IN THE HIGH COURT OF JUSTICE CO/3352/96
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
AT BRISTOL CROWN COURT

Friday 28th November 1997

Before

MR JUSTICE SEDLEY

REGINA

-v-

CRIMINAL INJURIES COMPENSATION BOARD
ex parte Brown-Murphy

REVISED HAND DOWN JUDGMENT
NO PARTIES PRESENT

CAT Transcript of the Tape Recordings of
CATER WALSH & COMPANY
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Friday 29th November 1997

REVISED JUDGMENT

The issues

Paragraph 7 of the 1990 Criminal Injuries Compensation Scheme provides:

> 'Compensation will not be payable unless the Board are satisfied that there is no possibility that a person responsible for causing the injury will benefit from an award.'

The first issue in this application for judicial review is whether such responsibility is limited to criminal responsibility.

The second issue is whether, if it is so limited, the conclusions of the Board still meet the narrower test.

The facts

The applicant, who is now 19 years old, is the oldest but one of seven siblings who were systematically subjected to serious sexual abuse by their mother, father and stepfather. The father of the first five children committed suicide. The mother and stepfather moved in 1989 from Ireland to Wales, where within a year the abuse had been discovered and the children taken into care. The senior social worker concerned with their case summarised it in this way:

> 'The emotional destruction caused to all the children as a direct result of the physical and sexual abuse they have suffered is the worst I have witnessed in my career. They experienced the loss of their birth family in the sordid

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> circumstances of their father's suicide by hanging, in the garden shed, which at least ended the physical and sexual abuse suffered in that home, only to find themselves involved with a stepfather who, together with their mother and others, subjected them to years of depraved sexual abuse, coupled with physical abuse/sadistic practices, the indignity of video photography, and possibly worst of all, inter-child sexual abuse enforced by fear and pain.
>
> As a direct result of these abusive relationships, all the children have not only lost their parents, but also each other. The maternal family have been unable to accept the circumstances, and offer no support to them. They are children completely alone, unable to turn to each other or their extended family for love or support, and are dependant on the care and understanding of professional social workers for their needs. It is hard to see how this can ever be altered.'

The gravity of the abuse can be guaged by the sentences passed on the mother and stepfather in 1991: the stepfather was sentenced to a total of 15 years and the mother to a total of 6 years imprisonment.

Late in 1992 the mother escaped from custody and returned to the Republic of Ireland. Although her whereabouts are known to the authorities, she is still there and still at large, apparently because of the slowness of the extradition procedures.

Through the Dyfed social services department the applicant and two of her brothers applied for criminal injuries compensation. The application asserted in relation to J:

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> 'She was found to have been abused by her mother, stepfather and a number of other males from a very early age..... . [J] has therefore been seriously abused by both her parents and by at least four other adults.'

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A single member of the Board allowed the claim in March 1993 and assessed compensation at £9,000, a figure which was considered too low. The application was therefore renewed before the full Board. Almost three years elapsed before the Board heard the case in May 1996. By then J had (in February 1995) returned to live with her fugitive mother, but had then left her and returned to Wales. The Board for the first time raised the Paragraph 7 issue and adjourned the matter to the end of July 1996 so that evidence could be taken from the police officer in the case and so that J's counsel might have a full opportunity to consider the matter, call evidence and make submissions.

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It has been accepted on J's behalf that the possibility cannot be excluded that she will resume close contact with her mother, nor consequently that the mother will benefit from any compensation awarded to J

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The Board's decision

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The chairman of the Board which sat was Mr Michael Lewis QC, who sat with Mr Roderick McDonald QC. They gave their decision orally, but it is

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recorded in an approved note which I reproduce in full:

> 'We are concerned with 3 children [J], aged 18, [R], aged 19 and [M] aged 17. They and their younger siblings came to Wales with their parents in July 1989. Their parents swiftly resumed the programme of abuse on them which had been the pattern of their family life in Southern Ireland. They soon involved at least 2 neighbours in their activities, which were varied. Matters were uncovered in May 1990 when the children were taken into care. Subsequently, the parents and another man were charged with a number of specimen offences. A second man was separately indicted. The mother was only convicted of 3 matters involving [R] and [M] but these were grave offences. She received a sentence of 6 years imprisonment.
>
> We heard evidence from WDC Thomas who was actively involved in the investigations as far as the mother was concerned. We accepted her evidence that the [B-M] household was a centre of a paedophile ring. To her belief 'Everything was done with the mother's knowledge and consent. If Mr [M] (The father) alone did something, the mother knew of it or encouraged it. She was the common link'. We accept that evidence.
>
> The mother has absconded to Ireland. [M] is living with her there intermittently in breach of his Care Order. [R] is in frequent contact with her, as is [J]. All 3 of these children have retracted their evidence against their mother, although [J] has now gone back on this.
>
> We heard evidence from an experienced social worker, Mr Anthony Rigby. He gave it as his opinion that he would not be surprised if [J] went back to her mother in the future (and has written of the enduring strength of her influence on her). We accept this evidence.
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> On the basis of what we have heard, we are satisfied that the mother was involved in

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the abuse of all 3 applicants.

