Case Nos: C/2000/0285
C/2000/2565

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
(CROWN OFFICE LIST) (MR JUSTICE OWEN and MR JUSTICE COLLINS)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 December 2000

Before:

LORD JUSTICE PILL
LORD JUSTICE BUXTON
AND
SIR ANTHONY EVANS

---

R
- v -
Criminal Injuries Compensation Appeals Panel — Respondent
ex parte
Carl Wade August — Appellant

R
- v -
Criminal Injuries Compensation Appeals Panel — Appellant
ex parte
Andrew Brown — Respondent

---

Allan Levy QC and Caroline Hamiliton (instructed by Roach Pittis) appeared for the Appelant Carl Wade August

Jonathan Crow and Dinah Rose (Instructed by the Treasury Solicitor) appeared for the Respondent Appeals Panel

James Guthrie QC and William McCarthy (instructed by Hardwicks) appeared for the Respondent Andrew Brown

Jonathan Crow and Hugo Keith (instructed by the Treasury Solicitor) appeared for the Appellant Appeals Panel

Judgment: Approved by the court for handing down
(subject to editorial corrections).

**Lord Justice Buxton:**

*Introduction and summary*

1. These appeals each raise a broadly similar question about the approach of the Criminal Injuries Compensation Appeal Panel [the Panel] to the construction of the expression "crime of violence" as used in paragraph 8 of the Criminal Injuries Compensation Scheme [the Scheme], the Scheme having been made by the Secretary of State exercising his powers under section 1 of the Criminal Injuries Compensation Act 1995. The 1995 Act placed on a statutory basis what had previously been a scheme operated under the prerogative. It was not however suggested that in any respect relevant to these appeals the new vires had altered the position as it obtained before 1995. In particular, the concept of "crime of violence" had simply been continued in the Scheme from the earlier set of rules.

2. In both of the present cases the applicant was refused compensation by the Panel on the ground that, while he had been the victim of a crime, he had not been the victim of a crime of violence. The central consideration in the Panel's decision in both cases was that the applicant had consented to the criminal acts directed at him. In August an application for judicial review of the Panel's decision was rejected by Owen J. Mr August appeals against that decision. In Brown Collins J quashed the Panel's decision and remitted the matter for reconsideration. The Panel appeals against that decision.

3. In the hope of avoiding undue repetition, it will be convenient to proceed as follows. First, I refer to the relevant terms of the scheme, and make some general comments on its structure. Second, at this stage purely as a matter of background, I set out the basic facts of the two cases. Third, I make some observations about the criminal law applying to the offences in issue in the two cases, since the argument was at some stages confused by misunderstanding on those points. Fourth, I indicate the extent of current authority on the proper approach in law to the construction of the expression "crime of violence". I then deal separately with the issues in each appeal.

*The Scheme*

4. Compensation is only paid under the Scheme to a person who has sustained a "criminal injury". That is defined in paragraph 8 as a personal injury directly attributable to

> "(a) a crime of violence (including arson, fire-raising or an act of poisoning); or
>
> (b) an offence of trespass on a railway; or
>
> (c) [arresting or assisting in the arrest of an offender]"

5. Paragraph 13 indicates circumstances in which an award, although otherwise justified under the terms of the scheme, may be withheld or reduced. Those include, in paragraph 13(e),

the applicant's character; and in paragraph 13(d) the conduct of the applicant before, during or after the incident giving rise to the application. Both of these provisions are potentially engaged in the present applications, but nothing arises in relation to them in the appeals before us.

6. Paragraph 9 of the Scheme further defines "personal injury" as including physical injury and mental injury, in the sense of a medically recognised psychiatric or psychological illness. Further provisions are however introduced limiting the circumstances in which compensation will be payable for mental injury. One aspect of these was discussed at some length in the appeal and it is necessary to make further reference to it.

7. One of the issues in these appeals is or was thought to be whether it was open to the Panel to take into account the factual consent of the applicant to the acts causing his injury in determining whether he had been the victim of a crime of violence, even though that factual consent would in law not be effective to prevent the acts from being criminal. It was a prominent part of the appeal in *August* to argue that since any consent given by August to the acts done to him could not be effective in law to alter the criminality of those acts, the Panel were by the same token precluded from taking the fact of his consent into account in deciding whether the crime that those acts constituted was a crime of violence. For reasons that I indicate in paragraph 20 below, that argument was in any event based on a misconception of the law relating to the criminal offences of which August complained. The argument did, however, draw attention to the terms of paragraph 9(c) of the Scheme, which includes amongst the circumstances in which compensation is payable for mental injury where the applicant

> "was the non-consenting victim of a sexual offence (which does not include a victim who consented in fact but was deemed in law not to have consented)"

8. It is important to see how paragraph 9(c) fits into the structure of the Scheme. Paragraph 8 limits compensation to personal injuries attributable to crimes of violence. Paragraph 9 adds the further limitation that personal injuries that are mental injuries will in any event not be compensatable (that is, even if they meet the paragraph 8(a) requirement of being directly attributable to a crime of violence) unless they have been caused in certain specifically defined circumstances. One of those circumstances is, by paragraph 9(c), that the applicant was "the non-consenting victim of a sexual offence". In turn, however, the latter category excludes victims who consented in fact but were deemed in law not to consent: the category alleged to be in issue in *August*. Such a person therefore cannot recover for mental injury, even though he is the victim of a crime of violence: because he is specifically said not to come within the otherwise eligible category of "non-consenting" victim.

9. For two, separate, reasons, therefore, paragraph 9(c) is of no assistance in the construction of the concept of "crime of violence" in paragraph 8(a). First, paragraph 9 only arises once it is determined that a crime of violence does indeed exist as defined in paragraph 8. It therefore cannot affect the issue of whether or not the consent of the victim is relevant to the construction of terms used in paragraph 8. Second, nor is it of assistance even by way of analogy. Indeed, if analogy were to be sought, paragraph 9(c) is contrary to the contentions advanced in *August*, because it says that, irrespective of the effect of a victim's consent in law, a

victim who consented in fact is not a "non-consenting" victim. Mr Crow, counsel for the Panel, sensibly declined to rely on any such argument, saying that it was dangerous to draw support for a construction of one part of a document that had evolved as had the Scheme from other parts of that document. I agree. The short point however is that paragraph 9(c) simply does not assist in deciding on the relevance of the victim's consent in applying the concept of crime of violence in paragraph 8(a), because it is directed at the different and limited question of when compensation will be payable for mental injury attributable to such crime of violence.

10. *The facts*

11. A concise statement of the facts relevant to each appeal is not made easier by the claims of each applicant having been substantially disbelieved by the Panel. However, it was, rightly, not suggested that the Panel had erred in law in that part of its work, although in both appeals it was argued that there were further facts that should have been taken into account. For present purposes, therefore, I can confine myself to the facts as found by the Panel.

12. The applicant in *August* was born in September 1976. He was placed in care in 1985, and was from a young age a psychologically seriously damaged child, who presented various manifestations of disturbed behaviour, including in particular sexual precocity. There is reason to think, though no proof, that he was sexually abused at an early stage of his life. In the early summer as it was thought to be (there was some uncertainty as to the exact date) of 1990 he met a man called Crow in some public lavatories. He was then aged 13 or 14, Crow was aged 53. August had gone to the lavatories looking for homosexual congress, for which he expected to be paid. He found a willing co-operator in Crow. Eventually, Crow was convicted of three offences relating to August. The first and most serious was an offence of buggery, which took the form of August penetrating Crow. The second was gross indecency, which took the form of Crow and August mutually committing fellatio on each other. The third was an offence of taking indecent photographs of August.

