OPINION OF LORD CAMERON OF LOCHBROOM

in Petition

JAMES HUGH CRAIG AND OTHERS

Petitioners

for Judicial Review

of a decision by

The Criminal Injuries Compensation Board

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10 December 1992

The petitioners are four train drivers employed by British Rail who seek judicial review of a decision of the Criminal Injuries Compensation Board dated 9 October 1991. That decision followed upon a hearing in Glasgow on 1 July 1991 after which the Board disallowed the four applications for compensation from the Board.

The Board was constituted under and in terms of a scheme established on 1 August 1964, by the Crown in exercise of the Royal Prerogative. It is enjoined to proceed under and in terms of the scheme which may be amended from time to time. The revised 1979 scheme which applies to the applications with which this petition is concerned, provides by paragraph 4 that "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 (including arson or poisoning) ...."

The agreed facts before the Board are set out in

paragraphs 2, 4, 6 and 8 of the decision complained of. In the cases of Maclennan, Watson and Leadbetter the person involved had either dived, thrown himself or jumped into the path of the locomotive being driven by the petitioner. In the case of Craig the person's action was more deliberate in the sense that having jumped out from bushes, he lay flat on the track with his neck on one rail and feet on the other. Each petitioner had complained of nervous shock arising from the fact of the collision between his train and the individual concerned. In all but the case of Maclennan the individual concerned was killed instantly. As appears from paragraph 1 of the decision, there was no dispute that the claims for compensation proceeded in respect of injuries sustained "as a result of suicides committed on the railway" when each applicant was driving a train. In addition the parties before the Board were agreed as accepting certain matters between them without need for proof. These were set out in a joint minute. This recorded the agreement as follows:

"1. It is reasonably to be anticipated that, if train drivers such as the applicants witness actions by third parties such as are described in the Statements, they will sustain nervous shock.

2. It is reasonably to be anticipated that the impact of a human body against (a) a window of the cab of a moving train or (b) the wheels of a moving train will cause a material risk of injury to persons within

the train, including the driver."

Before the Board, counsel for the petitioners had submitted argument which is set out in paragraph 11 of the Board's decision. In the course of argument he referred to the case of The Queen v The Criminal Injuries Compensation Board ex parte Warner [1986] 2 All E R 478 (also reported as ex parte Webb 1987 1 Q B 74).

The Board's decision proceeds as follows: "13. The Board note that, with one exception, the revised 1979 scheme, which applies to these applications makes no mention as to whether the Law of Scotland or the Law of England is to apply. The exception is contained in paragraph 15 which stipulates who is entitled to claim in fatal cases.

14. The Board considered the decision in Warner, the leading judgement in which was given by Lawton LJ. In the course of that judgement His Lordship said:-

'In my judgement Mr Wright's submission that what matters is the nature of the crime, not its likely consequences, is well founded. It is for the Board to decide whether unlawful conduct because of its nature, not its consequence, amounts to a crime of violence. As Lord Widgery, CJ, pointed out in Clowes' case at page 1364 following what Lord Reid had said in Brutus v Cozens (1972) AC 854, the meaning of 'crime of violence' is 'very much a jury point'. Most crimes of violence will involve the infliction or threat of force

but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the Board, as a fact finding body, have to apply to the case before them. They will recognise a crime of violence when they hear about it even though as a matter of semantics it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences as in the case of the Road Traffic Act 1972 to which I have referred.'

15. The Board respectfully agree with the ratio of that decision and are of the view that it applies in the present cases. In our opinion the Board has to have regard to the act itself to see whether it constitutes a crime of violence within the meaning of the Scheme. If it does, then the Board has to inquire whether any personal injury sustained by the applicant is directly attributable to that crime of violence - paragraph 4. In our view on the facts in the cases of" (three petitioners) "where the deceased threw themselves in the path of the train, no crime of violence occurred within the meaning of paragraph 4(a) of the Scheme. The facts do not support the proposition that the deceased used their own bodies as weapons by throwing themselves at the train. Even if they did throw themselves at the train that would not constitute a crime of violence within the meaning of the Scheme. It follows that we do not think that the facts in the case of" (the petitioner Craig) "constitute a crime of violence within

the meaning of the Scheme."