We consider that the circumstances oblige us to consider Paragraph 7 of the Scheme. A stalwart attempt was made to separate the abuse inflicted on them by persons other than the mother and to justify awards on that basis. We think that that was artificial. We conclude that we are not satisfied there is no possibility that any person responsible for these injuries will not benefit. We refuse the applications by [J] and [M] by virtue of Paragraph 7.

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We have not forgotten that we have already dismissed [R]'s application under Paragraph 25. We would also have dismissed it under Paragraph 7.'

On the Board's behalf Mr Macdonald QC has made an affadavit which contains the following passages:

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'We noted that although the applicant's mother had not been convicted of any offence that specifically related to this applicant, she had been charged with the offence of conspiracy to indecently assault her children which was ordered to lie on the file of the court. Instead she was convicted of incest with (count 8) and indecent assault on [R] (count 9) and of aiding and abetting her husband to bugger [M] (count 13). We therefore examined the evidence contained in the police statements to determine the extent of her role in the abuse of her children and particularly the applicant.'

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The word 'instead' in this passage reflects an assumption rather than an established fact.

'We accepted the evidence given by WDC Thomas at the adjourned hearing that the sexual abuse had been done with the mother's consent. Although her evidence was opinion evidence, it appeared to us to be based on her extensive work with the children and her knowledge of the allegations made by them. We concluded that there had been an atmosphere of sexual and physical abuse in the family

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> that constituted a continuing pattern. In particular we observed that the applicant's own application was made on the basis of serious sexual abuse by not only her stepfather and other males, but by her mother and that in essence she had suffered from abuse inflicted within a paedophile ring of which her mother was an active member.
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> Notwithstanding that [the mother] was not convicted of any specific offence relating to the applicant, we concluded on a balance of probabilities that she was responsible among others for the injuries of child physical and sexual abuse. We therefore found that it was artificial to consider the acts of the applicant's father in isolation from the mother in light of the nature of the abuse and the subsequent injuries.'

Although it does not arise for decision,

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I reiterate the concern I expressed in the course of argument at the use of the police officer in the case to give an opinion on the very question which it was for the Board to decide. While the strict laws of

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evidence do not of course apply, the role of the Board as an independent decision-maker is central to the Scheme. One can envisage claims (for example in cases where an alleged rapist has been acquitted) in which a

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police officer's opinion of the reason for the acquittal might be idiosyncratic or mistaken or both. Here, however, the Board has gone on to make up its own mind, and indeed to reach a conclusion which was

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inescapable on the totality of the evidence.

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The evidence

Mr Macdonald QC summarised the material evidence in this way:

> 'In her interviews with social workers.... the applicant described the extent of the sexual abuse that was suffered at the hands of her stepfather and older brother. At first..... she stated that she thought that her mother did not know what was going on. On page 23, however, she said that although she did not tell her mother, the abuse by her stepfather stopped probably because her mother knew about it. She also saw her mother indecently assaulting [N] and [R]. In evidence before us the application stated that the original allegations against her mother were true.
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> According to [P] her mother knew of her husband's assaults on the applicant having found him in the applicant's bed. This was confirmed by [M] who was herself also indecently assaulted by her mother..... ... . [M] in addition to giving evidence in interview of his parent's assaults on himself also stated that he had seen his father assaulting the applicant whilst his mother was in the same bed... .'

Thus whilst the mother had not been convicted of any crime against J, the one count which would have established criminal conduct on the mother's part in relation to J, conspiracy to commit indecent assault, was left on the file. The evidence, as Mr McDonald's affadavit indicates, would not have founded any other count of sexual assault against her and might not have been enough to prove conspiracy in relation to J; although, as Mr Keith on behalf of the Board has submitted, it might very well have founded a count of

cruelty contrary to the Children and Young Person's Act 1933, s.1, a point to which I shall need to return.

Mr Keith has shown me the three passages in the records of interviews upon which Mr McDonald's summary of the Board's findings is based. In one, J's sister P describes the mother finding the stepfather in J's bunk bed and saying 'What are you doing up there?' as the stepfather got down. In the second, J's sister M described the stepfather getting into J's bed:

> '....then Mummy came in.
> **What did mummy say?**
> Get out.
> **What did Daddy do?**
> He went out.'

