

IN THE HIGH COURT OF JUSTICE

CO 211-94

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QUEEN'S BENCH DIVISION
(DIVISIONAL COURT)

Royal Courts of Justice
Strand
London WC2

B

Friday, 7th July 1995

B e f o r e:

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MR JUSTICE BUXTON

REGINA

-v-

C.I.C.B.

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EX PARTE HOPPER

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(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 H. LEDERMAN (Instructed by Pearson & Caulfield) appeared
on behalf of the Applicant.

MR R. JAY (Instructed by the Treasury Department, London,
SW1)
appeared on behalf of the Respondents.

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

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Friday, 7th July 1995

JUDGMENT

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MR. JUSTICE BUXTON: This is an application for judicial review of a decision of the Criminal Injuries Compensation Board in the case of the applicant, Mr. Raymond George Hopper. The decision complained of, is a decision by the Full Board, taken on 1st November 1993, to refuse the applicant compensation for injuries sustained on 20th September 1991. The Board's decision was taken by them under paragraph 6(c) of the current Criminal Injuries Compensation Scheme which it is appropriate that I should read at this point so that it is available for reference. It reads as follows: "The Board may withhold or reduce compensation if they consider that having regard to the conduct of the applicant before during or after the events giving rise to the claim or to his character as shown by his criminal convictions or unlawful conduct, it is inappropriate that a full award or any award at all be granted."

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I can set out the background facts most conveniently from the affidavit sworn in support of the application by Mr. Arthur Michael Robinson, the solicitor representing Mr. Hopper. I should note that because of the Board's decision that this case fell under paragraph 6(c) of the scheme, it did not form any view of the accuracy of the account given

by the applicant of the injuries that he had sustained or
the circumstances in which he had sustained them. However,
A for the purposes of this application, it is to be assumed
that the account given by Mr. Robinson, which necessarily
comes from instructions given by the applicant, is, in
B fact, accurate. Mr. Robinson describes the events
complained of as follows:

"On 20th September, 1991 the applicant, together with
some friends, was in a public house in Newcastle upon
Tyne. He was there gratuitously assaulted by a group
of other young men who squirted the contents of a
C bottle containing ammonia into his face, and then hit
him about the head, both when he was standing up and
when he was on the ground. The effect of this attack
was to blind the applicant and he had difficulty in
breathing. He was eventually taken to hospital and
has continued to receive treatment for his eye
injuries which, although there is no medical evidence
conveniently to hand, appear to be of some
D seriousness. He described the events to a police
officer and later attended the local police station to
expand upon the matter to the officer who had
interviewed him in hospital."

Putting the matter very shortly, because it does not
E affect the application before me, there appears to have
been, to put it at its lowest, some confusion as to whether
the applicant had visited the police station, as he
alleged, and whether he had spoken to a police officer. He
F instructed solicitors to institute a claim with the
Criminal Injuries Compensation Board, which I will
hereafter refer to as "the Board". That claim was
initially rejected by the single member who ruled that on
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A the information before him the applicant had not
co-operated with the police in respect of this offence and
that therefore his case fell under paragraph 6(a) of the
Board's scheme.

B The appellant appealed against that decision on the
basis that the factual basis of it was incorrect. The
appeal hearing was held by two members of the Board on 1st
November 1983. Before that hearing the appellant, and his
advisers, received a document from the Board setting out
C the issues that the Board considered to arise at that
hearing.

D There were three matters set out. First of all, that the
appellant had to satisfy the Board that he had co-operated
with the police. Secondly, it would be for the applicant
to satisfy the Board as to the circumstances in which he
sustained his injuries. Thirdly, and this is the important
E issue in this case, the question was asked: Do the
applicant's convictions merit a reduction or refusal of
award? Reference was made to paragraph 6(c) of the Board's
scheme, which I have already read.