At this stage I should note a preliminary submission made for the respondent to the effect the petition was incompetent since the issue was one of fact for the decision of the Board in which the Board were given a discretion with which this Court could not interfere. Reference was made to Petition West 1992 S.L.T. 636 and in particular the point emphasised at the end of that opinion to the effect that it is not competent for the Court to review the act or decision on its merits nor may it substitute its own opinion for that of the body to whom the matter has been delegated or entrusted. In my opinion, this submission is without merit. I observe that there is no plea to competency stated for the respondent. In any event the present petition falls clearly within the proposition set out in West that "the sole purpose for which the supervisory jurisdiction may be exercised is to ensure that the body does not exceed or abuse that jurisdiction power or authority or fail to do what the jurisdiction, power or authority requires." The matter is neatly put in the opinion of Lord Weir in Gray v C.I.C.B (13 May 1992 unreported) where judicial review was sought in relation to a decision of the Board there holding that a crime of violence within the meaning of the scheme had not been committed. Lord Weir said "If there was no crime of violence, the petitioner's application is clearly not within the scheme. On the other hand if it can be said

that there was a crime of violence and that the petitioner's personal injury was directly attributable to such a crime, her application is within the scheme and in such circumstances the Board, in refusing to entertain her application, erred in law." In the present petition I am not asked to substitute my opinion on the facts for that of the Board but am merely asked to remit back to the Board for further consideration. This must however be on the basis that I consider that the Board were unwarranted in reaching the view that they did, on the facts presented to and found by them, as a matter of law arising from the operation of the scheme and the terms of the scheme itself. In my opinion, the present application is competent.

Counsel for the petitioners submitted that the decision of the Board was fatally flawed because they had overlooked the proposition that the activities of a person who was trying to kill himself may still constitute a crime even if he succeeded in his object of killing himself. That crime was that known in Scotland as causing injury by a reckless act. This was a different crime from that considered in Webb which was a statutory offence not applicable to Scotland. Motive was irrelevant - see McAllister v Abercrombie 1970 (5 Adam 366). The degree of culpability and recklessness was no doubt high - see R.H.W. v H.M. Advocate 1982 S.C.C.R. 152. It was of a character similar to that in culpable homicide. Reference was

made to Gordon's Criminal Law (Second Edition) paragraphs 26-04, 26-21 and 29-55 to 57. Counsel further submitted that assault could occur where no physical violence had taken place. So glue sniffing was a crime. Reference was made to the Second Supplement to Gordon's Criminal Law, paragraph 29-60 and the cases there cited. The Board had determined in other cases that a person witnessing a crime of violence could be compensated. An instance was given in a case noted in the February 1988 issue of Scolag Journal (number 10/4 of Process). Reference was also made to the Board's 1983 report and the case of ex parte Parsons referred to in paragraph 17 and to two cases cited in paragraph 20, where no direct violence was involved and yet the applications had succeeded. Those who sought to commit suicide could commit a crime of violence where recklessness was the test, either because the risk of injury to others had been realised and ignored or because it was not recognised when it ought to have been. Counsel also referred to Regina v Hancock 1986 A.C. 455 and to the successful applications in the cases of Dove and Burns, numbers 10/5 and 10/6 of Process. So a person intending to commit suicide who deliberately brought himself into collision with an oncoming train in circumstances where a risk of injury to those in the train arose, committed a crime of violence. As Counsel put it, if a person chose to kill himself in front of someone else the witness to such an accident was likely

to be revolted or greatly disturbed. In the circumstances in each of the applications, it had been shown that it was reasonable to foresee that the act of suicide was likely to affect other persons but it was not necessary to show that the bodies of the individuals committing suicide had been used as weapons in order to come within the ambit the scheme. The Board had had regard to the correct test set out in Webb, but even on that test, the circumstances in each application were sufficient to constitute a crime of violence as there set out. The present applications were a fortiori of other cases where the Board had accepted claims where there had been no or minimal criminal violence. No sufficient reason was given for the decision to refuse the present applications. They were unlike Gray v C.I.C.B. where the offence founded on was not one attended with violence.

