

IN THE HIGH COURT OF JUSTICE

CO/158/92

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QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

Royal Courts of Justice
The Strand
London

B
Friday 19 November 1993

Before:

MR JUSTICE LATHAM

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R E G I N A

- v -

CRIMINAL INJURIES COMPENSATION BOARD

ex parte GRAHAM FREDERICK BARRETT

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Computer Aided Transcript by
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(Official Shorthand Writers to the Court)

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MR J HARVEY (instructed by Messrs John J Smith, Middlesex)
appeared on behalf of THE APPLICANT

MR P KILCOYNE (instructed by the Treasury Solicitor, London SW1)
appeared on behalf of THE RESPONDENT

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

A to the applicant. That was a policy taken out by both him and his
wife, and the premiums were paid by them jointly. By paragraph 19 of
the relevant scheme insurance monies fall to be deducted from any
B payments under the scheme, save that the Board will disregard monies
payable to the victim or his dependents as a result of, or in
consequence of insurance personally effected, paid for and maintained
by the personal income of the victim. In accordance with that
C paragraph it was determined that one half only of the insurance monies
should be deducted, and that it fell to be deducted from that portion
of the claim payable to the applicant because it was to him that the
policy monies were paid.

D The Board in its decision concluded that of the sum total of
£96,347, only £5,500 was attributable to the children's claim, that
is the sum for the special care provided by their mother. The balance
was therefore the applicant's. That was a figure £90,847. One half
E of the insurance monies were deducted from that leaving a figure of
£7,751 to be paid to the applicant. The total award therefore
consisted of £7,751 to the applicant, and £5,500 to the children. It
is not the principles upon which the Criminal Injuries Compensation
F Board calculated the total sum as the dependency for the family which
forms the subject matter of the complaint; the complaint is against
the way in which it has been attributed to the applicant's claim on
the one hand and the children's claims on the other. If it were the
G case that the claims for the care of the children up to the date of
the hearing, and for their future care, were properly determined to
be the children's claims and not the applicant's claims, a very
substantial difference in the total sum payable by the Criminal
H Injuries Compensation Board would result.

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A The basis upon which the Criminal Injuries Compensation Board fell to determine the question of compensation in this case was the 1979 scheme which provides by paragraph 15:

B "Where the victim has died in consequence of the injury the Board will be able to entertain applications from any person who is a dependent of the victim within the meaning of section 1(3) of the Fatal Accidents Act 1976. Compensation will be payable in accordance with the other provisions of this scheme to any such dependent or relative."

C That identifies by whom applications can be made and then to whom payments can be made. The reference to the basis upon which compensation will be payable is a reference back to paragraph 12 of D the scheme which provides:

E "Subject to the other provisions of this scheme compensation will be assessed on the basis of common law damages and will normally take the form of a lump sum payment."

F It follows that the Criminal Injuries Compensation Board was required to deal with three applications in this case -- that is the applicant's on behalf of himself, on behalf of Simon, and on behalf of Rebecca, all of whom fall within the provisions of paragraph 15. In determining the claim each of those dependents is entitled to have their claim approached on the basis of common law damages. In this G particular instance this means in accordance with the principles on which the Courts have awarded damages pursuant to the Fatal Accidents Acts over the years.

H The basic principle under the Fatal Accidents Act is that the

A claim, which is a monetary claim, is for the value of that which has been lost by those generally described as the dependents. This is generally described as the 'dependency'. It is the dependency of each of the dependents which has to be determined. Under the Fatal Accidents Act each individual dependent had his own separate claim which he or she is entitled to have assessed separately. However, in procedural terms it is one claim brought usually by the personal representative of the estate of the deceased, which is then apportioned between the defendants.

C Over the years the practice has developed in relation to the valuation of the dependency, where there has been the loss of a father or a mother, whereby an overall figure is calculated as representing that which has been lost by reference either, where a father is concerned, to lost earnings, or, where a mother is concerned, to the value of the care which the mother provided. Of course there may be additional circumstances in which, as far as the father is concerned, it may be appropriate to provide further sums representing his care, and the mother, further sums representing lost income. The approach to the apportionment of the overall figure has essentially been pragmatic; the Courts have sought to provide as much money in free cash terms for the parent who is caring for the child as is sensible in all the circumstances, so that there can be ready access for that parent to the fund representing the lost dependency. The bulk has therefore been apportioned to the parent. That was and is a fiction, because in most cases, when analysed, it is plain that the children were in fact the parties, or the dependents, for whom the substantial proportion, where care was concerned, of the value of the claim was intended. It was for their benefit. And it is right to say that this

A has never been reduced to any coherent or sensible principle. It has
essentially been an approach which has had the attraction which I have
already indicated to the parent who needs the cash; and there is no
doubt that it could be said to be founded on good common sense.
B However, there are dangers. They have been recognised in particular
in McGregor on Damages, 15th Edition paragraph 1581, in which the
author indicates that there is no real sound basis other than
C pragmatism for approaching the problems of the apportionment of the
amount of money representing the lost dependency in this particular
way.

