Draft judgment to be handed down on ....20/7/94......
at 10 am. Confidential to Counsel and
their instructing solicitors, but the substance
may be communicated to clients not more than
one hour before the giving of judgement.

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Constitution:
Lord Justice Steyn
Mr Justice Kay

R. -v- Criminal Injuries Compensation Board Ex Parte Johnson

JUDGMENT

Mr Justice Kay: On 30th May 1989, Mrs Margaret Johnson had the misfortune to discover the recently murdered body of a friend lying on the floor in the friend's home. This experience caused her considerable emotional distress and since that date she has suffered from a shock-induced psychiatric illness. This case raises the question whether, in such circumstances, she is entitled to compensation under the Criminal Injuries Compensation Scheme.

Paragraph 4 of the Scheme makes provision as to its scope. The relevant parts read:

> "4. The Board will entertain applications for ex gratia payments of compensation in any case where the applicant .... sustained in Great Britain .... personal injury directly attributable
>
> (a) to a crime of violence(including arson or poisoning) ......".

Mrs Johnson made a claim for compensation under the scheme on 20th November 1991. In her application she described the incident giving rise to the claim in the

following way:

> "I went to the home of my friend Daphne Torok (also known as Sandra Douglas) to see if she was at home. The curtains were drawn although it was nearly lunchtime. I had a key and let myself in. I found Daphne lying on the floor in the living room covered by a rug. There was signs of a violent struggle with furniture knocked over. I found that my friend Daphne had been violently killed by someone. I was so shocked at the discovery of the body and have not been able to get over it. My doctor had me examined by a specialist and I was admitted to hospital suffering from an illness caused by finding my friend murdered".

On 19th March 1991, the single member of the board rejected the application giving his reasons as:

> "I am not satisfied that the applicant's illness was directly attributable to a crime of violence (Paragraph 4(a))".

Mrs Johnson was dissatisfied with this decision and, through her solicitors, indicated her intention to appeal and applied for an oral hearing. A psychiatric report prepared by Dr Cooper, a consultant psychiatrist, was enclosed in support of her application for a hearing.

The application along with the psychiatric report was reconsidered by the single member under Paragraph 23 of the Scheme but in September 1991, he again refused the application stating:

> "The report from Dr Cooper does not affect the question of attributability.

The applicant's illness has been caused by the discovery of her friend's body and was therefore, in my opinion, only indirectly attributable to the crime of violence".

The applicant was still dissatisfied with this decision and requested a hearing her solicitor stating:

"We respectfully submit that Sir Arthur Hoole, the member of the Board who adjudicated over our client's application, has erred in his finding that our client's illness is only indirectly attributable to the crime of violence. Undoubtedly, had the applicant not discovered her friend's brutally murdered body. She may not have suffered the psychiatric condition catalogued by Dr Cooper, consultant psychiatrist, in her report dated 23rd May 1991 but certainly if the murder had never taken place it would appear our client was unlikely to have suffered from any condition at all. In our view the act of finding the body is not so removed from the murder itself so as to break the causal link between the actual violence committed upon our client's friend and our client's subsequent psychiatric condition. We would accept that if the finding of the body were of itself an act so unconnected with the murder committed so as to say that it was a supervening act and thus broke the causal link between the initial violence and our client's condition, then the condition suffered would not directly be attributable to the murder. This would appear to be the basis for Sir Arthur Hoole's decision. However, we cannot agree that this is the case. It is only reasonable to assume that following a murder where the victim is left lying on her own living room floor that the body is likely to be discovered. We would say that such discovering is an integral part of the whole murder scenario so much so that in our opinion it must be linked

directly and form part of the initial violence. ..."

On 26th March 1992, the renewed application was heard by three Members of the Board. The application was again refused. The decision was given in the following terms:

> "The applicant claimed to have suffered psychiatric illness as a result of finding the body of a murdered woman sometime after the crime had been committed. Having considered the authorities placed before the Board, they concluded that in the light of Alcock and others v The Chief Constable of South Yorkshire Police that where the injury alleged is psychiatric, in order that it should be directly attributable to a crime of violence it is necessary to consider whether the victim has a sufficiently proximate relationship with the immediate victim of the crime within the definition provided by the case. On the evidence the Board were not so satisfied".

The applicant now seeks judicial review of the Board's decision with the leave of Schiemann J. The relief sought is a declaration that the decision of the Board is wrong in law, a writ of certiorari to quash the decision and a writ of mandamus directing the Board to assess the damages to which the applicant is entitled on the grounds that the injuries sustained are directly attributable to a crime of violence.

On behalf of the applicant, Mr. Hewitt, in his helpful and clear submissions, argues quite simply that the Board was wrong to introduce questions of foreseeability drawn from the common law test in relation to tortious liability into consideration of the scheme's requirement that the injury is "directly attributable" to a crime of violence.

