IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

CO/1562/97

Royal Courts of Justice
Strand
London WC2

Friday, 6th March 1998

B e f o r e:

MR JUSTICE DYSON

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REGINA

-v-

CRIMINAL INJURIES COMPENSATION BOARD

EX PARTE HILARY KENT & GORDON MILNE

- - - - - - -

(Handed down judgment of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 831 3183
Official Shorthand Writers to the Court)

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MISS A BURT for MR ML DINEEN (Instructed by Moore & Blatch, Lymington SO41 9ZQ) appeared on behalf of the Applicant.

MR J KNOWLES (Instructed by the Treasury Solicitors) appeared on behalf of the Respondent.

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J U D G M E N T
(As Approved)

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Friday, 6th March 1998

JUDGMENT

MR JUSTICE DYSON:

Introduction

The applicants seek to quash decisions by the Criminal Injuries Compensation Board (" the Board") published on the 10th February 1997 that neither of them was entitled to an award under the 1990 Criminal Injuries Compensation Scheme (" the Scheme"). The background to this tragic case is that Mrs Kent is the mother and Mr Milne the stepfather of Joanna, who was born on 4th March 1982. Between October 1991 and July 1993, Joanna was the victim of serious indecent assaults by Mr Milne's father, whom I will call "the grandfather". Neither Mrs Kent nor Mr Milne was aware of what the grandfather was doing to Joanna until the 8th August 1993, when she told Mrs Kent and/or Mr Milne of these indecent assaults. The evidence does not show how much (if any) detail she disclosed at that time. The applicants went with Joanna to the police and reported the matter. Joanna was interviewed by the Police, and described to them her experiences in some detail in the presence of Mrs Kent. At some stage, the applicants saw a pornographic video, which the grandfather had watched with Joanna.

Entirely understandably, these revelations caused great distress to both applicants. They both consulted their doctors, and, as the Board later found, suffered a reactive depression as a result of being told by Joanna that she had been indecently assaulted by the grandfather. In March 1994, Joanna and the applicants all applied to the Board for compensation. On 17th January 1995, all three applications were disallowed by the single member of the Board. They sought a review by three members. On 16th February 1995, the grandfather was convicted on three counts of indecent assault, and sentenced to 2 years imprisonment concurrently on each count. On 10th February 1997, the Board decided that Joanna had sustained personal injury directly attributable to having been indecently assaulted by the grandfather, and assessed compensation at £7500. In the case of both applicants, the relevant findings, for the purpose of

the present applications, were that they had suffered a reactive depression as a result of being told by Joanna that she had been indecently assaulted by the grandfather, but that such injuries were not directly attributable to a crime of violence. No further reasons were given for the conclusion that such injuries, caused in such circumstances, were not directly attributable to a crime of violence.

The relevant provision in the Scheme is to be found in paragraph 4, which, so far as material, states:

> "4. The Board will entertain applications for ex gratia payments of compensation in any case where the applicant ..... sustained in Great Britain .... personal injury directly attributable - (a) to a crime of violence".....

The Issues

The principal issue is whether the decision of the Board that the reactive depression suffered by the applicants was not directly attributable to the offences committed by the grandfather was wrong in law. In the context of this case, error of law means that the decision was outside the range of decisions which, directing itself properly, the Board could reasonably make.

On behalf of the Board, Mr Knowles raises a subsidiary issue, which arises only if I decide the first issue in favour of the applicants. In that event, Mr Knowles seeks to persuade me to uphold the decisions of the Board, on the grounds that the Board was in error in deciding, on the facts of this case, that the reactive depression suffered by both applicants was a personal injury within the meaning of paragraph 4 of the Scheme.

Directly Attributable

It seems that this is the first case in which the Court has been required to consider whether, and in what circumstances, psychiatric illness suffered by a secondary victim, as a result of being told that a crime of violence has been committed on the primary victim, may properly be said to be "directly

attributable" to that crime of violence. The position in negligence at common law is now clearly established. In McLoughlin v O'Brian [1983] AC 410,422H, Lord Wilberforce said:

> " Subject only to these qualifications, I think that a strict test of proximity by sight or hearing should be applied by the courts. Lastly, as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party".