F As to Mr. Hopper's previous convictions, he had two
convictions for theft in 1987 when he had been placed on
probation. He was, five months after that, in breach of
that probation order by reason of further offences of theft
and also an offence of failing to surrender to custody; a
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number of offences being taken into account on that occasion. He was then convicted of being drunk and disorderly in 1988. On 10th November 1989 he was convicted of a further offence of theft which entailed breaches of the requirements of the Community Service Order that had been imposed on him in respect of the offences in 1987, and also breach of his original probation order which had been continued. As a result of those offences, he was sentenced to a total of four months detention in a Young Offenders Institution. There was also in 1992, that is to say after the attack of which he complained, an incident where he was cautioned in respect of another offence of theft. Those are the matters therefore that gave rise to the Board's concern about whether paragraph 6(c) should be invoked.

The hearing is described by Mr. Robinson as follows:

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"The advocate acting on behalf of the Criminal Injuries Compensation Board questioned the applicant about his criminal record and his cautions. The applicant was able to clarify the nature of the cautions which referred to the theft by him of two knives from a shop on the same occasion. I addressed the Board members and advised them that cautions were not criminal convictions and pointed out that they referred to minor matters. The hearing was adjourned for several minutes. Then we were invited to return before the Board members to be advised that because of the applicant's character and criminal convictions it was inappropriate that he should receive an ex gratia payment from public funds. No further explanation as to the reasons for refusal and award was given. No reason was given as to why a reduction of award was not appropriate. [Then Mr. Robinson says] It is my belief that a reduction in any award was not considered by the Board in their deliberation."

A Originally, when the Board was asked to give a written explanation of its decision, the Board, by letter to the applicant's solicitors, said that Mr. James Law QC, who had presided at that hearing, had said, and I quote:

B "Applicant's character and way of life as evidenced by the list of convictions and cautions makes it inappropriate that he should receive an award of compensation from public funds."

C The original complaint made in the judicial review proceedings which were then launched was based upon the belief expressed by Mr. Robinson in his affidavit that the Board had not considered the possible alternative of a reduction in the award as opposed to the making of no award at all, a reduction in the award being an option that was open to them under paragraph 6(c) of the scheme.

D Faced with those proceedings, the Board exhibited a further statement of the reasons of the Board members and of the circumstances of the hearing. That was in the form of a document headed "Written Reasons for Judicial Review" signed by Mr. James Law, the chairman of the panel of the Board that heard this matter; not by way of affidavit by him but exhibited to an affidavit sworn on 29th July 1994 by a member of the Treasury Solicitors Department who are acting for the Board in this matter. In that document Mr. Law sets out the background in its first five paragraphs in terms that I have already indicated, and then says this in

paragraphs 6 and 7.

A "The applicant gave evidence at the hearing and confirmed that convictions contained in both lists were his, that they were correct, and that there were no other convictions or cautions not shown on the lists. He also confirmed that he had no matters outstanding waiting to be dealt with. He gave evidence to the Board to the effect that the charges relating to theft of motor vehicles had been in relation to stealing car radio cassettes, and in relation to the thefts he had been caught stealing cutlery from a store. The Board then heard submissions from Mr. Hopper's solicitor, Mr. Robinson, on the question of Mr. Hopper's convictions. The Board advised Mr. Robinson that they would consider this element of the application before considering any of the other merits of the application on the basis that if no award was payable to Mr. Hopper, due to his convictions, then there would be no reason to go into the other outstanding issues.

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D After hearing submissions, the Board retired to consider its decision. The Board in considering Mr. Hopper's convictions took into account the fact that his record showed that he had been made the subject of a community service order and a probation order, both of which he had breached, and that in 1989, which is after those breaches and further offences, he had been required to serve a custodial sentence. The Board further considered that pursuant to his custodial sentence he had been cautioned twice for offences of theft. In respect of Mr. Hopper's cautions the Board took into account that the terms of paragraph 6(c) of the scheme state that the Board are required to have regard to the applicant's character as shown by his criminal convictions or unlawful conduct. The Board then considered whether in all the circumstances in the exercise of their discretion it would be appropriate to withhold compensation from Mr. Hopper on account of his convictions and unlawful conduct or to reduce any award that might be payable to him on this ground.