13. August gave evidence at Crow's trial, at the end of which Crow was sentenced to a total of seven years imprisonment, including an extended term under section 2(2)(b) of the Criminal Justice Act 1991. On appeal to the Court of Appeal (Criminal Division) the court accepted that the psychiatric evidence indicated that Crow was likely to commit sexual offences in the future which might cause serious harm, and that therefore an extended term was not only justified but inevitable; but it reduced the sentence from seven years to five. In so doing the court said, at p 10D of the transcript of the judgment of Lord Taylor CJ, that it was influenced by the fact that

> "the only victim (if victim he was) of the conduct which brought the appellant before the court was a 13 year-old boy who was already corrupt, and who had gone to the public lavatory for the purpose of seeking out someone to obtain money from them for homosexual activity, and who was the active partner in the only act of buggery which took place."

14. The Panel concluded, having heard evidence not only from August but also from Crow and from the officer in charge of Crow's prosecution, that the crimes of which Crow had been convicted had not been crimes of violence towards August, because of August's consent to what had occurred. It rejected a claim by August that in addition to the offences of which Crow had been convicted Crow had also buggered him. The Panel found established only those matters in respect of which there had been convictions.

15. In *Brown* the applicant had in the 1960s been a pupil at an approved school, where it was clear that a high level of sexual misconduct took place amongst the pupils, allegedly unchecked by the staff. He claimed that when he arrived at the school, at the age of about 12, he was "raped" (that is, subjected to non-consensual buggery) on four specific occasions by larger and older boys, and also subjected against his will to various other sexual indignities in terms of oral sex and masturbation which, if they had taken place, would have amounted to gross indecency. No prosecutions had been brought in respect of these events, and the Panel accordingly had difficulty in deciding on the facts, particularly as it found the applicant himself to be a very unreliable witness. It appears to have accepted that the four incidents of buggery had taken place, but did not accept that they were non-consensual on Brown's part. Similarly, whilst doubtful about the very occurrence of the oral sex and masturbation, it concluded (in the words of the statement of Mr Lewer QC, Chairman of the Panel, the status of which I shall have to explore more fully below) that

> "in the light of the ages of the other three boys he identified, which were similar to his own, it was more likely to have been consensual conduct between boys than something forced on him or which he had done through fear or because of assaults."

16. The Panel's conclusion was therefore, in terms that are a matter of controversy in this appeal, and to which I shall have to return, that it was

> "not satisfied that any sexual activity between the applicant and any of the 3 boys he named was non-consensual and amounted to a crime of violence."

17. *The law as to buggery and gross indecency*

18. It will be convenient to make some observations about the underlying criminal provisions, since they were the subject of some misunderstanding, at least in the appeal in *August*.

19. The offences are set out in sections 12 and 13 of the Sexual Offences Act 1956 [the 1956 Act], which reproduce the common law. Contrary to the contentions advanced in *August*, these offences were not created to protect children, or any other person involved in them. Rather, they seek to prevent what Parliament describes in terms, in the cross-note before section 12, as "unnatural" behaviour. For that reason, first, both participants in any forbidden act are equally guilty of it, as principals and not merely as aiders and abettors; and, second, consent is never a

defence and is irrelevant to any issue of guilt. It was for that reason that Crow was convicted of buggery even though he had been the patient, not the agent; and even though the agent, August, had, as the Court of Appeal concluded, been a willing and active partner in that act of buggery.

20. It follows from that that an act of buggery will not necessarily involve and entail an assault, as Parliament has confirmed in section 7(2)(c) of the Sexual Offences Act 1967, which in its provisions as to time-limits for prosecutions distinguishes in terms between acts of buggery that do and do not amount to an assault. It also follows that, since the consent of either party is irrelevant to guilt, so the age of the participants is irrelevant: save when there apply the special provisions, not engaged in our case, introduced by section 1A of the 1956 Act to exempt from criminality acts of buggery done in private between consenting adults. The contention advanced on behalf of August that "Parliament has provided that a 13 year old boy cannot give a valid consent in law to buggery" was therefore misconceived. Such a provision is to be found in relation to offences of *assault* in sections 14 and 15 of the 1956 Act. But it is not extended to sections 12 and 13 for the reason already indicated, that those sections are aimed at unnatural behaviour by both parties, rather than at the protection of the victim of an assault.

21. *Authority on the construction of "crime of violence"*

22. The leading authority is the decision of this court in *R v Criminal Injuries Compensation Board ex p Webb* [1987] 1 QB 74 [*Webb*]. We were not shown any material derogating from the guidance given in that case. It has been approved and followed in later authorities, including most recently in Scotland in *Gray v Criminal Injuries Compensation Board* [1999] SLT 425. Nor was it suggested that the fact that *Webb* addressed the concept of "crime of violence" as used in an earlier scheme made it any the less authoritative as a guide to the construction of those same words as used in our paragraph 8(a).

23 All that said, however, two caveats must be entered. First, although the judgment in *Webb* does give guidance as to the meaning of "crime of violence" in general terms, the actual case was addressing claims by persons caused mental illness by witnessing the death of trespassers on the railway. Such offence as those trespassers might have committed, under the provisions of section 34 of the Offences Against the Person Act 1861, was not a crime of violence. It will have been noted from paragraph 5 above that that case is now specifically provided for, but as something other than a crime of violence, in paragraph 8(b) of the Scheme. Second, it necessarily follows from the circumstances of *Webb* that the specific issue in the present case, of the relevance of the victim's consent to whether the crime committed against him was a crime of violence, did not arise.

24 Mr Crow contended that six propositions of law could be drawn from *Webb*. I agree with him as to the first five of these. The sixth is a matter of more difficulty, a difficulty that has some bearing on the appeal in *Brown*. The six propositions were:

a) The concept of "crime of violence" is not a term of art

b) The issue for the Panel of whether a crime of violence has taken place is a jury question. As it was put in *Webb* at p 78A, it depends on "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"

c) That question is not technical or complicated: as it was put at p80A of *Webb*, the Panel "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"

d) The correct approach is not to classify particular offences, ie particular crimes such as "buggery" or "assault", as crimes of violence. Rather, the task of the Panel is to decide whether the events that actually occurred were (i) a crime; (ii) a crime of violence

e) In performing that task, the Panel has to look at the nature, and not at the results, of the unlawful conduct

f) A test (or possibly the test) for the existence of a crime of violence is whether there has been the infliction or threat of force or the doing of a hostile act.

25. All of these propositions are amply justified by *Webb* apart from the last of them. In that regard, what Lawton LJ said in *Webb*, at p 79H-80A, was that

> "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 [Panel], as a fact finding body, have to apply to the case before them."

26. *The decision in* August

27. In both cases before us the original decision was set out in brief (in *Brown*, extremely brief) written form, the Panel's reasoning however being further explained in these proceedings by witness statements by Mr Lewer. Those statements were admitted without objection, and I shall therefore refer to them where appropriate. I understand that in his judgment Pill LJ is to make some further observations about this aspect of the procedure.

28. The reasons given at the end of the hearing were in the following terms:

> "The applicant's history, his upbringing and his experiences before he met Crow explain why, as a 14 year old he was seeking sexual experiences with other men

and doing so for money. But to explain and understand does not mean an applicant is entitled to an award within this Scheme.

On all the evidence, it is probable that Crow was one, though certainly not the first, in a series of men whom the applicant met and had sexual activity with. At 14, he clearly needed help-but that does not mean he was not a consenting and willing partner to what he sought. Whether he can blame others is not a matter for us. We do not accept the submission that the cumulative sexual experiences he had were such as to nullify consent. We consider he did consent.

