THE HIGH COURT

[2022 No. 891 JR]

[2024] IEHC 143

BETWEEN

EDDIE CUNNINGHAM CUMMINS AND ERICA CUNNINGHAM CUMMINS

(SUING BY HER MOTHER AND NEXT FRIEND MICHELLE CUNNINGHAM)

APPLICANTS

AND

THE CRIMINAL INJURIES COMPENSATION TRIBUNAL AND

THE MINISTER FOR JUSTICE

RESPONDENTS

Judgment of Ms. Justice Mary Rose Gearty delivered on the 23rd of February 2024

1. Introduction

1.1 The Applicants are the children of a man who was shot dead at his doorstep. The issue is whether a decision to exclude them from a compensation scheme due to their father's criminal conduct was one which this Court should quash.

1.2 The Applicants claim compensation from the Criminal Injuries Compensation Tribunal ("the Tribunal") which was set up to pay compensation to those who

suffer personal injuries as a result of crimes of violence. The Compensation Scheme ("the Scheme") extends to the dependents of those who are victims of a fatal attack.

1.3 The Tribunal refused to pay any compensation to the Applicants on the grounds that the conduct or character of their father made it inappropriate to do so. The Applicants contend that the Scheme was misinterpreted, that the decision was *ultra vires* the powers of the Tribunal and that the decision was unreasonable.

1.4 The language of the provision, the context of the Scheme and the public policy aim of preventing criminals from obtaining compensation for injuries inflicted as a result of their criminal activities, all align to persuade me that I should not quash the Respondent's decision. The decision was taken within the limits of the Tribunal's powers, it was reasonable and proportionate, and its rationale was clear.

2. Procedural and Evidential History

2.1 Eddie Cummins died on the 13th of August 2005. One of his children was under 2 years old and the other not yet born. They are clearly blameless victims of this cowardly act. The victim was shot four times at close range by a gunman who ran to a waiting getaway car. He was never apprehended. The vehicle was found, burnt out, over a mile from the scene. The victim had 27 previous convictions. The Respondent ruled that his dependants are not entitled to claim compensation due to a provision in the Scheme that prevents or reduces an award in circumstances where the victim's conduct, character or way of life, makes this inappropriate.

2.2 On the 7th of March 2011, these Applicants, through their mother, made their application. No point is taken in respect of delay given the age of the children at the relevant time, mirroring a similar approach in civil liability cases generally.

3. The Criminal Injuries Compensation Scheme and the Onus of Proof

3.1 The provision of the Scheme on which the Respondent Tribunal relies to deny the Applicants' right to compensation is paragraph 13, which provides that:

> "*No compensation will be payable where the Tribunal is satisfied that the conduct of the victim, his character or his way of life make it inappropriate that he should be granted an award and the Tribunal may reduce the amount of an award where, in its opinion, it is appropriate to do so having regard to the conduct, character or way of life of the victim*."

3.2 A similar provision has been the subject of a judgment by Ní Raifeartaigh J. in the separate cases of *Doyle* and *Kelly v. Criminal Injuries Compensation Tribunal*, decided together at [2020] IECA 342. There, it had been argued that the same Scheme (in an earlier version), was contrary to European Union Law as contained in the relevant Directive and insofar as it constituted unlawful discrimination against those applicants. The exclusion there, at paragraph 14 of that Scheme, was in practically identical terms. Both Doyle and Kelly had criminal convictions and anticipated that paragraph 14, with the same references to conduct, character and way of life, would be used to deny them any award. Each took a case to prevent this outcome.

3.3 One of the arguments put forward in *Doyle* was that paragraph 14 constituted discrimination against persons who were *"unfortunate enough to have criminal records."* I do not think, and neither did the Court of Appeal, that this is misfortune but a matter of choice. Were it otherwise, our criminal justice system would not be fit for purpose. Our system rests on the principles that those who commit offences are responsible and that imprisonment deters and punishes. These principles make no sense if committing crime is a matter of bad luck rather than a matter of choice.