Nor is this disqualification of secondary victims who suffer shock as a result of third party communication based on the concept of foreseeability. As Lord Ackner said in Alcock v Chief Constable of South Yorkshire [1992] 1AC 310,400H:

> " (2) Even where the nervous shock and the subsequent psychiatric illness caused by it could both have been reasonably foreseen, it has been generally accepted that damages for merely being informed of, or reading, or hearing about the accident are not recoverable. In **Bourhill v Young** [1943] AC 92,103, Lord Macmillan only recognised the action lying where the injury by shock was sustained "through the medium of the eye or the ear without direct contact". Certainly **Brennan J** in his judgment in **Jaensch v Koffey**, 155 CLR 549,567, recognised:" A psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential"."

This is of some significance, because foreseeability is not relevant to the right to compensation under paragraph 4 of the Scheme: see per Cumming-Bruce LJ in Parsons v Criminal Injuries Compensation Board (unreported, 19th November 1982) , transcript Page 5b to e.

I am in no doubt that these applicants have no cause of action at common law against the grandfather. They were not within the sight or hearing of the indecent assaults, or their immediate aftermath, so that the requisite degree of proximity was absent. But that is not determinative of the question whether their reactive depression was directly attributable to the indecent assaults within the meaning of paragraph 4 of the

Scheme. It may seem inherently unlikely that a victim should be entitled to compensation under the Scheme in circumstances where he or she would have no cause of action against the offender, but clearly there can be such cases. Parsons is an example. In that case, the claimant had suffered nervous shock as a result of seeing a dead body on the railway line as he was driving his train. It was held (or assumed) that the deceased had committed a crime of violence. The Court of Appeal quashed the finding of the Board that the injuries sustained by the claimant as a result of his nervous shock on seeing the body were not directly attributable to the crime. It seems clear that Mr Parsons would have had no claim against the estate of the deceased: there was no close relationship of the kind required by Alcock between himself and the deceased.

The central question in this case is what is meant by "directly attributable". In my judgment, the Scheme does not require the Board to approach this question in a complicated or excessively analytical way. I bear in mind what Lawton LJ said in R v Criminal Injuries Compensation Board ex parte Webb [1987] 1 QB 74,78A:

> "The government has made funds available for the payment of compensation without being under a statutory duty to do so. It follows, in my judgment, that the court should not construe this scheme as if it were a statute but as a public announcement of what the government was willing to do. This entails the court deciding what would be a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence".

It is also of relevance that courts have always avoided indulging in philosophical analysis when questions of causation arise. Thus, in Stapley v Gypsum Mines Ltd [1953] AC 663,681,

Lord Reid said:

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it. " A jury would not have profited by a direction couched in the language of logicians, and expounding theories of causation, with or without the aid of Latin maxims": Grant v Sun Shipping Co Ltd, per Lord du Parcq. The question must be determined by applying common sense to the facts of each particular case".

In my view, one feature of paragraph 4 of the Scheme is clear: the word "directly" is intended to impose a restrictive limitation on the causation contemplated by the word "attributable": see Parsons, transcript Page 8 E. This authority is binding on me, as it was on the Board.

For the applicants, Mr Dineen relies on a passage in the judgment of Lord Lowry LCJ in O'Dowd v The Secretary of State for Northern Ireland, (a decision of the Court of Appeal in Northern Ireland), where he said:

> "Without further burdening this judgment with examples of reported cases, it is safe to say that an act can be an effective cause (causa causans) of damage, even if it is preceded, accompanied, or followed by another act (whether negligent or not) of the injured party or a third party: whether the act complained of is a causa causans is a question of fact and degree. There will, admittedly, be a few occasions on which there is only one reasonable answer to that question, one way or the other".

This passage occurs in a section of the judgment where Lord Lowry is discussing causation generally, and without regard to the limitation on it imposed by the word "directly". In any event, I remind myself that the challenge before me is by way of judicial review. In that context, a judicial statement that whether the act complained of is a causa causans is a question

of fact and degree, and that there will be [only] a few cases where there is only one reasonable answer to that question, is of little assistance to the applicants.