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F The Board took the view that Mr. Hopper's convictions were sufficiently serious and persistent to persuade them that discretion should not be exercised in favour of the applicant and reduced award would be inappropriate for these circumstances and that no award should be made to Mr. Hopper."

A Before me today Mr. Lederman has made various
criticisms of what (although he did not characterise it in
these terms) he criticises as the late emergence of this
more extended statement of the Board's reasoning and
B approach. But not merely has he criticised the timing, a
matter to which I will return briefly, but he also invited
me, in effect, to ignore what the chairman of the Board
says in this document. I understood his submission to be
C that I should reject this statement as an accurate
statement of what was in the Board's mind, it being
suggested that it was an ex post facto reconstruction. I
cannot accept that submission. It is based largely on the
D fact that in its original statement, to which I have
already referred, the Board made no reference to the
possibility of a reduction in an award.

E In the circumstances of that hearing, and in the
circumstances of the Board's lack of duty to do more than
indicate to the applicant what its decision is, and the
basis of it, which the Board did do, I cannot think that
omission of any extended discussion of other and
F alternative courses that the Board has not adopted can in
any way indicate that the Board had not had those in mind.
Also, I am simply not prepared to accept that this document
would have been put before me quite consciously by the
G Board and by its author if it was not substantially

A accurate. As I have said, there is nothing in the
surrounding circumstances to indicate that that is not so.
I therefore do accept that the Board considered the
possibility of a reduced award, and as the chairman, Mr.
B Law, makes clear they took the view that the nature of this
man's convictions and conduct precluded them, in their
discretion, from giving him any award at all.

C The original ground of criticism, therefore, falls as
a matter of fact. I do not need to consider it further.
However, in his skeleton argument, and before me today, and
by way of amendment to the grounds, Mr. Lederman has opened
up a more extensive challenge which I think I can fairly
summarise in this way. He accepts that the operation of
D the scheme, and the way in which this court has supervised
the operation of this scheme, places a good deal of
discretion in the hands of the members of the Board. But
he says that particular considerations apply in respect of
E paragraph 6(c), the paragraph under which the Board acted,
and that it is plain from the evidence that the Board has
filed, not least the statement of the Board's chairman that
I have just read, that it did not approach its task
F properly and did not properly apply paragraph 6(c). The
fault alleged is this: that the Board considered separately
and independently the issue arising under paragraph 6(c) of
the accused's character as shown by his criminal
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A convictions, and did not balance out or assess the nature
and seriousness of his convictions against the
circumstances of the offence of which he complained, and,
also, though this was pressed less firmly, did not balance
it against the handicap or detriment to him of not
B receiving an award at all. For my part it is plain that
that is indeed what the Board did because they said in
terms at the hearing, and in Mr. Law's account of the
Board's reasons: "We will consider first, putting it in
C litigation terms, as a preliminary point the nature of Mr.
Hopper's character." Their account of what they thought
about Mr. Hopper's character was focused solely on the
nature and seriousness of the convictions. So there is, in
D my judgement, no doubt at all that the Board did act in the
way of which Mr. Lederman complains. The question is:
Were they wrong in law in so doing?

E Paragraph 6(c) on its face would appear to invite the
Board to do exactly what they did, to look at the matter as
a issue separate from the nature of the offence and the
nature of the injuries that the man has suffered. True it
is that there are cases referred to by the Board, and
F suggested to me by Mr. Lederman, in which the Board might
decide that in the particular circumstances of the case,
even though the applicant was, by reason of his
convictions, entirely or largely unmeritorious, nonetheless
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A the circumstances of the case enabled them to give him an
award. An example cited was of a person with a very
serious criminal record who had been injured in, for
instance, saving a police officer from an attack or
removing a terrorist bomb from a dangerous position, where
B the meritorious nature of his conduct would outweigh the
detriment from his previous convictions. I have no doubt
at all it is open to the Board so to act. It does not, of
course, follow from that that they are under an obligation
C to weigh up the offence and the conduct in each case.
However, Mr. Lederman says, leaving that sort of example
aside yes they are, and there are two reasons for that.
First of all, he draws attention to the latter words of
D paragraph 6(c):

"Having regard to the conduct of the applicant... [and
so on] ...it is inappropriate that a full award, or
any award at all, be granted."