In the third passage M 'stated he had seen Dad bumming J in bed whilst Mum was turned away from them in bed'. While, therefore, the mother's knowledge of the abuse being inflicted on J was clearly demonstrated, her actions appear to have veered between trying to protect J from abuse and pretending not to notice it. Neither will have been enough to make her an aider and abetter of the particular acts against J of which the stepfather was convicted - intercourse with J when she was under the age of 13 and indecent assault on her. This stands in contrast with the activity of which the mother was convicted and which involved incest on one son, joining in an indecent assault upon the same son, and aiding and

abetting a man (also convicted) to bugger M. Counts alleging that she indecently assaulted two of the other daughters were left on the file. It was therefore, as the Board found, by her active and passive contribution to the atmosphere and process of systematic abuse in the family that the mother bore a part of the responsibility for the abuse of J.

Submissions

For J, Mr Craven submits that 'responsibility' in Paragraph 7 of the Scheme is intended to signify criminal responsibility, whether primary or secondary, but nothing wider. For the Board, Mr Keith submits that the word is an ordinary English word which embraces moral as well as legal responsibility. If, however, the meaning is the narrower one for which Mr Craven contends, Mr Keith submits that the findings of the Board either are or would inexorably have been that the mother bore a measure of criminal responsibility for J's trauma.

Neither construction is without its difficulties. Mr Craven has first to face the powerful argument that the word 'responsibility' is in ordinary usage not limited to criminal liability, and that there is at first blush nothing in the broad purpose of Paragraph 7 of the Scheme inconsistent with such a meaning. He meets this objection in the following way. First of all, simply to apply the

Cozens v Brutus [1973] AC 854 test without contextualising the word is unsafe. The appropriate test for this Scheme is to ask what a reasonable and literate reader would make of it. **R v CICB, ex parte Webb [1987] QB 74.** When one looks at Paragraph 8 of the Scheme, one sees the same phrase - 'person responsible'- used in a way consistant only with criminal responsibility:

> 'Where the victim and any person responsible for the injuries which are the subject of the application (whether that person actually inflicted them or not) or living in the same household at the time of the injuries as members of the same family, compensation will be paid only where -
>
> > (a) the person responsible has been prosecuted in connection with the offence, except where the Board consider that there are practical, technical or other good reasons why a prosecution has not been brought.....'

To make prosecution of the 'person responsible' a condition of payment, Mr Craven submits, makes sense only if responsibility means criminal responsibility. If so, it is at least likely that the same phrase means the same thing when used in Paragraph 7.

Beyond this, Mr Craven poses the question: if responsibility goes beyond criminal liability, where does it end? Mr Keith is unable to give a direct answer to this question, save to say that it must not go beyond what is reasonable on the facts but that it may well include not only civil liability but

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inappropriate causative behaviour.

In the course of argument two useful examples were canvassed:

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> (a) A mother let's her child play without supervision in the street, where the child is abducted and seriously damaged by a paedophile. If, as is very likely, the mother will benefit by an award to the child, is it open to the Board to regard her as a person responsible for causing the child's injury?
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> (b) A child of 10, left briefly with a younger sibling who is being naughty, uses a strap on the younger child in the way their father, a disciplinarian, does on both of them, and thereby causes the younger child serious injury. Is it open to the Board to refuse the younger child an award on the grounds that the father, who may benefit from it, is a person responsible for causing the injury?

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The second of these examples reproduces a feature of the present case - the finding that it was by contributing to the 'abusive atmosphere' that J's

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mother acquired responsibility - but involves a contentious value judgment about the dividing line between discipline and abuse. Both examples highlight the kind of difficult moral judgment which a catholic

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reading of 'person responsible' would require of the Board. In either such case, as in others which one could postulate, each Board would be navigating by its own private values, with unpredictable outcomes on

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questions which are not ordinarily the province of any form of public adjudication.

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Mr Keith nevertheless has on his side not only the apparent breadth of the Scheme's language; he is also able to point to the concluding exception contained in Paragraph 8 (a), which lifts the need for a prosecution where for 'good reasons' none has been brought. Such good reasons, he submits, may include the fact that although a person responsible for the injuries is living in the same household, prosecution is impossible because his or her responsibility for the injuries falls short of criminality. This, I accept, is a feasible literal reading of the paragraph. But in order to work it has to inflate the exception to a size which smothers the rule. In other words, to require a prosecution except where there is no crime is to go right outside the limited and comprehensible class of 'practical' and 'technical' reasons for non-prosecution, and through the residual category of 'other good reasons' to enter a different league in which no crime has been committed at all. I do not think that this can be what the Secretary of State had in mind in formulating Paragraph 8 of the Scheme. There is force, therefore, in the submission that as in Paragraph 8 so in Paragraph 7 'a person responsible' means a person who is criminally responsible.