For the respondent, Counsel submitted that the Board had proceeded properly in accordance with the law laid down in Webb. Reference was made to the speech of Lord Reid in Brutus v Cozens. The Board had applied the facts to a term of ordinary English usage. The facts were indistinguishable from those which obtained in Webb. If it was being urged that the conclusion was one to which no reasonable tribunal could come, then the same conclusion had been reached on identical facts in Webb. If it was being argued that there was some error in the approach in law which had been adopted; it had

been accepted for the petitioners that the test in Webb was correct. That was the test applied by the Board. The submission for the petitioners mirrored that put forward unsuccessfully in argument in Webb. It was of no consequence that a common law crime and not a statutory offence was involved. The Board's reference in their decision to the deceased using their bodies as a weapon was intended as an answer to the primary analogy which had been put before the Board of throwing stones at a train. The scheme in operation at the relevant time fell to be contrasted with the specific provision for cases such as the present now made in the statutory scheme under the Criminal Justice Act 1988, and in particular in Section 109(3)(m). It also fell to be contrasted with the scheme announced in Parliament in 1990. This provided for compensation for personal injury directly attributable inter alia to "an offence of trespass on a railway." In relation to the cases in which the Board had accepted claims arising from the throwing of stones at a train, reference was made to Section 56 of the British Transport Commission Act 1949 which made an offence of unlawfully throwing upon a train a stone likely to cause injury to persons.

While it is to be observed that both the statutory scheme under the 1988 Act and the 1990 scheme specifically include within their ambit an offence which would cover the circumstances of the present cases, I do not consider that that factor is in any way decisive

in this case. Both parties accepted the test set out in Webb as the correct test. That test is also set out by Lord Weir in the case of Gray v C.I.C.B. Counsel for the petitioner however sought to distinguish Webb on its facts because the offence founded upon in that case was a statutory offence which had no application in Scotland. I do not find this attempted distinction in any way compelling. In the Divisional Court (1985 2 A.E.R. 1069) at page 1075 Watkins L.J. makes reference to a paragraph in the Board's nineteenth report to the following effect:-

> "Crime of Violence
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> An assault which, of course, is a crime of violence, may be carried out intentionally or recklessly. A person is reckless if he does an act which in fact creates an obvious risk of injury to other people, and, when he does that act he either has not given any thought to the possibility of there being any such risk, or has recognised that there was such a risk involved and has nevertheless gone on to do the act. However, it is not enough for the person who caused the injury to have acted very carelessly. All claims must be founded on a crime of violence. Carelessness or negligence of itself is not a crime...".

Watkins L.J. then goes on to consider that interpretation alongside the provisions of Section 34 of the 1861 Act. That Section provides "Whosoever by

any unlawful act or by any wilful omission or neglect shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanour". Watkins L.J. continues as follows "A man who deliberately lies on a railway line, or walks on it when a train is approaching, not only invites violent injury or death for himself but also exposes the passengers on the train to the risk of violent injury. Thus, the former practice of the Board may be explicable, not on the basis that an offence under Section 34 is by definition a "crime of violence", but on the basis that the particular criminal offences under Section 34, with which we are concerned, were carried out in an undeniably violent manner: that is to say, in a manner which involved not only the severity of violent injury or death for the criminal, but the danger of violent injury for others." Later on, having declined to be influenced by the Board's previous interpretation of the words of the scheme, however well intentioned, Watkins L.J. says this: "The trespasser who commits suicide on the railway may well be in breach of a duty of care owed to the driver of and the passengers on the train: his action may result in the driver suffering from depression and in passengers being injured. But surely it would be a startling result that a trespasser can be properly be said to have committed a crime of violence." Further on Watkins L.J. says

