolan agrees with Professor Kinsella that the Appellant had the intellectual and academic capacity to obtain a pass Leaving Certificate, to undertake further education and to have pursued vocational options such as office administration or receptionist.

33. Building the Appellant's confidence would be a central requirement if she was ever to be able to compete for and retain vocational employment on the open market. Her vocational failures to date have had a negative impact on her confidence. Around that was the necessity to deal with her vulnerability and mental health issues. Had the Appellant been able to stay at school, she is likely to have had the benefit of career guidance and would probably have been encouraged towards a career that played to her strengths and not her weaknesses, which unfortunately for her is what happened. Even with successful counselling, she had a long road ahead of her before being in a position to achieve employment in a job that she would enjoy and be able to keep. It had to be remembered that it would not be possible to undo her past experiences and that these were going to travel with her into the future. I thought it significant that Ms. Tolan did not consider the difficulties which the Appellant will undoubtedly face were unsurmountable, or as she put it herself, "...I would not give up on J...".

Psychological Assessment; Jo Campion

34. Jo Campion is a clinical psychologist with immense experience in advising and counselling the victims of Hepatitis C and HIV infection both prior to, during and since the original 1996 tribunal of inquiry into the Blood Transfusion Service Board. She has been intimately involved over the past 26 years at various levels with the Appellant's extended family, including her paternal grandparents, uncles and three cousins who were also unfortunately infected and one of whom has also died. Ms. Campion was concerned that to understand the Appellant, the Court had to be made aware of the almost unbelievably tragic family background where so many members of one family had been infected and had died as a result of having contracted Hepatitis C and/or HIV. Citing Dr. Barry White, Consultant Physician at St. James's Hospital, who treated the infected members of the family, she noted that in his experience no other family had suffered as much as they had. Ms. Campion stressed the impact that this tragedy has had on what was an important part of the Appellant's support structure.
35. The Appellant's grandmother developed very serious post-traumatic stress and depression following the death of the Appellant's father, as a result of which the Appellant was cut off from the rest of her family. Ms. Campion described the Appellant's grandmother as having suffered multiple layers of psychiatric injury following the death of her last son; she was totally and utterly devastated. She had not only been the carrier of the gene which she passed on to her sons, but she had actually inadvertently infected her own children by administering plasma derived and Factor 8 blood clotting products to treat their haemophilia.
36. She shared Dr. Cryan's opinion that the Appellant suffered a prolonged psychiatric injury in the form of post-traumatic stress disorder as a direct result of her father's death,

triggered by the circumstances in which she became aware of the fact and that he had not been evidently very ill or had been hospitalised. Dr. Cryan and Ms. Campion gave it as their opinion that the post-traumatic stress disorder was significant and very severe in the earlier years following the death, and that thereafter the condition waxed and waned; features of the condition persist.

37. While there are periods where the Appellant believes that the condition has resolved it is in fact just under the surface, evidenced by the ease at which the symptoms of the condition can be triggered. The Appellant experienced flashbacks to the carpark and of being told of her father's death, she developed sleep disturbances, panic attacks, anxiety and avoidance behaviour. The Appellant's persistent anxiety, a feature of post-traumatic stress disorder, is easily increased by small triggers. She begins to tremble and worries about losing control. She cannot face crowds and her social circle is confined to two other couples and her partner. The condition is chronic and, significantly, she is only 28 years of age. That she wanted to be constantly with her mother and in particular had slept in the same bed as her mother until she was thirteen was a phenomenon commonly seen in children with post-traumatic stress disorder where fear of losing the other parent develops with a perception of ensuing disasters in the event that the surviving parent should die.