That the drafter of the Scheme is willing to use precise language in this connection can be seen in

Paragraph 6 of the Scheme:

> 'The Board may withhold or reduce compensation if they consider that -
> .....
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> (c) having regard to the conduct of the applicant before, during or after the events giving rise to the claim or to his character as shown by his criminal convictions or unlawful conduct... it is inappropriate that a full award or any award at all be granted.'

Here 'unlawful conduct' is used in contra-distinction to 'criminal convictions' so as to encompass tortious as well as criminal activity in deciding upon contributory conduct by the claimant. Many forms of harassment, for example, might in the present state of the law be tortious only, and the Scheme deliberately includes these in contributory conduct.

As to the second issue, Mr Keith submits that although neither the indictment nor the evidence might sustain a conviction of the mother as either the perpetrator or an aider and abetter of a crime of sexual violence against J, the evidence incontestably brought her within section 1 (1) of the Children and Young Person's Act 1933:

> 'If any person who has attained the age of 16 years and has responsibility for any child or young person under that age wilfully assaults, illtreats, neglects, abandons or exposes him, or causes or procures him to be assaulted, illtreated, neglected, abandoned or exposed, in a manner likely to cause unnecessary suffering or injury to health....., that person shall be guilty of an offence... .'

Conclusions

In relation to the first issue I am persuaded by Mr Craven's arguments that the policy and objects of the Scheme as reflected in Paragraph 7 are not to deprive an otherwise deserving claimant of an award on the ground of possible benefit to a third party unless that third party bears a criminal responsibility for the claimant's injury.

As to the second issue it may well be that the mother could have been charged with neglecting or exposing J by failing to protect her from the stepfather's attentions, if necessary by going to social services or the police. As has been seen, however, the evidence of the children themselves was not all one way on this issue. Moreover the Board did not consider this question upon the restricted basis which I have held to be the proper one. In this situation I am not willing to refuse relief on the ground that only one answer was open to the Board on the evidence before it, namely that J's mother was criminally responsible under section 1 of the Children and Young Person's Act 1933 for the harm done to J by her stepfather. It is for the Board to consider this and reach its own conclusion upon the Scheme correctly construed.

When the Board does so, it will need to consider the situation as it now stands, including the present

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likelihood of the mother obtaining any benefit from the award to which J is entitled. If the further passage of time has produced a situation in which the Board can be satisfied that the mother will not

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benefit, the issue of her criminal responsibility will become academic; if not, it will be for the Board to guage it for itself.

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I add one further reflection. There is in the Board's papers a moving account of J from one of her foster mothers:

> 'She is now desperately lonely and is often trying to contact previous foster carers who in reality cannot give her very much support. When she first came to us..... she would often sit chatting for ages on the phone and I would only find out later that there had actually been no-one there.'

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It is because she is so damaged and so lonely

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that J has at least once drifted back to her abusive mother. If the Board, when it re-visits the case, does not find the responsibility of resumed close contact with the mother now obviated, can it not

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obviate the possibility of the mother's benefiting from J's award by arranging for the money to be placed in trust and released to J only for the purposes from which, or in situations in which, there is no

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possibility that the mother will benefit? J, although now an adult, continues to have the support of the Dyfed social services department, which may be

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able to make any arrangements which the Board itself cannot make.

Order

The court's order will be limited to an order of certiorari to bring up and quash the decision of the Criminal Injuries Compensation Board given on the 29th July 1996. I see no need for further relief at this stage, since the application will fall to be redetermined.

As agreed by counsel at the conclusion of argument, this judgment is to be handed down at Bristol without the need of attendance, both parties having received a text in advance. There will be liberty to apply (initially in writing and within 14 days of the handing down of this judgment) in relation to any matter upon which the parties have not within 7 days of the handing down of this judgment notified their agreement to the Crown Office.

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(MR JUSTICE SEDLEY)

QBCOF 98/0571/4

Royal Courts of Justice
Strand
London WC2

Monday 7th December, 1998

B e f o r e:

LORD JUSTICE MANTELL
LORD JUSTICE ROBERT WALKER
MR JUSTICE KAY

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R E G I N A

- v -

CRIMINAL INJURIES COMPENSATION BOARD

Appellant

ex parte JM B-M

Respondent

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(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
London EC4A 2HD
Tel: 0171 421 4040
Official Shorthand Writers to the Court)

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MR BURNETT QC (Instructed by The Treasury Solicitor, London SW1H 9HS) appeared on behalf of the Appellant

MR CRAVEN (Instructed by Director of Legal & Administrative Services, Carmarthenshire County Council, County Hall, Carmarthen SA31 1JP) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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MR JUSTICE KAY: The respondent sought compensation under the Criminal Injuries Compensation Scheme in respect of harm she had suffered as a result of serious sexual abuse within her home while she was a child. The Board rejected her application under paragraph 7 of the scheme which provides:

> "Compensation will not be payable unless the Board are satisfied that there is no possibility that a person responsible for causing the injury will benefit from an award."

