IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

CO/2674/91

Royal Courts of Justice,
Friday, 3rd December 1993.

B e f o r e :

MR JUSTICE SEDLEY

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Crown Office List

THE QUEEN

-v-

CRIMINAL INJURIES COMPENSATION BOARD

Ex parte ANDREW WAYNE GAMBLES

(Computer Aided Transcript of the Stenograph Notes of
John Larking, Chancery House, Chancery Lane, London WC2
Telephone No: 071-404 7464
Official Shorthand Writers to the Court)

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MR R DRABBLE (instructed by Messrs Arthur Smith & Broadie-Griffiths, Wigan) appeared on behalf of the Applicant.

MR S HOWARTH for MR M KENT (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

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

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Friday, 3rd December 1993

MR JUSTICE SEDLEY: Mr Richard Drabble moves for an order of certiorari to quash a decision of the Criminal Injuries Compensation Board given on the 10th September 1991 and refusing to make an award of compensation to the applicant Andrew Wayne Gambles. Macpherson J. adjourned the application to enable the Board to give its reasons. The Board provided its reasons in writing and Macpherson J refused leave after considering them. On oral renewal, however, Henry J gave leave upon the addition of a further ground of challenge, to which I will come. The Board's decision is that of three members, Mr Peter Weitzman QC, Sir Derek Bradbeer OBE., and Lord Macaulay QC, following rejection of the application in January 1989 by a single member of the Board, Mr Crawford Lindsay QC.

Because the Board rejected the oral evidence of the applicant, given as it was four years and more after the events complained of, in favour of his statement made to the police immediately afterwards, I will take the facts from that statement, made on the 30th August 1987. On the evening of the 28th August 1987, Mr Gambles went out drinking with some friends, and had had a number of pints of lager by the time when, just after midnight, they came out of the last pub and were cutting across a supermarket car park when Mr Gambles heard someone shout 'Youngy's been hit'. 'Youngy' was his friend Stephen Young. He and

Neil Scott went back towards the pub and saw a group of other youths there. Mr Gambles went up to a lad with blond hair and said: 'Have you been hitting my mate?' The blond lad said 'Are you talking to me?', and when Mr Gambles said he was the two squared up to each other to fight. However, another lad, the eventual assailant Stefan Bileski, interrupted the incipient fight by saying to Mr Gambles 'Come here'. Mr Bileski had one hand behind his back. He said 'What you causing trouble with my mate for?' and Mr Gambles replied 'Because he's hit my mate.' Neil Scott then came over and Mr Bileski, still with one hand behind his back, said to Mr Scott and Mr Gambles 'Come on, I'll take you both on'. He walked towards Neil Scott, who struck him in the face with his fist. Mr Bileski staggered backwards then came back towards Mr Scott and hit him over the head with a pint glass knocking him to the ground. Mr Gamble's statement goes on:

> 'I went over to the lad responsible and as soon as I was within his reach he hit me in the face with the broken glass he still had in his hand.'

Mr Gambles suffered quite serious lacerations, requiring suturing under general anaesthesia.

He applied to the Board on the 24th September 1987. On the 19th January 1988 Mr Bileski was convicted of assault under Section 20 of the Offences against the Person Act 1861, and a month later was sentenced to six months youth

custody. It was almost a year after that that the single member of the Board refused the application, giving as his reason that:

> 'The applicant provoked and was willing to participate in a fight. The application was rejected under paragraph 6(c) of the Scheme'.

Mr Gambles' request for a hearing before a full Board was not met until 10th September 1991. In the reasons given by the Board in response to the opportunity offered by Macpherson J, the material paragraphs are the final three which read as follows:

> "11. Detective Inspector Haynes gave evidence and told us that he had investigated the incident. Although many statements had been taken in connection with the incident the only other witness was Scott who was on the floor at the time. The officer said he had gone over the applicant's statement with him and it had not changed. In the officer's opinion the applicant did not deserve to have been attacked, although he had told the applicant that he was not entirely without blame.
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> 12. The officer told us that 'Rock Rock' had a bad reputation and that Bileski had previous convictions.
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> 13. After submissions we retired. Having had an opportunity of hearing evidence from the applicant we formed the view that we believed that the statement made to the police was an accurate account of what occurred. Our findings of that statement are that the applicant was, for whatever reason, ready to fight and that unhappily, as often happens, he then received much more serious injuries than might have been expected. We considered the appropriateness of a reduced award but as we found that he had evinced a willingness to engage in violence which culminated in the assault upon him, we

disallowed his application completely under paragraph 6(c)."