3.4 The Court of Appeal in *Doyle* relied on the judgment of the European Court of Justice in *Presidenza del Consiglio dei Ministri v. B.V.*, C-129/19; ECLI:EU:C 220:566, noting that the Scheme must be interpreted as implementing Council Directive 2004/80. *Doyle* confirms that Irish citizens have a right to compensation if they are the victims of violent crime; whether that crime occurs in Ireland or has a cross-border element is immaterial. However, Ní Raifeartaigh J. held that it was a legitimate policy decision to deny an award to a claimant on the grounds set out in paragraph 14, as long as the decision to do so was not arbitrary or inconsistent.

3.5 At paragraph 57, Ní Raifeartaigh J. refers to the European Convention on the Compensation of Victims of Violent Crimes. Her description is instructive:

The Convention envisaged that compensation would be payable to victims from public funds for offences which were intentional, violent and the direct cause of serious bodily injury or damage to health… Article 8 provides that compensation may be reduced or refused on account of the victim's or the applicant's conduct before, during or after the crime, or in relation to the injury or death; compensation may also be reduced or refused

on account of the victim's or the applicant's involvement in organised crime or his membership of an organisation which engages in crimes of violence; and compensation may also be reduced or refused if an award or a full award would be contrary to a sense of justice or to public policy (ordre public).

3.6 The *Doyle* judgment sets out the history and context of the Scheme in detail and, at paragraph 65, notes that virtually all Member States who had adopted a similar scheme by 2008 had provided for a reduction or refusal of an award where the victim contributed to his injuries and that the majority of schemes did not preclude an award (in whole or in part) on the grounds of previous convictions alone. The case is silent on the issue of dependents, a question that did not arise.

3.7 While the applicants failed in their main argument in *Doyle and Kelly*, that the Scheme discriminated against them, they succeeded insofar as the Court of Appeal agreed that the Tribunal was required to be consistent and transparent. Since then, the Respondent Tribunal has established a system whereby cases are summarised and the rulings and relevant reasoning in sample cases are made publicly available.

3.8 In *McDonagh v. the Legal Aid Board* [2018] IEHC 559, Burns J. held that the Board had clearly misinterpreted a provision under the relevant legal aid scheme but confirmed that the courts will only interfere with the decision of a body administering such a scheme in exceptional circumstances. The onus is on these Applicants to prove that the Respondent has clearly misinterpreted the relevant provision or has acted so unreasonably that its decision must be quashed.

3.9 The Applicants argue that they are unfortunate enough to have been dependent on a man who had criminal convictions and that they, being entirely innocent of any criminal activity, ought not be excluded from this scheme. They argue that paragraph 13 limits the refusal of an award to applications by the victim only, where his conduct requires it, but not to other applicants, such as his dependents.

3.10 There are three reasons to apply the limitation in paragraph 13 to the Applicants' right to compensation here: the wording of the provision itself, consistency within the Scheme and within its legislative context, and, compellingly, as a logical extension of legitimate public policy reasons.

4. Interpretation and Context

4.1 On the plain wording of paragraph 13, there will be no award in the case of a victim whose lifestyle makes it inappropriate to award anything to him. There is no express term restricting this denial of compensation to victim applicants only. The Applicants argue the opposite, effectively, saying that if the award is to be denied, the provision should be read narrowly and applied only to the victim who is himself the applicant. It appears to be grammatically correct to read the provision either way. The paragraph describes only the lifestyle of the victim, not his dependents. It is silent as to the merits of the applicant, who may be the victim himself, one who is responsible for the maintenance of the victim, or one of his dependents. Arguably, all these are categories of claimant who may apply but who may not receive an award if the victim himself would not have received an award.

4.2 There are other paragraphs in the Scheme which refer to claimants and dependents, although this one does not, it refers only to the victim. I was urged to read the provision narrowly, as a result. But it seems to me more important to read it in its context. The phrase does not mean, in my view, that this paragraph is confined to the victim-applicant and nobody else. The opening words of the provision are unambiguous: "No compensation will be payable…". It might have been clearer if it had added *in any case* or *to any claimant*, but only one interpretation confines the limitation to the victim applicant alone, and this is not the obvious interpretation. It is equally possible, just looking at the language and without considering its context for the moment, that this provision bars compensation in all cases, involving any kind of applicant, where the victim's conduct, character or way of life make it appropriate to deny that victim compensation.