On the issue of credibility, we are not satisfied that he was penetrated by Mr Crow, and we take note of the basis of the conviction as explained to us by the police officer, whose evidence we accepted. However, this does not affect our decision on consent.

29. In paragraph 11 of his witness statement Mr Lewer gave some further background to the Panel's decision:

"Submissions were made by the presenting officer, and by Counsel for the Applicant. The presenting officer submitted that there had been indecent assaults, or worse, and that the issue for the appeal panel was whether the Applicant had in fact consented. Counsel for the Applicant submitted that there was no dispute that the Applicant had participated voluntarily, in that he was not forced. However, his consent had been vitiated by his earlier history and abusive experiences, and by the age of the assailant, who was 55. The Applicant had been sexualised by cumulative abuse by others, and was not responsible for his own actions."

30. It may be convenient to say that counsel referred to by Mr Lewer was neither Mr Levy QC nor Miss Hamilton who appeared for Mr August before us and in the court below. However, it was not suggested that Mr Lewer's account of the way in which the case had been put by Mr August's then representative was inaccurate.

31. *The appeal in* August: *preliminary*

32. It is tempting to say that the bare facts of *August* render it impossible to say that a conclusion by the Panel that there had been no crime of violence was irrational or contrary to law: which is what August has to establish in order to quash the Panel's decision. He was the active and willing participant in an act of buggery in which he was the agent, not the patient. He was equally a willing participant in the acts of fellatio which, or something like them, he had positively gone in search of. The reasonable and literate man of *Webb* could not possibly be said to be clearly wrong in concluding that in the ordinary understanding of language no "violence" had been involved: however criminal and deplorable in other respects the conduct of Crow had been. However, Mr Levy, in a wide-ranging argument, said that that would be far too

simplistic an approach to the matter. I hope that I do justice to that argument by summarising its main points as follows:

a) The Panel had wrongly assumed that the only issue as to whether a crime of violence had been committed was as to whether August had consented to what had been done.

b) Even if that assumption were justified, the Panel in acting on it was wrong as a matter of law to use consent as a disqualifying factor at all because

i) A child of 13 cannot as a matter of law consent to the acts committed in this case; and

ii) In any event, current public policy, perhaps more clearly than at the time of *Webb*, requires such a child, and particularly one with the horrific background of August, to be treated as a victim and not as a consenting participant

c) The Panel had ignored or misunderstood evidence that demonstrated that August in any event had not consented in fact.

d) Insofar as this was a different point from those set out above, the Panel had wrongly assumed as a matter of principle that, once consent was shown to exist, there could not be any question of the crime being one of violence. This complaint was only faintly discernible in the original argument, but it echoes the main, indeed in effect the only, complaint raised in resisting the appeal in *Brown*.

33. Argument (b)(i) can be disposed of immediately, for the reasons set out in paragraph 21 above. The other contentions need further consideration.

34. *The issue before the Panel in* August

35. Mr Levy seized on the account of the hearing given by Mr Lewer as set out in paragraph 29 above. The Panel's own presenting officer had accepted that there had been indecent assaults (Mr Levy would interpose, clearly a crime of violence) and that the only issue was whether the applicant had consented to them. "Consent" was therefore presented as some sort of disqualifying factor, that (i) wrongly changed the nature of the offence; or (ii) was treated as a factor that conclusively determined the nature of the acts or offence. The Panel had agreed with this analysis, as Mr Lewer's statement, and the statement of reasons given at the end of the hearing, clearly showed.

36. This argument takes too mechanistic an approach to what was said by the presenting officer, and ignores the way in which the case was presented on behalf of Mr August. I deal first with the suggestion that the case was one of indecent assault. In fact, as indicated above, it was not; and, insofar as the hearing officer said that it was, he either misunderstood the case (a misunderstanding plainly not shared by the Panel, who proceeded on the basis of the offences actually committed by Crow); or was speaking figuratively. But even if the case had been one of indecent assault, criminal because as set out in paragraph 20 above the provisions of sections 14 and 15 of the 1956 Act render a child's consent ineffective, it would still be necessary to consider, on the basis that the applicant consented in fact, whether the crime had been one of violence. That was emphasised with his customary clarity by McCullough J in an indecent assault case, *R v CICB ex p Piercy* (unreported, 14 April 1997), at p 4E of the transcript:

> "Consent given by a girl under the age of 16 to unlawful sexual intercourse or indecent touching is not recognised by the law. It does not, however, follow that to commit either offence against a girl of that age involves the use of violence. Each case must be decided on its own facts. Not every application of force is violent. Just as consensual sexual intercourse between a man and a woman would not normally be regarded as a violent act, so it is with a girl under the age of 16. [The offender's] admission that he had intercourse with the applicant did not amount to an admission that he had been violent towards her. The medical evidence did not negative her consent, and the Board clearly believed that she had not established that she did not consent. Not every indecent touching of a girl under the age of 16 involves violence."

37. I respectfully agree with that analysis. Mr Levy indeed read us most of this passage, and declined an invitation from the court to say that it was wrong. He said, rather, that the facts of *Piercy* were very different from those in *August*. So they were, not least in the fact that in *Piercy* the applicant was the patient in the act of intercourse, whereas in our case he was the agent. I thus regard the reference to assault in the proceedings before the Panel as at best a red herring.

38. I revert, therefore, to the nature of the case put before the Panel by August, as set out in paragraph 29 above. It is plain that it was accepted on all sides that consent was indeed the only issue, in the absence of any evidence of August being forced to participate. The Panel were clearly within the proper limits of their judgement, acting as the jury envisaged in *Webb*, to think that at least on the facts of *August* the applicant's consent or willing participation was highly relevant to deciding whether, as a matter of ordinary language, Crow's criminal acts had been violent towards him. And that was clearly also the view of August's then counsel, both in his argument as reported by Mr Lewer and in the nature of the evidence that he adduced: to which I shall turn in more detail at a later stage of this judgment.

39. I therefore conclude that in the particular circumstances of *August* the Panel were justified in thinking that (i) the issue of August's consent was relevant to the construction and application of the concept of "crime of violence"; and (ii) that issue was the only live issue before them at the Panel hearing.

40. *Public policy and the child victim*

41. There were two strands to this argument. First, that the Panel did not give sufficient consideration to the actual position of August, and did not for instance consider whether the whole history of his connexion with the exploiter Crow demonstrated behaviour of a threatening nature on Crow's part. The presence of threats or intimidation, it was said, was indicated by August's breaking off his connexion with Crow in a state of fear, and reporting the events first to the social services and, when that produced no results, to the police. Second, that in any event the concept of "crime of violence" as directed towards children should take account of recent thinking as to the need to protect and treat as victims children such as August who had been sexually abused or entangled in prostitution. I consider those points in turn.

42. So far as the history is concerned, Mr Crow pointed to powerful reasons for doubting whether August had, during the transactions with which the Panel was concerned, been in the vulnerable position that Mr Levy urged. Amongst the matters to which he drew attention was the observation of the Court of Appeal (Criminal Division) which is cited in paragraph 13 above. It is not necessary to descend into this dispute in detail, because I am quite satisfied on two points. First, this was not the basis on which the matter was put to the Panel. Second, the argument overlooks the fact that the compensation claimed must be directly attributable to the commission of a crime. When the court asked what crime Crow had committed, during the alleged grooming and exploitation process, apart from the crimes upon which the Panel proceeded, it was not surprised that no answer was forthcoming.