Background of Family Infection and Deaths; Impact on Appellant

38. Knowing the family well, in particular the Appellant's father, and having assessed the Appellant herself, Ms. Campion gave very telling evidence about the closeness and strength of the relationship between the Appellant and her father and the central role the support he offered would undoubtedly have played in terms of her schooling and future career had he not lost his life at such a tragically young age. The Appellant was at a very tender age when her father died. She was a developing child at the time, so her capacity to cope was completely overwhelmed by her psychiatric injuries.
39. Fortunately, Ms. Campion has developed a rapport with the Appellant. Counselling is going to take time and will involve dismantling the psychological wall the Appellant has built around herself for protection; a process which has to be undertaken gently. Helping the Appellant to come to terms with the situation in which she finds herself, to help her deal with her persisting anxiety, to help her gain confidence, self-esteem and self-worth will be a long process which may take years. The foundation for successful therapy is the establishment of trust so that she can rely upon and take ownership of the advice she receives; risk of failure in this process has to be avoided at all costs.
40. The process will be complicated by the Appellant's promise to her father never to see a doctor and never to take medication. Ms. Campion explained that that was a significant problem for a psychotherapist. Particularly given the Appellant's history, being able to treat her anxiety with anti-depressants would, in the ordinary way, be a highly appropriate course of action. The potential inability to use that tool in therapy was approximated to carrying out surgery without an anaesthetic. There were, however, many positive indicators, or '*beacons of light*' as they were described by Mr. O'Scanail when cross examining Ms. Campion.

41. The Appellant wanted to work, to be a role model for her daughter and to make her father proud of her; significantly, in the course of assessment it was evident that she was engaging and wanted to engage. However, these positive indicators should not be seen as leading to a cure; psychotherapy does not provide a cure, rather, the object is to allow a very traumatised person to assimilate the consequences into her life and to help free her from the ongoing disablement she has experienced for nearly two decades so that she can live socially in a general sense without fear or anxiety, a significant component of which would be a return to the workforce.

Vocational Capacity

42. Professor Kinsella, Ms. Tobin and Ms. Campion were all of the view that despite her forays into hairdressing and as a receptionist in a gym, the Appellant's psychological status was such that even with successful psychotherapeutic intervention it was unlikely that the Appellant would be a candidate to compete in the open market for full time employment; however, on cross examination and in answer to questions of clarification from the Court, Ms. Campion's opinion was that for her own sense of self-worth, belief and confidence, one of the goals of therapy would be a return to at least part-time employment. It was quite clear from the evidence of Ms. Tobin and Professor Kinsella, all other things being equal, that the Appellant had an intellectual ability to obtain gainful employment. In this regard she was suited to a role which played to her strengths such as a job in administration.
43. Significantly, in her own evidence it was this aspect of her job as a gym receptionist that the Appellant said she enjoyed in particular; moreover, Ms. Campion clarified for the Court that in securing a part-time job she did not envisage the Appellant working in some form of sheltered employment; the expectation was that with successful therapeutic intervention she would be able to compete for employment in a role on the open market that would play to her academic strengths and personality.

Actuarial Evidence

44. The Appellant introduced actuarial evidence in support of the claim for loss of opportunity. It was made absolutely clear from the outset that the Appellant was not seeking to recover an actuarialised pecuniary loss of earnings for the past or into the future; rather, the actuarial computations were introduced by way of guidance to assist the Court in the assessment of compensation for loss of opportunity as indicated at para. 19 of the judgment of this Court in *KB v. The Minister for Health* [2019] IEHC 905 where I stated:

"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."

John Logan, Consulting Actuary

45. The parties were agreed that the circumstances in *KB* were very different and, apart from the enunciation of principle, that case was to be distinguished from the present. In

addition to preparing actuarial reports Mr. Logan gave evidence. He considered a range of alternative employment options for the Appellant in line with the advices of Ms. Susan Tolan, namely as (a) a hairdresser, (b) a receptionist and (c) an administrator. The assumptions made, and the calculations and computations carried out by Mr. Logan both in respect of the past and the future make no allowance for *Reddy v. Bates* contingencies (See [1984] ILRM 197) nor for pension losses, though Mr. Logan said that a small element of loss of pension had been built into the computation of past losses, in particular.

46. In carrying out the computations, allowance was made, and account taken, as it had to be, of the Appellant's actual loss of earnings to date as a hairdresser and gym receptionist. The Appellant also received job seekers' allowance in 2014 and between the 1st September, 2016 and the 18th June, 2019, in addition to child benefit. In Mr Logan's opinion, the job seekers' allowance payments were not to be taken into account in assessing the losses as they arose directly as a consequence of the psychiatric injury suffered by the Appellant as a result of her father's death arising from Hepatitis C and HIV infection. Child benefit did not fall to be taken into account as that is something to which she was entitled and would have received one way or the other.

Respondent's Approach to the Claims; Evidence;

47. The Respondent chose not to call evidence but rather to put the Appellant on proof of her claim. This observation is not intended in any way as a criticism of the way or manner in which the claim was met, quite the contrary. I pause here to reiterate once again that the Tribunal and, on the hearing of the appeal, Mr. O'Scanaill, approached the task of cross examination, particularly of the Appellant, with courtesy and sensitivity. In the event, the Court is left with the evidence of the Appellant and the expert witnesses called on her behalf. I accept that evidence; I have no reason to do otherwise.