4.3 Looking at the provision in the context of the whole Scheme, it appears that the more consistent and logical interpretation is that any applicant may be denied an award due to the character of the victim. Paragraph 12 is a provision in almost identical terms which limits recovery in the case of a victim who was responsible for the offence giving rise to his injuries. There is no reference to claimants or dependents, and I note the same clear, unambiguous opening line:

> "*No compensation will be payable where the Tribunal is satisfied that the victim was responsible, either because of provocation or otherwise, for the offence giving rise to his injuries and the Tribunal may reduce the amount of an award where, in its opinion, the victim has been partially responsible for the offence*".

4.4 This provision does not provide for restrictions in respect of the victim alone, on any interpretation. It could not, tenably, be argued that while a victim of an assault who had provoked the attack could not recover compensation and nor could his dependents, but his family, in the event of his death, would be entitled to compensation from the Respondent Tribunal. Paragraph 13 is consistent with this provision but only if read in the same manner: if no compensation is payable to a man who, by his conduct, character or way of life makes it inappropriate to compensate him for criminally inflicted injuries, then no compensation is payable to his dependents, whether or not he dies of those injuries.

4.5 Paragraph 13 is only consistent with paragraph 12 if his dependents (like himself) *cannot* obtain compensation in a relevant case. This view is supported by Paragraph 6 of the Scheme, which expressly aligns the Scheme with the Civil Liability Acts, 1961 – 2017, stating that awards will be made on the basis of damages awarded under those Acts.

4.6 Under the Civil Liability Acts, the plaintiff dependants of a deceased step into the shoes of the deceased in that they are fixed with her contributory negligence and are deemed responsible for her acts for the purposes of calculating any award of damages. Paragraph 13 is only consistent with this interpretation if the Applicants are treated in like manner as the victim, had he survived.

4.7 In *Hayes v. the Criminal Injuries Compensation Tribunal* [1977] 5 JIC 2401, Finlay P. rejected a similar argument in respect of paragraph 15 of that 1971 Scheme which referred to social welfare entitlements being deducted from a claimant's award. He

noted that just because the word "dependent" was not used, this did not mean that "claimant" did not incorporate all dependents, despite the fact that the word, used in other sections of that Scheme, did not appear in paragraph 15. Similarly, I would require a compelling reason to construe paragraph 13 as meaning that only a victim applicant could be denied an award due to his conduct or character. The policy reasons for extending such a decision to the dependents of the victim applicant are considered further, below.

4.8 As set out by Finlay P., "it will be for the *claimant* to establish his case" [his emphasis]. I am asked to construe this Scheme as a coherent document which occasionally refers to dependents and claimant and if it does not refer to either category, this omission is intentional. Therefore, it is submitted that Article 13 must mean that this limitation is confined to victim claimants. I do not agree with this submission and such an interpretation is not consistent either internally, within the Scheme itself, or within the statutory history and framework of the Scheme. As noted in *Doyle*, it is envisaged in the Convention that there will be proportionate restrictions on compensation due to conduct, including criminal activity on the part of a victim. The Scheme itself is aligned with the Civil Liability Acts, under which dependents derive their rights from a deceased claimant, which confirms this interpretation.

5. Evidential Basis and Reasons for the Decision

5.1 The Applicants submit that the Tribunal refused to make an award on insufficient evidence, in particular they point to the frailty of the evidence: a belief held by the relevant garda that the victim's death was drug related. It was also claimed that the decision does not reveal which aspect of Article 13 was being applied: was it a general finding on conduct, character and way of life or was it specific conduct which led to the shooting, or both? It was further argued that, if his conduct led directly to his death, the appropriate exception to use was paragraph 12, which permits the Tribunal to make no award if the victim is partially responsible for his injuries. The Tribunal relied only on paragraph 13 in refusing to make an award.