E He says that he gets some help from that use in the Board's
scheme of the word "inappropriate". I cannot agree with
that. It seems to me that that word is doing no more than
saying that the question is whether the criminal
convictions make it appropriate for a full award or any
F award at all to be granted. There is nothing in the use of
that word in the scheme that directs the reader's mind,
much less that compels the direction of the reader's mind,
towards the balancing activity that Mr. Lederman argues
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for.

A However, Mr. Lederman further argues, that this
question has been considered and resolved in his favour in
the judgment of Mr. Justice Sedley in R v Criminal Injuries
Compensation Board Ex parte Gambles, which is reported in
B the 1994 volume of the Personal Injury Quantum Reports at
page 314. Putting the facts of that case briefly, the
applicant there had been injured as a result of a fight in
which he had himself taken some part. The Board had
C disallowed his application under paragraph 6(c) of the
scheme, the paragraph which we are concerned with, under
that limb of the paragraph that refers to "the conduct of
the applicant before during or after the events giving rise
D to the claim". ~~That is a different case from that which we~~
are concerned with here because it was the conduct of the
applicant in connection with the incident that gave rise to
the claim, rather than his character, that the Board relied
E on in the Gambles case. It is important to note what the
nature was of the attack in that case on the Board's
conclusion. It is set out by the judge as follows:

F "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:

G "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)."

A The complaint there was that the Board have treated their
finding that the applicant had engaged in violence as
automatically bringing him within paragraph 6(c). The
judge dealt with the matter in this way, in a passage that
B Mr. Lederman relies on, at page 318. He sets out the facts
that the Board had found in respect of this incident in
which, as I have said, the applicant was engaged not merely
as a bystander, unlike our case, and then said this:

C "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
D ~~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.

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

A. Does the applicant's conduct make the 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?

F 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,
G namely that the conclusion has been reached by an

appropriate process of reasoning from the facts."

A In our present case Mr. Lederman says two points can be
drawn from the observations of Mr. Justice Sedley in the
Gambles case. First, that in cases involving character, as
well as cases like that of Gambles that involve conduct, it
B is necessary for the Board to demonstrate a nexus between
the character of the applicant that is complained of and
something else. I think it is not unfair to Mr. Lederman's
argument to say that there was some difficulty in eliciting
C what that something else needed to be. In the case of
character it is difficult to see that it can be the events
that constituted the infliction of the injury. I, for my
part, cannot think of any case where it could be said that
D there was a "nexus" between the applicant's character, as
opposed to his conduct in connection with the events, and
the events that in fact occurred. The nexus Mr. Lederman
therefore says must be between the character of the
E applicant and the award, or lack of award, that the Board
is minded to make. That step has been omitted in this
Board's reasoning because they have not set out step B that
is referred to by Mr. Justice Sedley, and demonstrated a
F nexus between the character and the award.

G I have to say that that statement of the argument
demonstrates beyond a peradventure that it was not this
case that Mr. Justice Sedley had in mind or was intending

A to address in his observations in the Gambles case. I
quite agree that the judge does suggest that character, as
well as conduct, is covered by the analysis that he puts
forward, but as to that I would say two things. The first
is that that observation was necessarily obiter. The
B second is that if this matter has been argued before Mr.
Justice Sedley he would have been the first to acknowledge
that the particular analysis that he puts forward in
Gambles cannot apply in a case where character, rather than
C conduct, is complained of. In the case before him, where
there was a direct involvement of the applicant in the
activities that caused his injury, it was understandable
that the judge should say that there should be some
D demonstration of that involvement and of how the Board
viewed it. The Board should not treat the engagement of
the applicant in the incidence as an automatic reason for
disqualifying him. But if one asks in a case of character,
E rather than conduct, how that nexus can be demonstrated I
am for my part baffled to understand how the Board can be
expected to say more than it said in this case.