43. As to the second limb of this argument, I would certainly not undervalue the importance of society taking an active and sympathetic role in protecting those who find themselves in Mr August's position. The Panel has, however, to apply the Scheme, which does not award compensation for general failings on the part of society, such as may very well may have occurred in Mr August's case; but only for injuries caused by crimes of violence. This part of Mr Levy's argument was in truth a complaint that the Scheme itself was inadequate in its terms and limitations. That complaint was at the bottom of the arguments relying on the European Convention on Human Rights that were ventilated at length in August's skeleton argument, but in the event not pursued before us. I say no more about that than that I consider the latter decision to have been well-judged. But none of this has anything to do with the construction of the actual terms of the Scheme, or its application by the Panel. The Panel cannot be criticised on this basis.

44. *The evidence before the Panel*

45. Mr Levy complained that the Panel had ignored or not given proper weight to reports from a clinical psychologist, Dr Gerrilyn Smith. These were prepared respectively on 22 December 1997; 2 July 1998; and 22 October 1999. The first two of them were before the Panel. The last, as can be seen from its date, was prepared after the Panel hearing and (presumably) for the purposes of these proceedings.

46. We have read all of these reports, and disturbing they indeed are in the account that they give of August's problems and the lack of attention or inappropriate attention that they received in his childhood and early adolescence. Relevantly to this case, they are said to demonstrate that August did not consent, or at least could not give informed consent, to his connexions with Crow: so that as a matter of fact the Panel was wrong to find that he had consented. The high-water mark of that conclusion is to be found in the concluding paragraph of Dr Smith's last report:

> "It is debatable whether a psychologically well adjusted child connected to their family of origin could have made such an 'informed choice'. It would be highly improbable if not impossible for a grossly psychologically disturbed and damaged 13 year old boy living in the care system to do so. His life experiences and state of mind rendered him effectively incompetent in caring for himself in his long term best interest."

47. Mr Levy very properly accepted that he could not use that report, which had not been before the Panel, to criticise the Panel's conclusions on the evidence that had been before it. He submitted, however, that those of Dr Smith's reports that had been before the Panel were to the same effect. I fear that I cannot agree. The burden of the two earlier reports is not that August was incapable of consenting to what occurred or did not consent to what occurred, but rather that any such consent should not be regarded as diminishing the culpability of what had occurred. It will suffice to quote what I think to be a representative passage from paragraph 3.12 of the first report:

> "Carl's understanding of the legal situation regarding the episode with Mr Crow is somewhat confusing. However it is my opinion that adults must take responsibility for their behaviour. Carl was clearly below the age of consent, and the adult must therefore share a greater degree of responsibility for the sexual acts being committed. Children who have been sexually abused are often very sexualised, and will indeed make inappropriate suggestions to adults in relation to sexual interactions. However, again the onus is on the adult to refuse to take part in such inappropriate activity, and the therapeutic imperative is to seek treatment to help the young person better understand themselves, including their sexual abuse experiences."

48. It is instructive to read this and other passages in the light of the case as presented on behalf of August before the Panel, as set out in paragraph 29 above, and the terms of the Panel's ruling as set out in paragraph 28 above. The case was not that August had not consented, but rather that because of his psychological state and history his consent was "vitiated": the view expressed by Dr Smith. It was that case that Mr Lewer was plainly addressing, without averting to it in terms, in his written ruling. The Panel's view was that while such considerations might excite sympathy for and understanding of August's willing participation, they did not mean that he did not consent in fact. Such a conclusion was, on the evidence, plainly within the proper ambit of the Panel's judgement.

49. *An assumption that the presence of consent was conclusive as to "violence"?*

50. Such an assumption, if it were made, would in my view be inconsistent with the approach laid down in *Webb*, which requires all the circumstances of the case to be considered, as a jury question, in deciding whether the crime as actually committed had been a crime of violence. The analysis of the Panel's reasoning set out above demonstrates that no such assumption was made in this case; or, at least, that if such assumption was made it was not the basis on which the Panel decided the case. Consent was regarded as the only live issue because, as the case developed and was presented, as described in paragraphs 36-39 above, on the facts it was the only live issue.

51. *Conclusion in the case of* August

52. None of the criticisms of the Panel's conclusions are borne out. Owen J was right to reject them. I would dismiss this appeal.

53. *The decision in* Brown

54. The written conclusion issued by the Panel at the end of the hearing was in markedly shorter and less informative terms than that issued in *August*. It has already been set out in paragraph 17 above, but it bears repetition:

> "The Panel was not satisfied that any sexual activity between the applicant and any of the 3 boys he named was non-consensual and amounted to a crime of violence."

55. For greater understanding, therefore, it is necessary to turn to Mr Lewer's statement. Having indicated the (considerable) difficulties as to the applicant's credibility, he said, at paragraph 14:

> "Given the sexualised environment, there were also likely to have been consensual sexual relationships and experimentation between boys of similar ages. The Panel took the view that if what occurred was consensual, then it would not be a crime of violence, even if it still amounted to a criminal offence because of the ages of those concerned. The Panel understood that this was also implicit in Counsel's submission, though it notes that it is not how the case is now put in the "Grounds" [scil., of the application for Judicial Review, referred to in more detail in paragraph 60 below].
>
> 15. What we had to decide was first whether the Applicant had been involved in 1966-67 in sexual activity of the kinds he described...and secondly, if he had been involved in significant sexual activity of the nature he described, whether that was done consensually or was forced upon him (by fear or actual force) so as to amount to a crime of violence. If he participated consensually, the Panel did not consider that he had been the victim of a crime of violence.

56. The Panel reviewed the evidence, such as it was, including a medical report that appeared to show that Brown had in fact been subject to prolonged abuse, going beyond the four acts of non-consensual buggery on which he based his claim. It then expressed the conclusion that such crimes as had been committed had involved consensual acts and thus had not been crimes of violence as defined or analysed in paragraph 55 above, and in Mr Lewer's statement as set out in paragraph 16 above.

57. Having dealt with that issue Mr Lewer continued, in paragraph 19 of his statement, in a passage cited here because it is strongly relied on by Mr Guthrie QC on behalf of Brown, as it was relied on by Mr Keith on behalf of the Panel before Collins J:

> "The Panel did not consider the claim under paragraph 13(d) of the Scheme...as no issue of conduct under that sub-paragraph had been raised or argued. Any reference to consensual conduct was to the conduct that the Panel considered was an element that determined whether an act was or was not a crime of violence. Nor did the Panel accept that anal intercourse cannot be seen as anything but an incident involving violence, as suggested. The Panel considered that a person can consent in circumstances in which there may still be a crime but not a crime of violence."

58. *The course of the proceedings in* Brown

59. The short point relied on before us to uphold Collins J's judgment is that both the written statement of reasons and Mr Lewer's witness statement reveal that the Panel wrongly assumed that, if the criminal acts directed at Mr Brown were consented to by him, then, for that reason alone, they could not have been crimes of violence. It was not, as I understood it, submitted that the Panel could not take the consent of the victim into account in deciding whether the crime had been one of violence. The complaint was rather that they had relied on that fact to the exclusion of all others. The Panel thus had not reviewed all the facts and circumstances, as a jury, as the guidance in *Webb* required, but had applied a dogmatic and inappropriate policy. That approach revealed an error of public law on familiar grounds of refusing to consider relevant facts or applying a policy or theory without proper regard for the instant case.

60. This complaint is not easy to extract from Mr Brown's Form 86A. The Grounds expressed there were, first, that the Panel's written reasons, as set out in paragraph 54 above, were inadequate. That was said to be because it was unclear whether the reference in them to Brown's consent indicated that the Panel thought that no crime had been committed; or whether, alternatively, it thought that, although a crime had been committed, Brown should not recover in respect of it because of the provisions of paragraph 13(d) of the Scheme (see paragraph 5 above). Form 86A then explored these two, hypothesised, alternatives, saying in respect of the first of them, at paragraph 5(i) of Form 86A, that

> "allegations of intercourse per anum cannot be seen as anything but an incident involving violence."