The respondent thereupon sought judicial review of that decision. On 29 November 1997 Sedley J granted her application, and quashed the decision of the Board so that the respondents's application for compensation would fall to be re-determined. The Board now appeals against that decision.

The relevant factual background was helpfully set out by Sedley J in his judgment:

> "The applicant who is now 19 years old, is the oldest but one of seven siblings who were systematically subjected to serious sexual abuse by their mother, father and stepfather. The father of the first five children committed suicide. The mother and stepfather moved in 1989 from Ireland to Wales, where within a year the abuse had been discovered and the children taken into care. The senior social work concerned with their case summarised it in this way:
>
> > 'The emotional destruction caused to all the children as a direct result of the physical and sexual abuse they have suffered is the worst I have witnessed in my career. They experienced the loss of their birth family in the sordid circumstances of their father's suicide, hanging in the garden shed, which at least ended the physical and sexual abuse suffered in that home, only to find themselves involved with a

stepfather who, together with their mother and others, subjected them to years of depraved sexual abuse, coupled with physical abuse/sadistic practices, the indignity of video photography, and possibly worst of all, inter-child sexual abuse enforced by fear and pain.

As a direct result of these abusive relationships, all the children have not only lost their parents, but also each other. The maternal family have been unable to accept the circumstances, and offer no support to them. They are children completely alone, unable to turn to each other or their extended family for love or support, and are dependant on the care and understanding of professional social workers for their needs. It is hard to see how this can ever be altered.'

The gravity of the abuse can be gauged by the sentences passed on the mother and stepfather in 1991: the stepfather was sentenced to a total of 15 years and the mother to a total of 6 years imprisonment.

Late in 1992 the mother escaped from custody and returned to the Republic of Ireland. Although her whereabouts are known to the authorities, she is still there and still at large, apparently because of the slowness of the extradition procedures."

We can add to that factual background that the mother has now been extradited and returned to this country where she is starting to serve the balance of her sentence, together no doubt with some further penalty in respect of the fact that she escaped from lawful custody.

On 10th September 1992 the application to the Board was made by Dyfed County Council on behalf of the respondent, who was then aged 14. Attached to the application was a report from the Council's Social Services Department. It included the following passages:

"She was found have been abused by her mother, stepfather and a number of other males from a very early age. She says that she can remember being abused from the age of six, but that it was possibly happening before this. Joanne has therefore been seriously abused by both her parents and by at least four other adults. She has also shared in group abuse between brothers and sisters and in children and adult group abuse."

Then later (paragraph 4):

"Her parents have coached her from an early age to abuse other children and to submit to sexual abuse from themselves and other people."

On 29th March 1993, the Director of Social Services was notified of an award made by a single member of the Board of £9,000. The Director rejected the award as inadequate. In accordance with the scheme the matter was referred for an oral hearing. Almost three years elapsed before the Board heard the case in May 1996. By then the respondent had, in February 1995, returned to live with her putative mother, but had then left and returned to Wales. The Board raised the issue under the paragraph 7 of the Scheme and adjourned the matter to the end of July 1996 for further evidence to be obtained on that question.

The relevant part of the Board's decision given orally, but noted at the time by the advocates on both sides, with the note of the advocate appearing for the Board being approved by the Board as an accurate note, included the following explanation of their decision:

"We heard evidence from WDC Thomas who was actively involved in the investigations as far as the mother was concerned. We accepted her evidence that the [R-M] household was a centre of a paedophile ring. To her belief 'Everything was done with the mother's knowledge and consent. If [the father] alone did something, the mother knew of it or encouraged it. She was the common link.' We accept that evidence.

The mother has absconded to Ireland. [One son] is living with her there intermittently in breach of his Care order. [Another child] is in frequent contact with her, as is [the respondent in these proceedings]. All three of these children have retracted their evidence against their mother, although [the respondent] has now gone back on this.

We heard evidence from an experienced social worker, Mr Anthony Rigby. He gave is as his opinion that he would not be surprised if [the respondent] went back to her mother in the future (and has written of the enduring strength of her influence on her). We accept this evidence.

On the basis of what we have heard, we are satisfied that the mother was involved in the abuse of all three applicants.

We consider that the circumstances oblige us to consider paragraph 7 of the Scheme. A stalwart attempt was made to separate the abuse inflicted on them by persons other than the mother and to justify awards on that basis. We think that that was artificial. We conclude that we are not satisfied there is no possibility that any person responsible for these injuries will not benefit. We refuse the application(s) by [the respondent and her brother] by virtue of paragraph 7."