Appellant's Demeanour

48. The Appellant's demeanour was that of a very troubled and stressed individual, quite obviously scarred by the psychiatric injury which befell her. Giving evidence about her father and the effect which his death at such an early age had had on her, particularly with regard to schooling and her career, was an obviously harrowing experience. It certainly brought home to me in a very vivid way the enormity of the therapeutic task which faces both herself and Ms. Campion.

Post-Traumatic Stress Disorder/Psychiatric Injury Claim; Damages/ Compensation

49. Having considered the expert evidence and the submissions I am satisfied that while the award made by the Tribunal was within the range of compensation appropriate to her injuries, it was on the lower end thereof. While I note that the term "damages" is very often used both in judgments on appeal and in the decisions of the Tribunal I think it appropriate at this juncture to make the following observation. In my view it would be preferable and more correct to use the term "compensation" rather than "damages". The reason is twofold. "Damages" derives from the Latin "damnum" and is a legal term that describes monetary compensation payable by a civil wrongdoer for injury and loss suffered or likely to be suffered by the victim of the wrong, whereas "compensation" is a

sum of money payable to a victim in respect of injury or loss by a party other than the wrongdoer. This explains the use of the word "compensation" rather than "damages" throughout the Hepatitis C Compensation Tribunal Acts, 1997 to 2006 and, by way of further example, in the Garda Síochána (Compensation) Acts, 1941 and 1945.

50. In delivering its decision on her claim, the Tribunal noted the absence of any psychiatric or psychological treatment having been afforded to the Appellant and hence the absence of any contemporaneous evidence of injury at, or relatively shortly after, the death of the Appellant's father in 2003. The expert evidence in relation to this injury is based on interviews with the Appellant carried out by Dr. Cryan and Ms. Campion between 2015 and most recently on the 6th January, 2021 by Dr. Cryan and the 7th January, 2021 by Ms. Campion. In her most recent report, Dr. Cryan expresses the opinion that recognised reminders of a trauma precipitate a resurgence of PTSD symptoms within the Appellant which she has learnt to cope with through avoidance behaviours. In her opinion, the therapeutic intervention planned by Ms. Campion, with which the Appellant has so far engaged, will be of significant benefit to her. Handled appropriately, meaning gently and over what may be a prolonged period of time, Ms. Campion is also hopeful that the Appellant will find herself equipped with tools which will enable her to deal effectively with the consequences of her psychiatric injury and enable her to have a fulfilling personal and vocational life.
51. In fairness to the Respondent it is not suggested, nor was it suggested to the Appellant's experts, that the absence of appropriate therapeutic treatment or contemporaneous medical records between 2003 and 2015 ought to bear in some significant way or at all on the assessment of compensation, particularly in circumstances where the Appellant's medical evidence in this regard is accepted. That the Appellant continues to suffer from the consequences of a psychiatric injury and that she is likely to do so for the foreseeable future is not in question, any amelioration being dependant on the therapeutic intervention planned by Ms Campion. Treatment with anti-depressants, if possible, psychotherapy and cognitive behavioural therapy may not provide a cure for what is, in effect, indelible psychological scarring on someone who is only 28 years of age; her life expectancy was actuarialised at 64.151 years.

Definition of Personal Injury; Purpose of General Damages

52. Personal injury is defined by s. 2 of the Civil Liability Act, 1961 as including "... any disease and any impairment of a person's physical or mental condition, and 'injured' shall be construed accordingly". Compensatory damages are founded on the principle of *restitutio in integrum*, the object or purpose of which is to restore the tortiously injured party to the position enjoyed at the time when the wrong was committed so far as that is reasonably possible by an award of money. O'Higgins C.J. observed in *Sinnott v. Quinnsworth* [1984] ILRM 523 at 531:

"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."

Where recovery in respect of injuries and loss has occurred by the time of the trial, general damages are assessed to date of recovery. Where, however, the injuries and loss are continuing and are likely to continue into the future beyond the date of trial the injured party will also be entitled to damages for pain and suffering into the future.