61. When I first saw the Panel's written statement of reasons I was concerned at its brevity. I am not on reflection sure that that is a valid criticism. It has to be remembered that the statement is issued immediately after a full hearing, in this case a hearing at which Mr Brown was represented by counsel, and at which all concerned may be expected to have identified the live issues: which, according to Mr Lewer's statement which has not been challenged, were principally related to the applicant's credibility. I also note that a Judge as experienced in public law matters as Collins J was unimpressed by the complaint as to inadequacy of reasons: see paragraph 3 of his judgment in this case.

62. However that may be, it was this complaint of ambiguity that elicited Mr Lewer's statement in the Judicial Review proceedings, which I have already quoted from at length. If that statement, and in particular paragraph 19 of it, extracted at paragraph 57 above, is read in the context of the Form 86A it is clear that it is directly addressing the complaints there made. In particular, when addressing the complaint quoted in paragraph 60 above Mr Lewer does not say (as he would be expected to have said had the Panel made the error complained of by the Respondent to this appeal) that the sumbission *necessarily* failed in a case where consent was present. Rather, he appears to me to say that consent must be taken into account before concluding that an act of anal intercourse is an act of violence.

63. I make these points not to suggest that Mr Brown is in some way precluded by the history from advancing the case that he now asserts. Mr Crow rightly did not make any such submission. Rather, when reading the documents and statements in the case there is a danger that they may mislead unless the nature of the issues before the Panel and as they were originally thought to be before the judge is kept in mind.

64. With those preliminary observations, I turn to the judgment of Collins J.

65. *The judgment of Collins J*

66. On the facts of *Brown* there is no such easy answer as was suggested for *August* in paragraph 32 above. As Collins J put it, in distinguishing Owen J's conclusion in *August*:

> "Here the applicant was buggered. He suffered direct physical injury. It was, as it seems to me, in the circumstances of a 12 or 13 year old being buggered by others, inevitable that he would be injured. Consent apart, this would, in my judgment, undoubtedly have been regarded as a crime of violence."

67. The issue as it finally took shape before Collins J was in narrow terms, and did not involve the extensive analysis that was adopted, at least before us, in *August*. That issue is summarised in paragraph 12 of his judgment. Mr Keith, then appearing for the Panel, said that the proper construction of the Panel's ruling, as shown by Mr Lewer's statement, was that it had concluded in all the circumstances of the case that Brown's willing participation prevented what had been done to him, albeit that it was criminal, from being characterised as a crime of

violence. That was a conclusion as to the nature of the actual offence committed, reached within the ambit of the Panel's factual judgement as envisaged in *Webb*, and not open to criticism as having been irrational or entailing an error of law. That argument was advanced to meet the submission of Mr Guthrie QC (who appeared before Collins J and before us, but not before the Panel) which I have summarised in paragraph 59 above. Collins J recorded Mr Guthrie's submission in these terms:

> "it is clear that the Panel was effectively saying to itself 'Because there was consent, there could be no crime of violence. Whatever may be thought of the offence of buggery in other circumstances, buggery where there is consent (albeit the victim's age does not prevent the crime from existing), it cannot be said to be a crime of violence.' "

68. Mr Keith relied strongly on Mr Lewer's statement set out in paragraph 57 above, that the Panel had considered that consent was "an" element, not the element, that determined whether an act was a crime of violence. That and other parts of Mr Lewer's statement showed that the Panel had indeed addressed the particular facts of the applicant's case, without preconception as to the effect of the applicant's consent.

69. The Judge did not accept Mr Keith's submission, but it is not wholly clear that he accepted the full force of Mr Guthrie's submission either. The Judge said this, at paragraph 14 of his judgment:

> "I find it difficult to read what Mr Lewer says in that narrow sense [as contended for by Mr Keith]. It seems to me that what the Panel is saying is that, because this was an offence of buggery to which the victim consented (albeit as a matter of law the consent did not prevent the offence being committed), it could not be regarded as a crime of violence. It seems to me that the findings of fact that went only to whether or not there was consent shows that that is indeed the case. As I ventured to point out in argument, when dealing with what happened to a young lad aged 12 or 13, the reasons why he consented might well be thought to be material when considering whether he has been the victim of a crime of violence....Was there in reality true consent which can properly be said to negate the element of violence that might otherwise be inherent in an act of buggery?

70. The latter part of this observation would seem to indicate that the Judge criticised the Panel not because it had committed an error of public law by treating the presence of consent as conclusive of the, properly factual, issue of whether there had been a crime of violence; but rather because, in seeking to review the issue of consent, the Panel had not considered that issue in sufficient depth. That that was the Judge's concern is perhaps further demonstrated by the fact that he went on from this part of the judgment to review the law applying to paragraph 8 of the Scheme; emphasised that he was bound by *Webb;* and then, at paragraph 26 of the judgment, distinguished Owen J's judgment in *August* by saying:

> "[Owen J] said that it was for the Appeals Panel to consider all the evidence. He was not prepared to say that on the evidence in that case the [Panel] had reached a decision which was in any way flawed as a matter of law. Having regard to the facts found, that does not in the least surprise me because, as I repeat, there was no question in that case of the applicant being a victim of a crime of violence in the true sense of that word. He was not injured directly or physically as a result of the crime in question.

71. There is no mention here of the real difference between *Brown* and *August*, if Mr Guthrie is right in saying that the Judge accepted his argument: that the Panel's decision in *Brown* was flawed not because it made a wrong assessment of the facts, but because, by its assumption that the presence of consent concluded the issue of violence, the Panel precluded itself from making an assessment of the nature that *Webb* calls for at all.

72. The Judge then went on to consider an example of a prize fighter claiming compensation for his injuries, and the suggestion that it would be open to the Panel to decide that, because of the existence of consent, the assault occasioning actual bodily harm that he had suffered was not an offence of violence. The Judge continued at paragraphs 29-30 of the judgment:

> "I venture to suggest that the 'reasonable literate man' referred to by Lawton LJ [in *Webb*] would be amazed that that was so. It seems to me in that sort of case that consent cannot change the nature of the acts so as to render something which would otherwise have been a crime of violence not a crime of violence."

73. He then said, in relation to the instant case:

> "What was done to the applicant? The answer is that he was buggered. It was inevitable from that that he would suffer some trauma. So much the doctor indicates. He did suffer trauma. As it seems to me, again the reasonable literate man would say to himself that the act of buggery by one person upon another who was aged 12 or 13 should be described as a 'crime of violence' against that 12 or 13-year-old. That being so, as it seems to me, the fact that there was consent (if there was) does not mean that it is not a crime of violence."

It is difficult to read this passage as being anything other than the basis upon which the Judge decided the case. It is notable that, in contrast to the example of the prize fighter, he did not feel able to say that on the facts of *Brown* no reasonable literate man or Panel acting as a jury could come to the conclusion that there had not been a crime of violence. Rather, he said that the juror looking at the facts of *Brown* would say that violence had taken place, and the Panel should not have been deflected from that conclusion by the presence of the victim's consent. That is a criticism different from that adumbrated in the passage cited in paragraph 69 above, but it does seem to be the basis on which the Judge proceeds. Mr Crow complains that if that was what the Judge indeed did, he impermissibly substituted his judgement for that of Panel, as the statutory decision-making body.

25 above, that requirement, as a universal rule, cannot be extracted from *Webb*. A test in those dogmatic terms is inconsistent with Lawton LJ's emphasis on the issue being a jury question that turns on all the circumstances. As he said, while there will usually be the infliction or threat of force, that is not a universal requirement. Since however this was not the basis on which the Panel proceeded it is unnecessary to pursue the issue further.