The grounds of application for judicial review are contained in paragraphs 19-21 of the Form 86A. They read:

"19. The written evidence before the board did not indicate any criminal offence of violence, whether as principle or aider and abettor by the mother against the Applicant. In particular the written evidence included the witness statements obtained by and used by the police. These contained no allegation by the Applicant or anyone else of crimes, and in particular crimes of violence by the mother against the Applicant. The allegations affecting the Applicant

were of offences by the step-father and [the brother] alone. The stepfather confessed to a certain extent and said he committed the offences alone and that there was a row when the mother found out and the offences stopped. There was no evidence to contradict this. The mother made no admissions at all.

20. The Board relied on the oral evidence of the police officer, WDC Thomas. She said that she believed the mother had permitted or encouraged abuse by the step-father and knew what was happening in the house. Nevertheless, she agreed that the police evidence was as alleged in paragraph 19 above, i.e. it did not contain allegations of offences by the mother against the Applicant. She did not produce or refer to any additional evidence. What the officer said was her own belief and not evidence or probative evidence and could not establish to any degree criminal liability of any relevant kind (and therefore not responsibility) by the mother.

21. In so far as the Board decided there was a possibility of mother benefitting from an award to the Applicant the Applicant accepts this is a decision she cannot challenge, but she contends the Board was wrong to conclude the mother was a person responsible for the injuries for which she could claim an award. In so far as this conclusion was one of fact it was not based on probative evidence and was one no reasonable tribunal could have reached and in so far as it was based on the meaning of paragraph 7 it was wrong in law and the Board misconstrued its mandate. Furthermore, in so far as the Board decided that the offences and consequent injuries committed by the step-father and/or [the brother] could not be the subject of an award in isolation of offences (if any) and injuries committed by the mother the Board was wrong in law."

An affidavit from Roderick MacDonald QC, one of the Board members who heard the application, was filed in answer to the application. In that affidavit the decision was explained (page 93):

"10. We accepted the evidence given by Woman Detective Constable Thomas at the adjourned hearing that the sexual abuse had been done with the mother's knowledge and consent. Although her evidence was opinion evidence, it appeared to us to based on her extensive

work with the children and her knowledge of the allegations by them. We concluded that there had been an atmosphere of sexual and physical abuse in the family, the constant continuing pattern. In particular we observe that the applicant's own application for compensation was made on the basis of serious sexual abuse by not only her stepfather and other males but by her mother, and that in essence she had suffered from abuse inflicted within paedophile ring of which her mother was an active member.

11. Notwithstanding that the mother was not convicted of any specific offence relating to the applicant, we concluded that on the balance of probabilities she was responsible, among others, for the injuries of child physical and sexual abuse. We therefore found that it was artificial to consider the acts of the applicant's father in isolation from those of the mother in light of the major abuse and the consequent injuries. We also concluded in view of the evidence from Mr Rigby about the relationship between the applicant and her mother that we were not satisfied that there was no possibility that the applicant's mother would not benefit from an award."

At the hearing the Board was represented by Mr Keith of counsel. Mr Keith argued clause 7 was not confined to criminal responsibility and would cover moral responsibility for the harm or criminal acts of another. In the alternative, Mr Keith argued that even if his submission as to the interpretation was wrong, nonetheless on any view of the facts the mother would inevitably be guilty of an offence of cruelty contrary to section 1 of the Children and Young Persons Act 1933 by neglecting her daughter or exposing her in a manner likely to cause unnecessary suffering or injury to health.

Sedley J decided that clause 7 did require criminal responsibility for the claimant's injury. That decision is not challenged by the Board and it is not necessary to recite the reasons given by the judge for his conclusion. As to the

alternative submission made to him, Sedley J concluded that whilst the evidence might justify a charge of negligence or exposing the daughter in a manner likely to cause unnecessary suffering by failing to protect her from the stepfather's attentions, for example by going to the Social Services or the police, the evidence did not all point in one direction. Thus he was not willing to refuse the relief sought, when the Board had never considered the question upon the restricted basis which he had held to be the proper one. The judge therefore quashed the decision of the Board so that the matter would be remitted for a fresh hearing. He pointed out that that the fresh hearing would be on the basis of the position as it was at the time of the rehearing and he raised the question whether any award might be made subject to a trust so as to remove the possibility of the mother benefitting from it. Such power is contained in the scheme even in the case of an adult not under incapacity by virtue of clause 9.