As far as principle is concerned, the principle appears to me
to be clear. The principle is that each person who can be described
D as a dependent is entitled to the value of his or her dependency. The
value of that dependency will obviously depend upon, so far as the
children are concerned, their age and the financial circumstances in
which the family may be at any given time. But the fact remains that
E when in particular, as in this case, a mother dies, the children have
lost her care which has to be replaced; and just as in personal injury
actions where one is trying to determine the extent to which care is
required for somebody who has been significantly injured, the value
F or cost of that care is the claim that they have; so the value or cost
of the provision of care for a child is the value of the dependency
that the child has lost.

When one looks at the Criminal Injuries Compensation Board's
G scheme it seems to me to be plain that it was intended that this
approach -- that is the approach of principle -- should be retained
because paragraph 15, to which I have referred, makes it clear that
each dependent has his or her separate claim, and that can only have
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A meaning if one assumes that each dependent has a claim which can be properly valued. In the case of a child that will be, as in the Fatal Accidents Act, a claim for the value of the care he or she was receiving from the parent. In the present case that has been valued B by the Criminal Injuries Compensation Board at the value of the grandparents' care to date, or to the date of the award, and the cost of a nanny or live-in help, plus the top-up figure for the mother's special assistance thereafter. These items are prima facie the basis C of the claim for each of those children. They are not part of the applicant's claim.

D But it is said on behalf of the Criminal Injuries Compensation Board that all that has been done here is to carry out the exercise that the Court commonly carries out in terms of quantification on the one hand -- and as I have said there is no quarrel with that -- but then the distribution or apportionment of it on the other. It is said E that what has happened is exactly what would have happened in a Fatal Accidents Act claim in court; and it follows therefore that the award is wholly in accordance with paragraph 12 of the scheme and cannot be unreasonable or otherwise challengeable in judicial review proceedings.

F In normal circumstances it would clearly not be wrong or unreasonable to follow the normal practice of apportioning damages in the way I have indicated the Courts have pragmatically done in the past, even if a strict analysis suggests that this does not give G proper effect to the child's separate right to claim the full value of his or her dependency. But that ignores entirely the impact in this case of the insurance provisions.. It might be reasonable to give what is rightfully the child's to the parent, in effect for the parent H

A to use it on the child's behalf in normal circumstances, but in the present case the effect of doing that is to reduce the child's compensation by the value of the payments to the applicant under the insurance policy. Neither common law nor the scheme sanction such a deduction. I fully accept that the Criminal Injuries Compensation Board scheme is intended to provide ex gratia compensation where there is no other source from which financial loss can be made good, but the children here have their own claim under the scheme, and their position is that they have no insurance money to make up their financial loss. The consequence is that in my judgment this decision was wrong and should be quashed. It does not, however, follow that the arithmetic consequences which were set out in the award will necessarily be carried over into another amended award because it may be, looking at the way in which the award was made for the care given by a nanny or live-in help on the one the hand, and a housekeeper on the other, that there is considered to be some overlap between those two which may need to be considered. I say may, not because I am saying it is necessarily the case, I am simply saying that it will not necessarily follow as night the day that the figures will remain exactly the same with a simple change from it being the applicant's claim on the one hand to being the children's claim now. For these reasons this application succeeds and the decision is quashed. Are there any consequential matters, Mr Harvey?

G **MR HARVEY:** Do I take it that your Lordship directs that the matter be remitted to either the same Board, or a differently constituted Board, for consideration of the arithmetical matters that have arisen as a result of your Lordship's judgment?

H **MR JUSTICE LATHAM:** Certainly. I simply remit it. It does not seem to me to be necessary to direct it is dealt with by the same or a different Board, but I am in your hands.

MR HARVEY: My Lord, I have no feelings about that.

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MR KILCOYNE: My Lord, I would not have thought a specific direction is required.

MR JUSTICE LATHAM: That is what I thought. It will simply be remitted.

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MR HARVEY: My Lord, the only other matter is that I ask for the applicant's costs of and incidental to this application?

MR JUSTICE LATHAM: My Kilcoyne?

MR KILCOYNE: I do not think that I can resist that.

MR JUSTICE LATHAM: Are there any other consequential matters?

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MR HARVEY: I do not think so.

MR JUSTICE LATHAM: Thank you very much.

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