80. *Conclusion on the appeal in* Brown

81. To the extent that the Judge concluded that the Panel had committed the error complained of by Mr Brown, for the reasons set out above I am unable to agree with him. To the extent that he proceeded on the basis tentatively suggested in paragraphs 62 and 63 above, then that is not a basis which Mr Guthrie sought to support in this court; and in any event would involve the Judge's substituting his own judgement for that of the Panel. Such a course cannot be justified in this case. Although the facts are not as straightforward as those in *August*, it is in my view impossible to say that the Panel were irrational in concluding that the acts committed, consensually, with Brown were not ones of violence.

82. *Disposal of the appeals*

83. I would dismiss the appeal in *August*. I would allow the appeal in *Brown*, set aside the Judge's order, and substitute an order that the application for judicial review be refused.

**Sir Anthony Evans :**

84. The Criminal Injuries Compensation Scheme was introduced in 1964 on an *ex gratia* rather than a statutory basis, and was revised in 1969. The Scheme provided for compensation for physical injury caused by a "crime of violence". The meaning of that phrase was considered both by the Queen's Bench Divisional Court in *R v CICB ex parte Clowes* [1977] 1 WLR 1353 and by the Court of Appeal in *R v CICB ex parte Webb* [1987] 1 QB 74. In both cases it was said that the phrase is not a term of art (per Lord Widgery LCJ in *Clowes* at 1364C, per Lawton LJ in *Webb* at 77H).

85. I can see no reason for doubting that the comment holds good when the meaning of the same phrase has to be considered, as it does here, in the context of the statutory scheme, which was introduced by the Criminal Injuries Compensation Act 1995. The material provisions are as follows, under the heading "Eligibility to apply for compensation"—

> "6. Compensation may be paid in accordance with this Scheme:
>
> (a) to an applicant who has sustained a criminal injury on or after 1 August 1964, ... .
>
> 8. For the purposes of this Scheme, "criminal injury" means one or more personal injuries as described in the following paragraph being ... directly attributable to:
>
> (a) a crime of violence (including arson, fire-raising or an act of poisoning), ... .

9. For the purposes of this Scheme, personal injury includes physical injury (including fatal injury), mental injury (that is, a medically recognised psychiatric or psychological illness) and disease (that is, a medically recognised illness or condition). Mental injury or disease may either result directly from the physical injury or occur without any physical injury, but compensation will not be payable for mental injury alone unless the applicant:

(a) was put in reasonable fear of immediate physical harm to his own person; or

(b) ...

(c) was the non-consenting victim of a sexual offence (which does not include a victim who consented in fact but was deemed in law not to have consented, ... ."

86. In his judgment in *Clowes*, Lord Widgery LCJ included this comment:—

"What the meaning of 'crime of violence' is in my opinion is very much a jury point. If the question arose in a case to be determined by a jury I should have thought the judge would have to leave the meaning of the phrase to the jury and would possibly interfere with their deliberations to the minimum." (1364D).

87. Mr Crow for the Board adopted this as part of his submissions in this case. If it means no more than that the Court should endeavour to give the phrase its natural and ordinary meaning, as it is required to do by the normal rules of statutory interpretation, then of course I do not demur. But I do not think that treating the matter "as a jury point" adds anything to this basic proposition. Even if the meaning was to be decided by a jury, it would be necessary for the judge to give a direction to that effect, and the search for the natural and ordinary meaning would be taken no further. In effect, the jury would have the same task as the judge does now.

88. The judgments in *Clowes* showed different approaches to the definition of "crime of violence", but all were agreed that it was necessary to have regard to the context of the criminal injuries compensation scheme in which the words were found (per Eveleigh J at 1358, Wein J at 1361 and Lord Widgery CJ at 1364A). The inclusion of personal injury caused by arson and poisoning was regarded as relevant (Eveleigh J at 1359B and Wien J at 1362B). Whilst it was not necessary that "actual physical force" was used in the commission of the crime (Eveleigh J at 1358F), nevertheless the crime had to be one which "concerned" violence to the person, or at least one which involved the possibility of violence to another person (Wien J at 1362G and Lord Widgery LCJ at 1364E). Lord Widgery added that a jury could be invited to consider "whether violence in this context does not mean an unlawful use of force or threats directed at the person of another" (1364F).

89. The judgment of the Court in *Webb* was given by Lawton LJ. He approved the submission made by Michael Wright QC (as he then was), counsel for the board, which is found at page 76 of the report. The suggested definition was a crime "which involved the infliction or threat of force to a victim" (Lawton LJ at 79F), and "what matters is the nature of the crime, not its likely consequences" (79H). Lawton LJ added "Most crimes of violence will involve the

infliction or threat of force, but some may not" (79H/80A). He contemplated, therefore, a "crime of violence" for the purposes of the scheme where force was neither threatened nor used.

90. We were also referred to *R v CICB ex parte Piercy* (14 April 1997 ref CO/399/96) where the offence committed against the applicant was that of having unlawful sexual intercourse with a girl under the age of 16. McCullough J held that in the circumstances of that case no "crime of violence" was committed. There was evidence of a bruise on the middle of the girl's thigh but "the medical evidence did not negate her consent, and the Board clearly believed that she had not established that she did not consent" (page 5). The judge said this:—

> "It does not, however, follow that to commit either offence against a girl of that age involves the use of violence. Each case must be decided on its own merits. Not every application of force is violent" (page 4).

The application was made under the 1990 Scheme.

91. Coming to the 1995 statutory scheme, paragraph 9 extends the definition of personal injury to include mental injury, but with the riders in sub-paragraph (a) and following set out above.

92. The first question is whether paragraph 9 is relevant to the meaning of "crime of violence" in paragraph 8. In my judgment, it is. It confirms that a crime of violence may be committed when there is no use of force, but the victim is put in reasonable fear of immediate physical harm (sub-paragraph (a)). This reflects the observations of Lawton LJ in *Webb*. The profusion of negatives does not make sub-paragraph (c) easy to follow, but at least it shows that the draftsman recognised the distinction between non-consensual in fact and deemed lack of consent as a matter of law. It also suggests that a sexual offence is or may be regarded as a "crime of violence" when the victim does not consent in fact.

93. There is, however, no express reference to another situation which may arise in sexual cases, where the victim submits to the sexual act but does not consent voluntarily to it. Juries are directed that the victim of rape did not consent to intercourse unless the consent was "real", freely and voluntarily given.

94. For these reasons, I would hold that the correct approach to determining whether or not a "crime of violence" was committed for the purposes of the Scheme is, first, to identify the crime that was committed, and then to consider whether in the circumstances of the particular case the crime can properly and naturally be described as a crime of violence, taking account of the following factors in particular:—

> (1) "Crime of violence" includes personal injury caused by arson and by poisoning (I do not read these references as extending the scope of the statutory definition);
>
> (2) the statutory definition implies a non-consenting victim (cf *Piercy* which I would hold was rightly decided on the basis of consent, rather than the minimal use of force);
>
> (3) it also implies a non-consenting victim in fact as distinct from any deemed lack of consent in law (cf Art 9(c)); and

(4) "non-consenting" means the absence of "real" consent, freely and voluntarily given.

95. The need to identify the crime that was committed makes it inevitable that there has been a tendency towards classifying certain crimes as crimes of violence, and others not. Thus, Lord Widgery in *Clowes* approved a submission that "a crime of violence should mean a crime of which violence is an essential ingredient" (page 1364G). But Wien J cautioned that "One cannot categorise crimes of violence" (page 1362F). I would respectfully hold that the nature of the crime is relevant in deciding whether a "crime of violence" was committed, but that other factors must be taken into account before reaching a final conclusion in the particular case, principally the presence or absence of "real" consent and to a lesser extent to the question whether force was threatened or used.