The Criminal Injuries Compensation Scheme, which as is now well established is subject to the supervisory jurisdiction of this Court, can be looked at for present purposes in the form revised in 1979. Paragraph 6 in its material part provided:

> 'The Board may withdraw or reduce compensation if they consider that.....
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> (c) having regard to the conduct of the applicant before, during or after the events giving rise to the claim or to his character and way of life..... it is inappropriate that a full award, or any award at all, be granted.'

In order to assist the public, the Board from time to time issues guidance:

> '..to summarise some of the more important aspects and conditions of the Criminal Injuries Compensation Scheme, and to provide applicants with enough information about its interpretation by the Board to help them apply with the minimum of trouble and research.'

The introduction to the edition of the Guide before me, which is dated 1990 and replaces the 'Statement' of 1987, continues:

> 'It must be emphasised, however, that the Guide is an aid and not a substitute for the Scheme itself and cannot cover every situation. Each case is determined by the Board on its own merits and solely in accordance with the relevant provisions of the

Scheme.'

Paragraph 30 of the Guide says in its material part:

> 'Fighting. Compensation will not usually be awarded in the following circumstances.....
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> c. If the injury or death occurred in a fight in which the victim had voluntarily agreed to take part. This is so even if the consequences of such an agreement go far beyond what the victim expects. A victim who invites someone 'outside' for what he intends should be a fist fight will not usually be compensated if he ends up with the most serious injury. The fact that the offender goes further and uses a weapon will only make a difference in exceptional circumstances.'

The grounds upon which leave was initially sought were

> (1) that in the absence of detailed reasoning from the Board it could and should be inferred that the Board had misapplied paragraph 30(c) of the Guide; alternatively
>
> (2) even if the facts did fall within paragraph 30(c) the proper test was that contained in paragraph 6(c) of the Scheme, which confers a discretion to exercised on the facts of each case.

Henry J granted leave where Macpherson J had refused it upon the addition, following receipt of the Board's reasons, of a further ground:

(3) that the Board erroneously treated the finding that the applicant was willing to engage in violence as having the automatic consequence that no award (full or reduced) should be made.

The basis of this allegation is the final sentence of the Board's reasons:

> 'We considered the appropriateness of a reduced award but as we found that he had evinced a willingness to engage in violence which culminated in the assault upon him, we disallowed his application completely under paragraph 6(c).'

For the applicant Mr Drabble submits, first, that the evidence of willingness to fight only went as far as a willingness to fight the first lad, not to fight Bileski. Let me dispose of this submission before moving on to the real issues of law. On the evidence accepted by the Board it was entirely within their power to find that on the material occasion the applicant was evincing a general willingness to fight, and that his approach to Bileski after the latter had knocked down the applicant's friend Neil was an approach fully consistent with the continuation or renewal of hostilities.

This apart, however, Mr Drabble submits that the finding of the Board is flawed because it omits the one essential matter to which the Board's reasoning had to be directed under the Scheme, namely, the question why the applicant's willingness to fight should result in a nil award rather

than a reduced award, which might be in whatever proportion was judged to fit his moral blameworthiness. He submits, and Mr Michael Kent for the Board concedes, that on the facts of the present case it is the conduct of the applicant before and during the events giving rise to the claim, and not any of the other elements of paragraph 6(c) of the Scheme, which came into play on the facts found.

Mr Drabble draws attention to a number of early examples in the Board's reports of cases where a wholly disproportionate reaction by the aggressor has resulted in an award, albeit a reduced award, to an applicant who has either initiated or voluntarily involved himself in the hostilities. He also cites the case of Lane v Holloway [1968] 1.Q.B.379 in which a man who had initiated a minor fight was held not to be disqualified from recovering damages when his antagonist reacted with unexpected and disproportionate violence. He does not argue for parity of reasoning in this case; he cites these as instances of common sense and equity applied, whether by the Board or by the courts, to situations in which two people have got themselves into a fight but where one of them has injured the other by the use of unpredictable and disproportionate violence.

Mr Kent for the Board submits that paragraph 6(c) of the Scheme affords to the Board the widest possible

discretion. He submits, rightly in my judgment, that the relationship between bad conduct or character and the withholding or reduction of compensation is not necessarily causative. For example, what the applicant does after the event, or the applicant's criminal character, can partially or wholly disqualify him from an award. Next, submits Mr Kent, there is nothing in the Board's reasoning to show that they were not alive to the alternatives offered by paragraph 6(c) of the Scheme. And the penultimate sentence of their reasons shows that they were also alive to the question of disproportionate response. Where reasons are condensed as these are, he submits, the court should not assume that a step was omitted simply because it is not explicitly stated. He does accept, however, that on the facts of the case paragraph 6(c) does not necessarily exclude an award, although he submits that the facts make only a nil or a much reduced award possible.