It was following Sedley J's decision that this matter took an unexpected turn. As is usual, the decision was sent to the Board members. For the first time, Mr MacDonald became aware of the argument advanced on behalf of the Board at the hearing. Put simply, he concluded that the Board's case had been advanced on a false basis. He explained that whilst counsel had set out in an advice the arguments which he intended to submit and which indeed he did later deploy, neither that advice nor a subsequent skeleton argument had been copied either to Mr MacDonald or the Chairman of the Board. The respects in which the case as

conducted differed from what Mr MacDonald contends are the reality of the matter were: (i) the Board had never considered that responsibility meant other than criminal responsibility; (ii) the Board had been satisfied on a balance of probabilities (which is the required test) that the mother had been guilty of criminal conduct towards the respondent; (iii) the Board had not taken the view that an offence contrary to section 1(1)(i) of the Children and Young Persons Act 1933 would amount to responsibility for the purpose of clause 7. As a result leave to appeal was sought and in support of the appeal Mr MacDonald swore a second affidavit to explain the position.

In that affidavit he said, speaking of his first affidavit:

> "I asserted that the Board found that, notwithstanding the absence of a specific conviction of the Applicant's mother of an offence against the Applicant, her mother had been guilty of criminal conduct against her ..."

Whilst not doubting for one moment Mr MacDonald's *bona fides*, which no one has called into question, that assertion was not in fact made in the first affidavit. If it had been, it is difficult to see, as Mr Craven for the respondent points out, how the case could have been conducted before Sedley J on a quite different basis with the judge and both counsel not appreciating that that was the reasoning behind the decision.

It should be specifically recorded that no criticism at all attaches to Mr Keith in this matter. He had made clear his

understanding of the position and of his instructions and of the way in which he intended to conduct the case before the court when he wrote his advice. It is not his fault that that advice was never seen by either member of the Board concerned.

Mr Burnett QC, who appears for the Board on this appeal, immediately acknowledged that he had a number of problems to overcome in the presentation of this appeal. First, he required the court's leave to rely on the further affidavit of Mr MacDonald and, secondly, he recognised that the circumstances in which a court would permit arguments to be addressed which had not been put forward at the original hearing was limited. With commendable realism he acknowledged if he failed in those two regards the appeal was not arguable.

Mr Burnett accepted that on the material placed before Sedley J and with the arguments that had been advanced to him the judge's conclusion could not be faulted. The court therefore turns to consider the two problems identified by Mr Burnett first and his arguments on those two points.

Mr Burnett dealt first with his contention that in the unusual circumstances of this case, he should be permitted to advance arguments not deployed before Sedley J. He invited the court's attention to Pitalis v Grant [1989] 1 QB 605, in which this court held that whilst it retained a discretion to exclude a pure question of law which had not been raised at first instance from being raised on appeal, the usual practice was to allow it to be

taken when the other party had had an opportunity of meeting it, had not acted to his detriment by reason of the earlier omission to take the point and could be adequately compensated in costs.

In his judgment, in that case Nourse LJ at page 611D expressed the matter in his way:

> "The stance which an appellate court should take towards a point not raised at the trial is in general well settled: see *MacDougal v Knight* (1889) 14 App. Cas. 194 and *The Tasmania* (1890) 15 App. Cas 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 Ch. D. 419, 429, *per* Sir John Jessel MR:
>
> > 'the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'
>
> Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party had had opportunity enough to meet it, secondly, that he not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pour point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

Mr Burnett argues that the questions arising in this case are pure points of law and that none of the reasons for exercising the court's discretion not to allow the point to be taken arise in this case.

In relation to the admission of new evidence, Mr Burnett first reminded the court of the classic test for the admission of fresh evidence on appeal as expressed by Denning LJ, as he then was in Ladd v. Marshall [1954] 1 WLR 1489. In order to raise some fresh evidence of a new trial, three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that if given it would probably have an important influence on the result of the case, although it need not be decisive; thirdly, the evidence must be such as it is capable of belief or, in other words, it must be credible though it need not be incontrovertible.

Mr Burnett then drew the attention of the court to the way in which this court has applied that test in judicial review cases. He draw attention to the judgment of Sir John Donaldson MR in R v Secretary of State for Home Department ex parte Momin Ali [1984] 1 WLR 663 with which Fox LJ expressly agreed on that point.

At page 669H Sir John Donaldson said:

> "Just as I think that the doctrine of issue estoppel has, as such, no place in public law and judicial review (see *Reg v. Secretary of State for the Environment, Ex parte Hackney London Borough Council* [1983] 1 WLR 524, approved by this court [1984] 1 WLR 1489 has, as such, no place in that context. However I think that the principles which underlie issue estoppel and the decision in *Ladd v Marshall*, namely that there must be finality in litigation, are applicable, subject always to the discretion of the court to depart from them if the wider interests of justice so require."

Mr Craven argues that whilst he could not object to the court being made aware of the circumstances in which this appeal comes to be brought, it would be wrong to permit such radical departure from the arguments advanced before Sedley J and the courts should not admit evidence which is, in effect, a third bite of the cherry to explain the Board's reasons for its decision following upon the reasons given orally at the time which were approved in note form and the affidavit in response to the application for judicial review.