96. So, for example, the offence of rape negatives consent by the victim and I doubt whether rape could ever not be a "crime of violence" committed towards her. Sexual intercourse is not an offence unless the girl is aged less than 16, and her consent is not relevant as a matter of law (except in certain circumstances when the defendant is aged less than 24). But I would not hold that it can never be a crime of violence against her, and in the absence of real consent freely and voluntarily given I would hold that it invariably is, notwithstanding that the offence of rape was not charged or proved.

97. As regards the offence of indecent assault and gross indecency, any assault implies the non-consensual threat or use of force, and in my view the inquiry should focus on the presence or absence of consent, rather than upon the precise amount of physical force that may have threatened or used.

98. The present cases are concerned with the crimes of buggery, indecent assault and gross indecency where a male person is the victim. The same approach should be adopted, in my judgment, as in heterosexual cases, which I have outlined above. By the same token, I doubt whether the victim of buggery could ever fail to establish that the offence was a "crime of violence" towards him or her, unless the victim's "real" consent was given, provided always that the applicant could properly be described as the victim of the offence in the circumstances of the particular case — a feature of one of the applications here.

99. Finally, I add one general comment in deference to Mr Levy's submission that a boy who becomes homosexually active and promiscuous with older men may himself be regarded as the victim of the sexual misconduct of others which caused him to develop in that way. I would not exclude the possibility that the boy could establish that he suffered non-physical injury amounting to actual bodily harm as the result of their activities, and therefore that he was the victim of "crimes of violence" for the purposes of the Scheme. However, this had not been explored in the present case.

August

100.. I agree that the appeal should be dismissed, substantially for the reasons given by Lord Justice Pill. For myself, however, I would place greater emphasis on the fact that August took the active part when the crime of buggery was committed, and therefore he cannot properly be

described as the victim of that offence. There is no suggestion of duress or any other reason why it may be doubted that he gave his real consent.

Brown

101. I find this case more difficult, but I conclude that the appeal should be allowed for the reasons given by Lord Justice Pill. The Board was entitled to reach the conclusion that it did, given the relevance and even the central importance, when the crime of buggery is concerned, of the issue of consent in fact.

Procedure

102. I agree with and would like to support the comments made by Pill LJ under this heading. The practical implications are such that this Court ought not, in my view, to seek to lay down procedures for the Board to follow. But in terms of principle, and as guidelines, I would suggest that some reasons ought to be given for the Board's decisions, their nature and extent depending on the circumstances of the case, and that sufficient reasons should be prepared soon after the hearing, rather than many months later as occurred here, though apparently this has been the accepted practice to date.

**Pill LJ:**

103. These appeals raise questions on the construction of the Criminal Injuries Compensation Scheme ("the Scheme") made by the Secretary of State exercising his powers under section 1 of the Criminal Injuries Compensation Act 1995 ("the 1995 Act"). Paragraph 6 of the Scheme provides that compensation may be paid in accordance with the Scheme to an applicant who has sustained a criminal injury on or after 1 August 1964. Paragraph 8 provides that for the purposes of the Scheme "criminal injury" means one or more personal injuries "as described in the following paragraph ... and directly attributable to (a) a crime of violence (including arson, fire raising or an act of poisoning)." Personal injury is described in paragraph 9 so as to include physical injury (including fatal injury), and mental injury (that is, a medically recognised psychiatric or physiological illness). Later provisions of paragraph 9 limit the circumstances in which compensation will be payable for mental injury alone.

104. The meaning of the expression "crime of violence" was considered in this Court in *R v Criminal Injuries Compensation Board ex p Webb* [1987] QB 74. Having described the nature of the Scheme, which at that time had not been put on a statutory basis, Lawton LJ stated, at p 78 that the Court's task is to decided both "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". At p 79H, Lawton LJ accepted that what matters is the nature of the crime and not its likely consequences and stated at p 80A:

> "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."

105. The relevance of the applicant's consent to the relevant events was not considered in ***Webb***. It is the central question in the present cases. Is consent to the relevant events a complete bar to their categorisation as a crime of violence? If not, what is the role of consent when deciding whether events constitute a crime of violence? Buxton LJ has set out the relevant events in the cases of August and Brown. In each case, the Criminal Injuries Compensation Appeals Panel ("the panel") rejected a claim for compensation. Those were cases in which the consent of the applicant was, at least, a factor in the decision against the applicant. The Court has to consider whether, in each case, the correct test was applied.

August

106. In the case of August, the Panel decided on 3 November 1998 that there had not been a crime of violence. Reasons given orally at the hearing were reduced to writing on 18 January 1999. It was stated that "we do not accept the submission that the cumulative sexual experiences he [August] had were such as to nullify consent. We consider he did consent". In a written statement dated 23 June 1999, Mr Michael Lewer QC, chairman of the panel elaborated on those reasons. He stated at paragraph 11:

> "Submissions were made by the presenting officer, and by Counsel for the Applicant. The presenting officer submitted that there had been indecent assaults, or worse, and that the issue for the appeal panel was whether the Applicant had in fact consented. Counsel for the Applicant submitted that there was no dispute that the Applicant had participated voluntarily, in that he was not forced. However, his consent had been vitiated by his earlier history and abusive experiences, and by the age of his assailant, who was 55. The Applicant has been sexualised by cumulative abuse by others, and was not responsible for his own actions."

107. At paragraph 12, the Chairman referred to the earlier reasons and added:

> "The appeal was rejected under paragraph 8(a) on the ground that the incidents complained of did not constitute a crime of violence. In summary, the appeal panel concluded that the Applicant had consented to the sexual activity, and rejected the submission that his cumulative sexual experiences were such as to nullify consent. The panel did not accept the Applicant's contention that he was the passive partner to buggery. In reaching its decision, the appeal panel acknowledged and fully took into account the applicant's history, his upbringing and his experiences before he met Mr Crow, which were fully set out in the evidence before it, including the evidence of previous sexual abuse and his history in institutional care."

The applicant's consent to the sexual activity was plainly central to their conclusion that there had been no crime of violence.

108. For the appellant, Mr Levy QC submits that a boy of 12 or 13 cannot give a valid consent to acts of buggery. In any event, the appellant was a grossly psychologically disturbed and damaged 13 year old boy living in the care system and was incapable of giving consent. Parliament recognised this by making acts of buggery involving persons under a certain age unlawful, irrespective of whether consent had been given. It made no difference that the

appellant was the active rather than the passive partner in the buggery. Mr Levy submits that it was necessary to protect and treat as victims children such as the appellant even if it was they who initiated the conduct which led to the sexual activity and even if they were the active partners in it. The appellant was the victim of crimes of violence committed by Crow.

109. The only personal injury alleged in the case of August was mental injury. Under paragraph 9 of the Scheme, compensation will not be payable for mental injury unless the applicant was "a non-consenting victim of a sexual offence (which does not include a victim who consented in fact but was deemed in law not to have consented)". From the Chairman's statement, it would appear that the conclusion was reached upon a consideration of paragraph 8(a) of the Scheme without the need to refer to paragraph 9. Upon their findings of fact, the same conclusion could have been reached upon a finding that there had been a crime of violence but, the personal injury involved being mental injury, the appellant had not satisfied the test of establishing that he was the non-consenting victim of a sexual offence under paragraph 9(c). I refer later to that sub-paragraph.