this, after consideration of the case of Parsons, "Nor can we find anything there (i.e. in the case of Parsons and the judgment of Comyn Bruce LJ) to support the argument that the violent death of the offender is itself sufficient to turn an offence into a crime of violence or is even, indeed, relevant in that connection. If, as we have held, Section 34 does not by definition create a crime of violence, we do not see how the manner of carrying out the offence can have that effect."

It is to be observed that the nature of the offence under Section 34 requires inter alia proof of "wilful omission or neglect" which endangers or causes to be endanger the safety of any person conveyed upon a railway. That offence seems to have all the constituents of the common law offence upon which Counsel for the petitioners founded. Thus in McAllister v Abercrombie, Lord McLaren pointed out, under reference to the Criminal Procedure (Scotland) Act 1887, the difference between those words of style which might be omitted and are taken to be implied and those words which were essential in order to make the act complained of a criminal one. In terms of the Criminal Procedure (Scotland) Act 1975 it is not now necessary to allege that any act of commission or omission charged was done or omitted to be done wilfully. But to aver a relevant charge it is necessary to include the words "to the danger of the lieges". Those words have their

equivalent in the reference to endangering the safety of persons conveyed or being in or upon a railway in section 34. I see no distinction in principle between the specific offence within Section 34 of the 1861 Act and the common law offence which Counsel sought to deduce from similar facts. I therefore consider that there is no warrant for the distinction sought to be made in relation to the facts in Webb as being concerned solely with a statutory offence. That being so, the facts in the present case are wholly analogous to those before the Court in Webb. In my opinion, the Board has not been shown to have applied the wrong test to the applications before them. There was no dispute that the Board had selected from Webb the proper test. The only question therefore was whether having selected the proper test on the facts the Board had reached a view which no reasonable tribunal could have done. The Board had before it the case of Webb and the facts in that case. In Webb the question which the Court of Appeal addressed itself to was whether a psychiatric injury directly attributable to conduct which could be labelled wilful omission or neglect was a personal injury covered by the scheme. That was precisely the same question which on analogous facts the Board required to consider in each of these four applications of the petitioners. In my opinion it could not be said that when faced with facts precisely analogous to those for the Court in Webb, in reaching a similar conclusion to the Court in

Webb, namely that in none of the cases before them had a crime of violence been committed, the Board had reached a view which no reasonable tribunal could have done.

It remains only for me to say that it is plain from the decision of the Divisional Court in the case of Webb that any earlier decisions of the Board which might have appeared to be in point on similar facts, had effectively been overruled by the decision in Webb. No doubt that was why alterations were made to the scheme in 1990 and why the statutory scheme legislated for in the 1988 Act made provision for cases such as the present. Nor do I consider that the case of a witness to a crime of violence is in point. In that event the only issue is whether there is a direct causal link between the crime of violence and the injury for which the applicant seeks compensation.

Nor did I find references to cases such as Regina v Hancock or the applications in Dove and Brown to bear upon the point in issue. In those cases the facts were wholly different. There there was quite clearly an act of violence directed against the taxi driver in Hancock, and the claimants Dove and Brown.

I consider that the flaw in the main submission for the petitioners lies in the assertion that because a suicide deliberately chooses a method of killing himself, the consequences of which are to involve risk of injury to others, that must be a crime of violence.

In my opinion that assertion runs wholly counter to the ratio of the decision in Webb. This appears most clearly from the Opinion of Watkins LJ in the Divisional Court, but is also to be inferred from the judgment of Lawton L.J. in the Court of Appeal.

In the whole circumstances I shall sustain the respondent's plea to relevancy and dismiss the petition.