There can be no doubt that the circumstances in which this case now finds itself are unfortunate. In many ways the most appropriate course and the fairest solution would be if the matter went back to the Board for rehearing in accordance with the decision of Sedley J. All the matters that could properly be advanced would be reconsidered and it is difficult to see how any real injustice could be done to anyone in those circumstances. However, attractive though that outcome may be, the question is whether that would be a proper exercise of this court's functions. I have come to the conclusion that it would be.

First, I do not consider that the issues upon which the Board wishes to take a different stance from that taken before Sedley J can be properly characterised as pure questions of law. There is no doubt they raise questions of law but I consider they also raise related questions as to the evidence. In Pitalis the issue in question concerned the interpretation of the word "premises" in section 133(3)(a) of the Rent Act 1977. On any view that was

a pure matter of law. However, the question whether the evidence was sufficient to justify a particular finding does not seem to me to bear that same quality and necessarily involves consideration of the facts. In this case the interpretation of clause 7 was, I am satisfied, a pure question of law. But that is not the issue that Mr Burnett now wishes to advance on a different basis. In order to consider the sufficiency of the evidence it is necessary to look in detail at the evidence. Issues arise for each party as to what evidence should be placed before the court when such an issue arises, particularly in the field of judicial review. If the arguments now sought to be advanced had been argued on this basis before Sedley J, and signposted as such in the affidavit filed on behalf of the Board, I am not persuaded that there would not have been thought a need to deal with the evidence in much greater detail than it was dealt with in the light of the arguments as they appeared at the time.

As to the fresh evidence I think it is significant that both counsel and the judge at the judicial review hearing read the decision, as it had been explained at that time, in the same way. If there was any doubt, Mr MacDonald had sought to explain the relatively brief oral reasons given at the time in his first affidavit. However, it seems to me that there has to come a stage when a decision-maker having given reasons and having had an opportunity to explain those reasons cannot be permitted to go on seeking to explain what was meant. There are two obvious difficulties in permitting such further explanation. First with

the passage of time, in this case nearly two years, even the most conscientious decision-maker may mislead himself as to his own reasoning at the time. Secondly, there is the public perception of whether justice appears to be being done, which it seems to me is inevitably called into question when repeated attempts are made to explain a decision given some considerable time before.

For these reasons, I reach the conclusion that this was not a case in which in the interests of justice it would be right to admit the fresh evidence. I also concluded that it was not a case in which it would be right to permit arguments of such a different kind to be advanced. In the light of Mr Burnett's concession that the appeal became unarguable on those findings, I would dismiss this appeal.

LORD JUSTICE ROBERT WALKER: I agree and I wish to add a few words only on one point which was mentioned in the course of argument. The judge referred to the possibility of any award to the applicant being held in trust for her. Paragraph 9 of the relevant Criminal Injuries Compensation Scheme does expressly provide as to that:

> "If in the opinion of the Board it is in the interests of the applicant (whether or not a minor or a person under an incapacity) to do so, the Board may pay the amount of any award to any a trustee or trustees to hold on such trusts for the benefit of all or any of the following persons, namely the applicant and any Spouse, widow or widower, relatives and dependants of the applicant and with such provisions for their respective maintenance education and benefit and such powers and provisions for the investment and management of the fund and for remuneration of the trustee or trustees as the Board shall think fit."

When the possibility of a trust under paragraph 9 was mentioned, Mr Craven, for the applicant, showed a lack of enthusiasm for it and expressed doubts as to whether a trust would be feasible. I have to say I do not share Mr Craven's doubts as to the theory of the matter, but I do very much share them in practice. This is not an appropriate occasion for a dissertation on the rule in Saunders v Vautier (1841) CR & PH 240 and the mechanism of protective trusts such as are found in section 33 of the Trustee Act 1925. However, there is no doubt that the mechanism of a discretionary trust can be used to confer benefits in kind and therefore in such a way that the beneficiary cannot turn them into money (for instance by the direct payment of rent for lodgings or of maintenance at a hostel or of college fees). That is a possibility which can be raised at a further hearing before the Board if appropriate.

But as to the practicalities of the matter, I believe that no one should underestimate the practical problems either of efficiently and economically administering what seems likely to be quite a small trust fund, or of ensuring that the applicant's mother is excluded from any possible benefit if the applicant were determined to try to assist her. Whether or not the applicant does now take that attitude seems on the information before this court quite uncertain and is something which may have to be explored again at a further hearing.

LORD JUSTICE MANTELL: I agree that this appeal fails for the reasons given by my Lords. I would only add this. I am

unpersuaded that there could ever be a case in which this Court would entertain evidence from a decision-maker in explanation of or justification for the decision under appeal.

ORDER: Appeal dismissed with costs.
(Order not part of approved judgment)