5.2 It is important to recall the evidence put forward in this case and the crucial fact that it was not controverted in any way. It was never suggested that the shooting was related to some other, non-criminal, event. It was never suggested that the victim was shot by accident. It was never suggested that this was a mistaken identity case. The garda belief, that the killing was drug-related, was not the only evidence before the Tribunal. Considering the manner of the shooting, which was planned and executed in a style wholly inconsistent with a random or accidental killing, it is hard to argue with the finding of the Tribunal that the garda opinion on this issue was probably correct, let alone hold that its finding was unreasonable.

5.3 If an investigation reveals that injuries were criminally inflicted in a vengeful assault, for instance, or in the course of an attack provoked by the victim, it may be that paragraph 12 would be a more appropriate provision under which to refuse

an award. Indeed, the Respondent referred to such a case, anonymised but available on its website, in which a court case had revealed more of the motivation of an attack than this Tribunal had available. In that case, there was evidence not only that the victim had previous convictions, but also that the victim had been involved in an incident which led to the attack on him. The Tribunal there relied on both provisions to refuse to make an award of compensation to that victim.

5.4 The Applicants must prove their entitlement and they have not pointed to any evidence which might lead me to conclude that this man's death was not related to his criminal activity. There was no suggestion of, for instance, a feud over a building contract, arising from his employment, which escalated out of control. His death is wholly inexplicable unless related to his crimes, probably involving drug dealing. Several suspects were arrested but none was prosecuted. Crucially, none of this was challenged, nor was more detail sought.

5.5 The Tribunal must take into consideration this information and it was reasonable to rely on it in those circumstances. It would clearly be a case in which paragraph 13 could apply, if the victim had been the claimant, having survived the shooting. The previous convictions are numerous, and their content is relevant; they suggest more than opportunistic or youthful transgressions. The victim's criminality was probably known to his local garda station as he and his family appear to have strong links to this small community, he having lived there for many years.

5.6 The victim had been convicted of drug dealing, crimes of violence and burglaries and there was uncontradicted evidence that his death was drug related. There was

no evidence available as to the identity or motive of the killers. Thus, there is little evidential basis for a conclusion that he was directly responsible, wholly or partially, for his death. While, in a general way, one could say that all those who deal in drugs are responsible if they are injured or killed as a result, it appears to me to be a very broad proposition and such a finding would be difficult to justify without more specific proof as to the reason for the attack. If this was the correct interpretation of paragraph 12, that criminality of a certain type, such as drug dealing, might be sufficient for a finding that the criminal was responsible for his own injuries, paragraph 13 might be superfluous, or disproportionate, as it could always be argued that criminal conduct indirectly caused an attack and that paragraph 12 was the only appropriate restriction but they appear to me to cover different situations. Paragraph 12 seems to be directed towards the victim who makes a more direct contribution to the circumstances in which he is injured, such as would be analogous with contributory negligence cases in civil liability claims.

5.7 There is ample evidence, particularly when considering the manner of his death, for the conclusion that his conduct, character and way of life make it inappropriate for the Tribunal to award compensation to him. The Applicant argued strongly that there were insufficient reasons for such a decision and sought more specifics as to dates and basic facts underlying the convictions. This argument might have more weight in a different case but here, there was ample evidence to justify the use of paragraph 13. The specific previous convictions included highly relevant convictions such as the sale and supply of drugs, possession of drugs, assault,

burglaries and possession of weapons. He was 31 years old at the date of his death. While this list of convictions alone might not be sufficient to justify refusing an award, in this case, not only did the garda report contain the belief was that his death was drug related, but the circumstances appear to support this belief.