Mr Dineen submits that there are only three links in the chain of causation between the grandfather's crime and the applicants' injuries. The crime caused injury to Joanna; Joanna told the applicants of her injury; and her disclosure caused the applicants' injuries. It is a short unbroken chain. Moreover, there was proximity both in time and place between the applicants and the crimes, since they were living with Joanna whilst she was being injured by the grandfather. Even if the applicants had heard about the stepfather's conduct from one person (A), who had been told about it by another (B), who had learnt of it from yet another (C), who in turn had been told about it by Joanna, Mr Dineen argues that the chain of causation would not necessarily have been broken. Some unusual event would be required to break the chain, and make the injuries suffered by the applicants indirectly, as opposed to directly, attributable to the grandfather's crime.

On behalf of the Board, Mr Knowles submits that the applicants' injuries did not flow directly from the grandfather's crime, but from the fact that they were told about it. If they had suffered injury as a result of seeing or hearing the assaults being committed, then the position would have been different. Proximity to the crime in time and place is a relevant, but not conclusive, consideration when the question of direct attributability falls to be determined.

I do not think that it is possible or wise to seek to

provide a detailed definition of direct attributability. Generations of judges have avoided defining causation, seeking refuge in common sense and the concept of fact and degree. I accept that the fact that a claimant suffers psychiatric illness as a result of being told that a crime has been committed (when such a crime has in fact been committed) does not of itself necessarily mean that the injury has not been caused by the crime. Suppose that Joanna had told her mother in graphic detail about one of the indecent assaults almost immediately after it had occurred, and suppose further that the girl was obviously very upset by what had so recently happened to her. If, in those circumstances, Mrs Kent had suffered shock and psychiatric illness as a result of what Joanna had told her, it would seem to me that her injury could properly be said to be directly attributable to the crime. As Mr Knowles put it, it would be almost as if Mrs Kent had witnessed the crime for herself. But the more remote from the crime in time and place the recounting of the experience, the more difficult it is to say that any psychiatric illness suffered as a result of being told about the crime is directly attributable to it.

I accept Mr Knowles's submission that proximity is relevant to the question whether the injury is directly, as opposed to indirectly, attributable to the crime. The closer in time and place the secondary victim is to the commission of the crime of violence, the more likely it is that any personal injury suffered by the him or her as a result of being told about the crime will be directly attributable to it. I cannot agree with Mr Dineen's submission that a finding of direct attributability must be made, no matter how many links there are in the chain of causation, unless one of those links is an unusual event. If an event is

unusual, it is likely that it will break the chain altogether. In my view, that approach does not take proper account of the direct/indirect divide.

Conclusion

I have come to the clear conclusion that the Board committed no error of law in finding that the applicants' injuries were not directly attributable to the crime. It is unfortunate that the Board gave no reasons, but in my judgment there was material to support its conclusions. Joanna did not make her complaint until at least several days after the last assault, and many months after some of the earlier assaults. I must remind myself that this is an application for judicial review. The question is not what I would have decided, but whether there is any evidence that the Board misdirected itself (in my view, there is none); and whether the Board reached decisions which no Board could reasonably have reached. In my view, the Board was entitled to reach the decisions that it did. As Lord Lowry said, the issues raised difficult questions of fact and degree. The court should be slow to interfere with the Board's findings on such issues. I can see no reasons in law for doing so in this case.

MISS BURT: My Lord, there are two matters I would like to raise. First is the question of costs. My client is legally aided and I would hope in the circumstances that your Lordship would say Legal aid taxation?

MR JUSTICE DYSON: Yes.

MR KNOWLES: My Lord, I would ask for our costs, not to be enforced.

MR JUSTICE DYSON: Yes, not to be enforced without order of the Court. You do not object to that, do you?

MISS BURT: My Lord, no. There is a second matter. It is that I am instructed to apply for leave to appeal your Lordship's judgment. For reasons that are apparent from your Lordship's judgment, that is at the top of page 3, concerning "directly

attributable". I say this is a landmark case involving a question of general public importance, namely as to the circumstances perfectly expressed in the first paragraph, there is no point in my repeating it, but I am instructed to apply.

MR JUSTICE DYSON: Do you want to say anything about that?

MR KNOWLES: I do formally oppose leave, but it is a matter for your Lordship.

MR JUSTICE DYSON: Whether there should be leave should be determined by the Court of Appeal, so I refuse your application for leave, thank you very much.