Meaning of Damages for 'Pain and Suffering'

53. There have been numerous academic and judicial expositions on the meaning of, and what is encompassed within, the term 'general damages for pain and suffering'. For my part the most succinct and comprehensive explanation which merits mention is to be found in the judgment of McCarthy J. in *Reddy v. Bates* [1984] ILRM 197 at 205 where he stated:

"Such damages are frequently stated to be for pain and suffering; they would be better described as compensation in money terms for the damage, past and future, sustained to the plaintiff's amenity of life in all its aspects, including actual pain and suffering, both physical and mental, both private to the plaintiff and in the plaintiff's relationships with family, with friends, in working and social life and in lost opportunity."

It is clear from this explanation that in carrying out an assessment of general compensation in respect of the claim for the psychiatric injury suffered by the Appellant, that the Court must have regard to other headings of claim encompassed in this definition where these are the subject of a separate claim or head of claim. In this case, the Appellant is to be compensated for injury to family relationships- in this instance the loss of her father's society- as well as for loss of opportunity as a consequence of the psychiatric injury.

The Principle of Proportionality; Award

54. General damages/compensation must in all cases be fair to the parties and must be proportionate to and commensurate with the injury or injuries suffered or likely to be suffered. Applying these principles and having regard to the period of time which has elapsed since the injury was inflicted upon the Appellant, features of which continue to afflict and are likely to remain with her for the foreseeable future, and the extent to which the injury has blighted the life of a comparatively young woman, the Court considers that a fair and reasonable sum to compensate the Appellant her for the psychiatric injury to date and into the future is €85,000.

Claim for Loss of Opportunity

55. It is not an issue that the Appellant has suffered a loss of opportunity as a result of the psychiatric injury sustained by the Appellant as a result of her father's death. Mr. O'Scanaill- very fairly I thought- accepted in his submissions that the approach taken by the Tribunal to this head of claim was overly restrictive by appearing to place it in the past; in this regard I have no hesitation in agreeing with counsel. What is in issue, however, is the measurement of compensation for that head of claim. In submissions Mr. O'Scanaill drew attention to certain features of the Appellant's evidence and the evidence of the expert witnesses. She had sought work from her mid-teens, she had obtained employment, she had moved employers, and had left her jobs voluntarily. She was

happy to live near her mother and to look after her daughter. She had signed up for work and had drawn job-seekers' allowance, all of this prior to any therapeutic intervention. Moreover, she had a proven track record of being able not only to hold down a part time job but a full-time job. These factors had to be taken into balance by the Court in making provision by way of compensation for loss of opportunity. I accept that submission.

56. He argued that it is not without some significance her experience of working as a gym receptionist chimed well with the predicted academic path or vocational careers for which she would best be suited. Professor Kinsella gave evidence in line with this report dated the 18th August 2018. In his opinion, the effect of her father's death on the Appellant could not be understated. Without his support and guidance, particularly throughout upper primary school and her second level education, she drifted, failed to engage and ultimately dropped out. The Appellant's evidence was that her father would not have tolerated any suggestion of leaving school. She felt that she would have remained at school and with his support and guidance would have completed her Leaving Certificate and would have been channelled into a career path which best suited her skills and abilities.
57. The fact that the Appellant dropped out of school in her mid-teens because of the psychological impact of post-traumatic stress on her resulted in a significant level of academic under-achievement, restricted her further education options and largely explained the failure to qualify or make progress in a career of hairdressing. Professor Kinsella's report refers to this as being her chosen career, however I accept her evidence that she only went into hairdressing because it had been organised for her by her mother and she was desperate to leave school.
58. Ms. Tolan prepared a report dated the 23rd May, 2019 in which she sets out the Appellant's educational and work histories. She gave evidence in line with her report as detailed earlier. The Appellant told her that she believed her life would have been very different if her father had not been infected with Hepatitis C and HIV, evidence which she repeated at the hearing. Ms. Tolan gave evidence that while the Appellant had no marketable skills to offer employers and would therefore be confined to entry-level work, she was unlikely to be able to compete with others in the market place for employment unless the consequences of her post-traumatic stress disorder could be addressed; a long period of time had already elapsed without appropriate intervention.
59. Had she not suffered this injury and had she had the benefit of her father's support, encouragement and guidance, Ms. Tolan's assessment of the Appellant is that she was likely to have completed her secondary education and passed the standard Leaving Certificate at a sufficient level to have enabled her undertake a PLC course in an area such as business administration and that she would have qualified to work as a receptionist or administrator or alternatively might have pursued a career in an area such as personal fitness and worked as a trainer in a gym.
60. Ms. Tolan provided salary ranges for these employments which were used by Mr. Logan with appropriate adjustments for experience and training commencing with a salary for