5.8 The Applicant also argued that a "drug related" killing may not always have a negative connotation. It may mean, it was suggested, that the victim had been a garda informant. This is highly speculative. It is also untenable as an argument in the circumstances. The victim had numerous convictions including one for sale and supply of drugs and two for possession of drugs. He lived in the same small area in Cork where his father and partner also lived. Even with no previous convictions, it was likely that most, if not all local gardaí would have known him. It is stretching credibility to suggest that he might have been an informant and that this was either a matter of which local gardaí were entirely unaware or, worse, they knew this but did not think it relevant to put into their report. Again, it should be noted that this was never suggested to the Tribunal and the garda belief as set out in the relevant report was not contradicted by any evidence.

5.9 It was also suggested by the Applicants that the Tribunal was wrong to state, without specific evidence, that confidential information was relied upon in the garda report, that it noted "the confidential nature of information that the Gardaí necessarily deal with". The argument, in my view, sought to conflate this with the kind of information that comes from a confidential informant. The contents of this

garda report is the relevant information and the evidence is that the Tribunal considered this information, not speculative information from unnamed sources.

5.10 There were several suspects in this case, a file went to the D.P.P. but no prosecution was brought. In those circumstances, it is obvious that the contents of that file are confidential and, had the files been sought, it is likely that they could not have been disclosed and certainly not disclosed in full. The statement is equally applicable to the local circumstances and the kind of background information that the gardaí would hold in respect of the victim and his potential associates or enemies. To say that the nature of the information gardaí deal with in investigating crime is usually confidential is not an unsupported finding by the Tribunal, it is a statement of the obvious and does not equate to a finding that there was a confidential informant involved in this case.

5.11 In its finding, the Tribunal first rejected the argument that paragraph 13 only applies to victim-applicants. I have already set out why I think that this is the correct view and that they were entitled to then consider whether or not paragraph 13 applied in the case of these dependents by examining the victim's history.

5.12 The Tribunal, in its decision, then referred to the nature and extent of the previous convictions of this victim, to the confidential nature of information in the possession of An Garda Síochána and then accepted the opinion of the gardaí that the shooting was drug related. In the next sentence it decides that the conduct, character or way of life of the victim makes it inappropriate to make an award. It is clear to me, and must be to the Applicants, that they are being denied

compensation from this Scheme on the basis that their father would not have obtained an award, had he lived, as he had significant relevant previous convictions and his injuries came about as a result of his criminality. While there was no proof of a direct causative link in that there was no suspect named as his assailant, there was evidence to support such a finding as a matter of probability.

5.13 That being so, the Tribunal was within its powers when it concluded that it would be inappropriate to make any award to the Applicants. As for the reasoning as set out in its decision, the Tribunal specifically noted the nature and the extent of the convictions of the victim, the public policy reasons for refusing such an award – namely that it would be inconsistent in that the victim could not have benefitted from compensation and that it was not seeking to blame the dependents but withhold compensation from a victim whose conduct, i.e. his convictions and way of life, brought him within the terms of paragraph 13.

5.14 Insofar as the submission was made that the Tribunal had fettered their decision in any way, there is no evidence of this. There is no suggestion in the decision that a blanket approach was taken or that a person who had any previous convictions, for instance, would not receive compensation. That would be the wrong approach, as the *Doyle* case makes clear, but there is no evidence that this was the approach taken in this case. The nature and extent of the convictions, the garda belief and the circumstances surrounding the shooting were all considered.

6. Public Policy and Compensating Victims

6.1 The point of the Scheme is to compensate those who are unfortunate enough to have suffered injuries at the hands of a criminal, not those who have suffered injuries at the hands of a criminal because they themselves are criminals. It seems to me that their dependents, particularly if, to some extent, they depend on a victim having made part or all of his money by breaking the law, cannot argue that it is a misfortune, such that the State must compensate them, to have been denied their livelihood because their provider's criminal income has been cut off.

6.2 The Court of Appeal described the relevant policy considerations as already set out above, in paragraph 57 of *Doyle*, referring specifically to the limitations on rights of compensation due to a victim or applicant's conduct. As noted by Ní Raifeartaigh J., the Convention is not binding but explains and helps us interpret the provisions of our Scheme and to understand the policy behind the Scheme.