F Mr. Justice Sedley acknowledged that the connection
that he was considering is based on a moral and not a
causative judgement. If that is so in a character case
the connection, if any, between the two events is amply
demonstrated by the Board concentrating, as the Board in
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A this case did, upon the nature of the accused's character as demonstrated by his offences.

B Therefore, I have to say that on this point Mr. Justice Sedley was not intending to go anything like as far as Mr. Lederman suggests he should go. I do not find in his judgment any authority for saying that there must be a demonstration in the Board's reasoning of some connection, other than the occurrence of the accused's previous convictions, between those previous convictions and the reflection or omission of the award that is proposed. In my judgement it was entirely sufficient under the terms of paragraph 6(c) for the Board to set out the matter as it did. There is nothing either in paragraph 6(c) or in what was said by Mr. Justice Sedley to suggest that paragraph 6(c) is anything other than a preliminary point, as the Board treated it as being, to be considered within the Board's discretion before they turn to the substance of the award.

F That is one point that is sought to be raised from the Gamble case. The other argument that Mr. Lederman put forward was that the Board should have engaged in a balancing exercise between the seriousness of the offences and the seriousness of the injury. It will already be apparent that I see no justification for that in the terms of paragraph 6(c). Indeed, its terms and nature seem to me

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deliberately to exclude such an operation; nor do I see anything at all in Mr. Justice Sedley's judgment in the Gambles case that would support such an approach. He was concerned with a question of conduct whereby, if I put it in this way, the matters complained of and the nature of the injury were in that case intimately intertwined. In a character case there is no connection between them at all and there is nothing in Mr. Justice Sedley's judgment and certainly nothing in the terms of the scheme, to support the obligation that Mr. Lederman seeks to place upon the Board. I therefore consider that the criticisms that have been advanced of the Board's reasoning in this case are unfounded.

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It will be apparent from what I have said, and stepping now back from the particular criticisms and looking more generally at the obligations of the Criminal Injuries Compensation Board, that I am in agreement with the observations of Mr. Justice Popplewell in the case of R v Criminal Injuries Compensation Board Ex parte Thomas [1995], Personal Injury Quantum Reports at page 99. I consider that that judge's general view of the Board and its activities is accurately set out in the headnote which reads as follows:

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"...that the the plain reading of paragraph 6(c) of the Scheme made it clear that an applicant's criminal convictions did not have to be related to the particular injury in respect of which compensation was

claimed to be relevant to the Board's consideration."

A If I may interpose to say, the more general points outside the facts of that case that seem to me to be important are:

B "The purpose behind the Scheme was that those involved in criminal activity should not receive money from the public purse for an injury which they had sustained. The Board was entitled to have regard to an applicant's criminal convictions as at the date at which the award fell to be considered rather than the convictions entered at the time of receipt of the injury in respect of which the claim was made. The Board's decision that the applicant was not an appropriate person to receive an award at public expense was a matter entirely within their discretion and was not Wednesbury unreasonable."

C Mr. Justice Popplewell referred to the case in the Court of Appeal, R v Criminal Injuries Compensation Board Ex parte Thompson, [1984] 1 W.L.R. p.1234. I would refer only to one part of the judgment of Lord Donalds~~MR~~, in which he D emphasised that under paragraph 6(c) there were two disjunctive categories of case that which I have referred to, as other judges have, as the conduct category and the other category, the character category, that is before me E in this case. The judge said this at page 1239, paragraph D:

F "In each case although different categories of circumstance can be taken into account the issue is the same: Is the applicant an appropriate recipient of an ex gratia compensation payment made at the public expense?"

G I would respectfully adopt that, as did Mr. Justice Popplewell, as a brief summary of the implications of

A paragraph 6(c). I say, as Sir John Donaldson said, that
the question is whether the applicant is an appropriate
recipient of an ex gratia payment judged in the light of
his previous convictions? That formulation excludes, in my
view, any obligation on the part of the Board to engage in
B the balancing exercise for which Mr. Lederman contends. It
reinforces that the Board's approach in this case was
correct and was entirely in accordance with the duty placed
on them under paragraph 6(c). For those reasons this
C application is dismissed.

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