hairdressing in 2012 of €20,691 gross per annum rising to €31,988 gross per annum in 2020 ; as a receptionist at €24,750 in 2012 rising to €44,000 gross income per annum in 2020; and as an administrator in 2012 at €20,500 gross earnings per annum rising to €44,000 gross income per annum in 2020. The respective total net annual earnings in each area of employment from 2012 to 2020 less earnings actually received was given as €138,226.43; €190,124.63 and €198,313.56 respectively added to which was Courts Act interest pursuant to the Courts Act 1981 (Interest on Judgment Debts) of €22,295.48, €28,616.50 and €30,167.79. Future loss of earnings in these occupations were capitalised to retirement age on certain assumptions at between €475,000 and €1,002,720.00. These figures do not take into account any *Reddy v. Bates* contingencies.

61. Having regard to the evidence of the Appellant, Professor Kinsella and Ms. Tolan I am satisfied and the Court finds as a matter of probability that but for her father's death the Appellant's secondary education was likely to have taken an altogether different course with his support and guidance, such that she would most likely have completed her secondary school education, passed the Leaving Certificate and have undertaken an appropriate vocational training course to qualify her for employment as a receptionist or an administrator in business administration. It has to be remembered that what is being compensated for under this heading of claim is the loss of opportunity caused by the injury and not a claim for a capitalised loss of earnings to date and into the future.
62. Circumstances such as those pertaining in this case inevitably involve an element of speculation as to what might have happened had the injury not occurred. In deference to the requirement that the assessment of general compensation for past and future loss of opportunity must be fair and reasonable and in that so far as the past is concerned regard must be had to the fact that but for the injuries the Appellant would have had to attend a vocational course on leaving school, that while attending college she may not have been able or willing to work when doing so, that she would naturally have wanted to spend time with her only daughter and that she was signed on and was looking for work in order to claim job seekers' allowance, thus declaring herself fit to work. Regard must also be had to the potential loss of earnings had the Appellant not been injured.
63. Whatever about the past, predicting the future prospects for the Appellant is even more problematic. It is entirely understandable, given what has happened to her in the past that the experts are guarded about what the future holds for psychologically and vocationally. I was impressed by her own determination to find a way to return to employment in a remunerative occupation which she would enjoy, a determination which is driven in part by the knowledge that this would make her father proud and further by wanting to be a good role model for her daughter, all commendable motivational reasons.
64. I was also impressed by the fact that the Appellant had secured a job as a gym receptionist for which she was able and which she enjoyed, at least initially, and in which she worked relatively long hours, all without any therapeutic intervention. I think it is significant in this case that she left that job voluntarily for a number of reasons, including a desire to spend time with her daughter and because she was experiencing difficulty in

getting her salary paid. Just as significant is the fact that she signed on as being available and looking for work.

65. In the circumstances of this case it seems to me that past performance is a reasonable predictor of what might likely occur for the Appellant once she has had the benefit of therapeutic intervention planned by Ms Campion with which, importantly, she wants to engage. Given that she held down what amounted to a full-time job in the past that she enjoyed I do not accept the proposition that it is unlikely the Appellant will secure or be able for full time employment, particularly if the job on offer is one which would give job satisfaction and is suited to her skill sets and personality. She will of course need to train for the kind of roles for which the experts say she is best suited.
66. Consideration must also be given to the matter of choice. The Appellant may choose to work part time rather than full time; she may choose not to work at all or not to do so for certain periods and there are also the ordinary contingencies of life to be taken into consideration as must the fact that in the award for loss of society the Appellant is being compensated, *inter alia*, for the loss of her father's support, guidance and advice. For all these reasons the Court considers that a fair and reasonable sum to compensate the Appellant for loss of opportunity is €250,000.00

Ruling

The Court will allow the Appeal against the awards of the Tribunal in respect of the Appellant's claims for Post-Traumatic Stress Disorder/ Psychiatric Injury by substituting the sum of €85,000 for €70,000, and the claim Loss of Opportunity by substituting the sum of €250,000 for €15,000, but will affirm the award of Tribunal in the sum of €120,000 in respect of the claim for Loss of Society. And the Court will so order.