6.3 Insofar as every decision must be proportionate, a central tenet of EU law, paragraph 13 does not mean that if a person with 11 Road Traffic Act convictions was shot to death in entirely unrelated circumstances his family could not recover compensation. The Tribunal must consider all the relevant facts and apply the provisions fairly. As noted, there is no evidence that the Tribunal fettered its discretion in this way. If, as here, it appears that the victim obtained some of his income from crime and had engaged in dangerous crimes, it is reasonable to find that his dependents, as a matter of public policy, ought not to collect compensation if, entirely foreseeably, he is injured or killed as a result of his criminal activities.

6.4 This proposition requires a little more explanation as the Applicants have argued strongly that the public policy reasons for refusing to make an award to these applicants were never spelled out. Firstly, recall that this man's death was not just drug related but one could conclude that his way of life, as a man who probably took and certainly supplied drugs, means it is reasonable to conclude that he was not an appropriate person to receive compensation under the Scheme.

6.5 Recall the circumstances that led to this man's death: he was shot at close range four times. The killer then left in a car which was burnt out and no evidence was recovered sufficient to even mount a prosecution, let alone secure a conviction. This, to a lawyer or even those who follow crime podcasts or read crime novels, has all the hallmarks of a "hit" or contract killing. If the victim was not involved in crime, it would either be a tragic error or an inexplicable event.

6.6 It is a matter of general knowledge that drug dealing is a dangerous occupation due to the fact that drug dealers are, by definition, criminals, their trade is a lucrative one and many dealers continue their trade by committing assaults and making threats in respect of drug debts and other quarrels arising in the course of their criminal business, including so-called turf wars. These types of offence are commonplace in the criminal courts. The incidence of assassination-style killings is higher amongst drug dealers and criminal gang members than in the general population. On the very unusual occasion that the wrong victim is killed in such an organised attack, that event is very widely reported and there is enormous public sympathy for the victim and family. When the victim of what might be

termed a "professional" or feud-related shooting is, himself, a criminal, it is a matter of much less surprise and attracts less sympathy because it is obvious that those who involve themselves in serious criminality are more likely to be the subject of such assaults. The phenomenon is an ancient one, so much so that we are all familiar with the phrase, *those who live by the sword, die by the sword*. Variations on this theme appear in the Gospel according to Matthew and in numerous songs, plays and poems.

6.7 It is, obviously, sound public policy to discourage criminality. In line with that policy, societies try to minimise the benefits of living a life of crime. In cases from the last hundred years in Ireland and elsewhere, the same policy reasons lie behind common law rules in the law of tort, complicity and certain defences to criminal offences. In particular, a person who joins a criminal gang cannot later rely upon the defence of duress in seeking to justify his conduct during a criminal enterprise.

6.8 I refer to duress because it relies on that broad policy of dissuading people from engaging in crime and it recognises that criminality brings risks to life and limb: it is no excuse to claim that you did not realise that crime could be dangerous or that criminals might threaten you. There is a related public policy principle to the effect that you cannot rely on the benefits of the law if you engage in breaking it. Otherwise, there would be a positive incentive to those who break the law. Why keep the law if you get its benefits no matter what your behaviour?

6.9 Turning to the family of criminals, the first point to note expressly is that any comment here is made in the specific context of a claim for compensation under

this Scheme. It would be entirely unfair to hold family members responsible for other members' actions in a general way. However, it should readily be seen why a state-funded compensation policy might not extend to the dependents of a convicted criminal when considering personal injuries inflicted as a result of his engagement in criminal acts. One of the most important objectives of criminal justice policy is to dissuade citizens from breaking the law. If criminals could rely on the State to, effectively, provide insurance to their families if they are killed by a criminal rival or associate, this is no disincentive to criminality.

6.10 Again, recall that the dependent steps into the shoes of the plaintiff in civil litigation generally. There is no reason not to extend this principle to the current circumstances and policy reasons support that view.