In my judgment the facts found by the Board are capable of sustaining the whole spectrum of possible decisions, from a nil award to a complete award, although the latter may well be frankly unlikely. This, precisely, is the broad discretion for which Mr Kent contends. Given the fact that the assault on the applicant, who was not armed, was made with a beer glass at a point at which the applicant had approached the aggressor but not, on the evidence, assaulted him, I am not disposed to accept Mr Kent's

submission that the case is one in which only a nil or much reduced award is feasible. All the possible levels of award lie within the range of decision compatible with the finding that the applicant was ready to fight in the material circumstances. Accepting as I do the submission that it is more nearly a moral judgment than a causative link that is postulated by paragraph 6, it is still for the Board to establish a rational and proportionate nexus between the conduct of the applicant before and during (and in other cases after) the events, and in other cases his character too, before these can reduce or extinguish the award to which he would otherwise be entitled. Common law cases like Lane v Holloway [1968] 1.Q.B.379 do, I think, assist as illustrations, though no more, of what common sense and equity may yield in this context.

The Board in such a case as this has therefore to proceed in three stages:

A. Does the applicant's conduct make a full award inappropriate?

B. If so, to what extent does the applicant's conduct impact on the appropriateness of an award?

C. What award if any should the applicant consequently receive?

I accept Mr Drabble's submission that the Board's reasoning goes from A to C, omitting B entirely. In this

situation, and even though the reasons have been volunteered at the court's invitation rather than having been required by law, it is not right for the court to supply the want by assuming the existence of the very thing that reasons are there to demonstrate, namely that the conclusion has been reached by an appropriate process of reasoning from the facts. I am acutely conscious of the distinction and experience of the three members of the Board, as indeed of the single member who preceded them; but just as they have their task, I have mine, and the conclusion I have come to is that there is a defect in the reasoning of the Board such that its decision cannot stand.

Mr Kent then sought in argument to establish a fallback position if I should reach this conclusion in relation to paragraph 6(c) of the Scheme: his submission was that the Scheme is not to be construed in isolation but to be read together with the approach or policy contained in the Guide. He described the Guide, attractively, as an indication of how certain matters have so far been treated by the Board under the Scheme, and therefore of how they are likely to be treated in the future. This is undoubtedly so, and the introductory passages of the Guide which I have quoted show it to be so. But it is a further step and one of considerable legal importance to submit, as Mr Kent was initially disposed to do, that the Guide has a discrete function capable of being recognised by the

law as a policy for the exercise of the discretions contained in the Scheme.

The legitimacy of a policy for the exercise of an administrative discretion was classically recognised by the House of Lords in the British Oxygen case [1971] A.C.610. It permits the decision-maker to adopt policies or rules by which consistency can be achieved in the exercise of a broad discretion, so long as the policy is communicated to applicants and so long as the decision-maker is willing to consider departing from it in an appropriate case. The word 'usually' in paragraph 30 of the Guide, Mr Kent initially submitted, affords exactly the correct leeway for a legitimate policy within the British Oxygen doctrine.

Potentially, it seemed to me, this submission raised important issues of law, revolving around the question whether an adjudicative body such as the CICB is necessarily in the same position as a department of state distributing government grant. But the prior question, on which Mr Kent sought and obtained an adjournment in order to take the Board's specific instructions, is whether in the light of its own presentation of the Guide, material parts of which I have quoted above, the Board wishes to present the Guide as a policy capable of operating so as, presumptively at least, to guide and possibly constrain the exercise of discretions conferred by the Scheme.

Having adjourned the matter, I am now informed that the Board -- very understandably -- does not take this stance, and that it wants the Guide treated as exactly what it purports to be and no more. This being so, the case falls to be decided simply and solely within the terms of paragraph 6(c) of the Scheme. It equally makes it unnecessary to consider the response which Mr Drabble would have made that, even if paragraph 30 of the Guide applies, it still recognises or accords a discretion to the Board to make an award in a case such as the present, and that the lacuna in its reasoning is still there. In the circumstances, however, and for the reasons I have given, this application succeeds without more.

MR DRABBLE: In those circumstances, I would ask for a formal order quashing the decision and for my costs and a legal aid taxation.

MR HOWARTH: I cannot resist any of those applications.

MR JUSTICE SEDLEY: Very well, an order of certiorari will go in the form sought. The applicant will have his costs against the Board and Mr Drabble will have his legal aid taxation.

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