110. Upon the facts in August, and the way the case was argued before them, the panel were in my judgment entitled to treat consent as the only relevant issue. Upon those facts, the panel were entitled to conclude that, if there was consent by the appellant, there was no crime of violence. What is questioned in the case of August is primarily the reality of the consent. The submission is made that there was no true consent. Mr Levy has argued that point forcefully and persuasively but in my judgment the panel were entitled on the evidence to reach the conclusion they did.

111. I agree with Buxton LJ that recent thinking as to the need to protect children and treat them as victims did not require the Panel to conclude that August could not have consented for the purposes of the Scheme and that he had not in fact consented. In considering whether there was a real consent, it was necessary to consider all the circumstances, including his age, background history and personality. It appears to me from the panel's statement of 18 January 1999 and the Chairman's further statement of 23 June 1999 that the relevant considerations were taken into account. I only add that when Mr Levy submitted that "a 13 year old boy cannot give a valid consent in law to buggery" he was in my view correctly stating the law. Buggery with a boy of that age is a criminal offence and consent by the boy does not make it anything other than a criminal offence. The boy's consent or lack of consent is irrelevant to guilt. What does not follow, however, is that his inability by his consent to render innocent an act of buggery in which he is involved means that for the purposes of the Scheme he is incapable of consenting to an act of buggery.

112. I agree that the appeal in August should be dismissed.

Brown

113. In Brown, the only injury alleged was physical injury, a claim for psychological injury not being pursued. In this context, I should mention paragraph 9(c) of the Scheme, which is a part of the limitation upon the right to claim compensation for mental injury. Paragraph 9(c) provides that compensation will not be paid for mental injury alone unless the applicant was "a non-consenting victim of a sexual offence (which does not include a victim who consented in

fact but was in law not to have consented)". It could be, but was not, argued that the presence of paragraph 9(c) in the Scheme assists physically injured appellants. The argument would be that by expressly barring a claim based on mental injury where consent has been given in sexual offences, it left open by implication a claim for physical injury where consent had been given in such cases. In my judgment that argument would assist to defeat a suggestion that, in the case of physical injury, consent to events necessarily defeats a claim. It has not however been argued on behalf of the Board that consent necessarily has that effect.

114. Collins J appears to me to have allowed the appeal from the Panel on the ground that he considered the Panel had treated consent as a complete answer to a claim, by itself depriving relevant events of the quality of a crime of violence. Collins J stated, at paragraph 30:

> "As it seems to me, again the reasonable literate may would say to himself that the act of buggery by one person upon another who was aged 12 or 13 should be described as a 'crime of violence' against that 12 or 13-year-old. That being so, as it seems to me, the fact that there was consent (if there was) does not mean that it is not a crime of violence."

115. Analysis of the findings of the panel, as set out in their brief reasoning of 8 June 1999 and the fuller reasoning provided in the Chairman's statement of 3 February 2000 is necessary. In the earlier document, they stated that "the panel was not satisfied that the sexual activity between the applicant and any of the three boys he named was non-consensual and amounted to a crime of violence".

116. In paragraph 14 of the later document it is stated that "the panel considered the principal issue was the applicant's credibility". Having considered the situation at Greystone Heath at the relevant time, the panel stated, at paragraph 14:

> "Given the sexualised environment, there were also likely to have been consensual sexual relationships and experimentation between boys of similar ages. The Panel took the view that if what occurred was consensual, then it would not be a crime of violence, even if it still amounted to a criminal offence because of the ages of those concerned. The Panel understood this was also implicit in Counsel's submission, though it notes that it is not how the case is now put in the 'Grounds'."

In paragraph 15 the panel set out the second issue as whether:

> "If he [Brown] had been involved in significant sexual activity of the nature he described, whether that was done consensually or was forced upon him (by fear of actual force) so as to amount to a crime of violence. If he participated consensually, the panel did not consider that he had been the victim of a crime of violence."

In paragraphs 16 and 17 the panel set out their reasons for concluding that the applicant was an unreliable witness. They concluded that any sexual conduct was "more likely to have been consensual conduct between boys than something forced on him or which he had done through fear or because of assaults".

117. The panel's conclusions on the second issue are set out at paragraphs 18 and 19:

> "18. Because the extent of his sexual activities was not clear, the Panel worded its decision by saying it was not satisfied that any sexual activity between the Applicant and any of the 3 boys names was non-consensual and amounted to a crime of violence.
>
> 19. The Panel did not consider the claim under paragraph 13(d) of the Scheme, as suggested in the Grounds, as no issue of conduct under that sub-paragraph had been raised or argued. Any reference to consensual conduct was to the conduct that the Panel considered was an element that determined whether an act was or was not a crime of violence. Nor did the Panel accept that anal intercourse cannot be seen as anything but an incident involving violence, as suggested. The Panel considered that a person can consent in circumstances in which there may still be a crime but not a crime of violence."

(Paragraph 13(d) of the Scheme provides that an award may be withheld or reduced when "the conduct of the applicant before, during or after the incident giving rise to the application makes it inappropriate that a full award or any award at all be made".)

118. I read the Chairman's statement as indicating that the panel addressed themselves not to buggery in general but buggery in the particular context of the environment of the then existing situation at Greystone Heath, which was considered in detail. That was the factual context in which the relevance of consent was considered. Consent was stated to deprive the events of the quality of a crime of violence in that specific situation. In stating that consensual conduct was "an element" in determining whether an act was or was not a crime of violence and in using the word "circumstances" later in paragraph 19, the panel demonstrated that they were not making a general pronouncement about consent but considering its relevance to the facts of the case.

119. Before expressing more general conclusion I add that in my judgment Collins J has put the point about the prize fighter too strongly. I would not expect the reasonable literate man to be amazed at the suggestion that a prize fighter who claimed under the Scheme might have to deal with the suggestion that his consent to the unlawful activity might prevent his recovery under the Scheme. Dealing with a situation in which a 64 year old man, whose wife had been insulted, challenged a younger man to a fight. Lord Denning MR stated in *Lane v Holloway* [1968] 1 QB 379 at 386:

> "I agree that in an ordinary fight with fists there is no cause of action to either of them for any injury suffered. The reason is that each of the participants in a fight voluntarily takes it upon himself the risk of incidental injury to himself. *Volenti non fit injuria*."

Lord Denning added however that such a man does not "take on himself the risk of a savage blow out of all proportion to the occasion. The man who strikes a blow of such severity is liable in damages unless he can prove accident or self-defence." The reasonable, literate man of today might not be familiar with the Latin tag but would be likely to see the force of those observations.

120. The basis of liability in tort is of course something different from the right to recover under the Scheme but I would expect the reasonable literate man to take into account the applicant's consent to events as an element in a consideration of whether those events amount to

127. It may be that legal complexities were contemplated in Brown and a four member panel was convened with that in mind. If that is so, it would have been better if something more than the three line statement of reasons had been produced after the hearing. I do not regard the emergence of what is in effect a reasoned judgment eight months after the hearing as satisfactory. It would not normally be acceptable in judicial proceedings.

128. I would expect there to be cases where the need for written reasons ought to be contemplated and a reasoned statement prepared at the time of or shortly after the hearing. Its absence invites appeals for lack of reasons, as in the present cases. Moreover, an attempt to express reasons long after the event, especially when four members are involved, will, with respect, inevitably create difficulties when clarity is sought. It may well be that the differing judicial views which have emerged in the case of Brown are, at least in part, attributable to that factor.

129. I did invite submissions on behalf of the panel on this question which counsel met only with the volume of work as the explanation for the procedure followed by the panel. It may be that a better explanation is available, but whether it is or not, I hope that consideration will be given to the points raised.