6.11 While I extend sympathy to the blameless children of this victim, who died in a cowardly and heartless act at the very doorstep of his home, I cannot agree that the dependents of a criminal who probably died as a result of his criminality should be compensated by the State for that injury to him. This is not to say that he deserved it and is very far from that, a distinction I want to make clearly. It is a much more nuanced but important principle: those who engage in crime do so knowing the risks. It is not a disproportionate or discriminatory measure to provide that his dependents are not entitled to compensation from the taxpayer if he dies as a result of his criminality, as this would not be in keeping with the State's policy of preventing crime and deterring people from committing crime.

6.12 Insofar as the Tribunal did not spell out these policy reasons, this is not such a deficiency as to amount to a reason to quash its decision or return the case to the Respondent for fresh consideration. Some might argue that the policy considerations set out above are so obvious that they need not be expressly stated. The Applicants argued that there was no comparable doctrine in civil law whereby general conduct might be a barrier to recovery of damages but, as discussed during oral submissions, this line of authority does exist. One analogy is that of the injured party who sues in respect of injuries incurred while he was committing an offence. His dependents would not recover if he himself could not recover damages.

6.13 Hogan J., sitting in the High Court, reviewed some of these authorities in *Carr v. Olas* [2012] IEHC 59. There, an argument took a tragic turn and the Court ruled that the plaintiff could not recover from the defendant driver as the plaintiff had effectively caused the relevant incident. Hogan J. commented at paragraph 39:

> "*… in circumstances where the participants are jointly engaged in serious criminal activity - the textbook examples of which are cases arising from injuries sustained in the course of robbery or (as in the decision of the Australian High Court in Gala v. Preston (1991) 172 C.L.R. 243) car theft – the courts lean against recovery in tort for reasons associated with public policy and maintaining the integrity of the administration of justice*."

He went on to cite MacLachlin J. in *Hall v. Herbert* [1993] 2 SCR 159 as follows:

> "*My own view is that courts should be allowed to bar recovery in tort on the ground of the plaintiff's immoral or illegal conduct only in very limited circumstances. The basis*

of this power, as I see it, lies in duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law...."

6.14 S. 57(1) of the Civil Liability Act 1961 provides: "*It shall not be a defence in an action of tort merely to show that the plaintiff is in breach of the civil or criminal law*." Similarly, it would be disproportionate if the Tribunal was to refuse a claim for compensation on the sole basis that the victim had breached the criminal law.

6.15 But that was not the sole basis for the refusal here. The number and the nature of the breaches were considered, the garda belief and the circumstances which led to his death were all factors. The Tribunal concluded that these circumstances, taken together, meant that it was not appropriate to make an award to this victim and, by extension, to his family. The rights of the dependents in this case are derived from the rights of the victim and, unless the Applicants can establish that it was unfair to withhold compensation from him, and they cannot in my view, it was not unfair to withhold compensation from them.

6.16 Given that there was no specific evidence about the reason for the shooting, the appropriate paragraph was paragraph 13 and not paragraph 12 which provides for those who are responsible for their injuries. The circumstances of *Carr v. Olas* fit more neatly into a paragraph 12 analogy but to extend what Hogan J. refers to as the textbook example, what of the robbers who are injured while fleeing the

scene of the crime and who sue their getaway driver? This is analogous to the facts of this case in that their associate's driving is the direct cause of injury, not their criminality. To paraphrase Hogan J., where participants are engaged in serious criminal activity, the courts lean against recovery in tort for public policy reasons and to maintain the integrity of the administration of justice.

6.17 The same comments apply to the Applicants in this case, it seems to me. They argue that this is to discriminate against them, but that would be the case if they could not recover under the Scheme generally. The only situation in which they cannot receive compensation is this one, as the injury in question was related to the criminal convictions and conduct of their father so as to render it inappropriate to compensate him and, by extension, the Applicant dependents.

7. Conclusions

7.1 These Applicants have not established that this decision was *ultra vires* the powers of the Respondent, nor have they established that the Respondent fettered its discretion or that its decision was unreasonable or unsupported by reasons.

7.2 *Certiorari* is refused and I will hear the parties on the question of costs.