In support of his submission, he places reliance primarily upon the decision of the Court of Appeal in R. v Criminal Injuries Compensation Board, Ex Parte Parsons, which is briefly reported in The Times, 25th November 1982 but in respect of which he has supplied us with a full transcript. He submits that that decision is binding upon this court and establishes the principle for which he contends.

In Parsons case, a train driver claimed compensation under the Scheme for a shock-related psychiatric condition following upon his discovering, lying on the line on which he was driving his train, the body of a man who had committed suicide. The Board rejected the claim giving as one of their reasons:

> "We were not satisfied that it was reasonably foreseeable that a person who found the dead man's body, which may have been lying on the line for a considerable time, would suffer personal injuries in the form of nervous shock or depression as a result of doing so. Accordingly, we considered that these injuries were too remote a cause of and were not directly attributable to a crime of violence".

On an application to this court for judicial review, heard by Glidewell J., the Board conceded that this approach was wrong but argued on other grounds that the decision was right. Glidewell J. found against the Board and granted an order quashing the decision. The Board appealed and the Court of Appeal upheld the decision of Glidewell J.

In the course of his judgment, with which Fox and Dillon LJJ agreed, Cumming-Bruce LJ said:

> "Before the learned judge in the Divisional Court counsel for the Board

accepted that that conclusion was wrong and, as stated by the judge, "in doing so he accepted that (counsel for the applicant) was right in his contention that the Criminal Injuries Compensation Scheme may involve a payment of compensation in a case where, if the person who committed the crime of violence which almost inevitably will also be a tort in civil law, were able to say that never the less were he sued, the injured person would not obtain compensation in tort; and this is because the test of foreseeability plays no part in that scheme".

No question of evidence or fact arises in connection with the concession made by counsel for the Board in the Divisional Court, and we certainly would not shut the appellant out from arguing the point in so far as Mr. Wright wished to argue it. But, in my view, it is perfectly clear that the test of foreseeability has not, on the language chosen by the draftsman in paragraph 5 of the Scheme, been made a relevant consideration. It was almost otiose to state that the draftsman, in selecting the words requisite to paragraph 5 was faced with the question whether to choose language that would manifestly introduce the same criteria as those relevant for the purposes of liability in tort, or some other criterion and, on consideration of the language, it appears to me plain - I would have thought almost beyond argument - that the language of the draftsman was deliberately designed to establish a criterion different from the criterion or criteria relevant to liability in tort. ....

For myself I share the view, evidently held by counsel for the Board below, that foreseeability is not the relevant criterion for the purposes of construction of paragraph 5 of the Scheme".

Fox LJ in agreeing with Cumming-Bruce LJ said:

"... The illness in this case is the direct consequence of the crime. The crime caused the very state of affairs on the railway which constituted the condition which would lead to the shock; the shock was produced by what the applicant saw and what he saw was the direct consequence of the crime".

Paragraph 5 of the Scheme as considered by the Court of Appeal in that case was in all material respects in identical terms to paragraph 4 of the Scheme at the date with which this court is concerned.

Mr Kent, counsel for the Board, recognises the formidable obstacle that the decision in the Parsons case represents but argues that the Court of Appeal's observations on foreseeability were obiter, or alternatively that the decision was per incuriam through want of argument. I cannot accept either of those two contentions. It is clear from the passage in Cumming-Bruce LJ's judgment to which I have earlier referred that the court was not shutting out argument on the point and that if the court had reached a different conclusion on the matter, it would have determined the appeal in a different way. Thus it is clear that this aspect of the judgment formed a part of the ratio decidendi. It is equally clear that the court fully considered this aspect of the case and reached a very clear and positive conclusion upon it.

Thus I conclude that this court is bound by that decision of the Court of Appeal and it is quite impossible to distinguish the facts in the present case in any way that would permit a different outcome. I would only add that even if I had reached another conclusion as to the binding nature of the authority in Parsons case, I should have viewed it as authority of the most persuasive kind as indeed should I have considered the case of O'Dowd v Secretary of State for Northern

Ireland [1982] N.I. 210, to which we were also referred. That case involved claims for nervous shock alleged to have been suffered by claimants who had seen the aftermath of a multiple terrorist killing. In that case the Court of Appeal for Northern Ireland presided over by Lord Lowry, then LCJ of Northern Ireland, considered a number of English cases on the point, although not Parsons case, and independently reached a very clear conclusion that foreseeability played no part in nervous shock claims of this kind where the provision being considered referred to "directly attributable".

For these reasons, it seems clear that the decision of the Board cannot be allowed to stand since there has been an error on a point of law.

Lest it be thought otherwise, it should be understood that it will not be in every case that a person who discovers a body the result of a crime of violence will be entitled to compensation. It is necessary for the applicant to satisfy the Board that he or she is suffering from personal injury caused by the experience. There are thus two elements to be established. Firstly it must be shown that the applicant suffered personal injury. Shock, distress and emotional upset cannot in themselves suffice however unpleasant the experience. There must be some sort of injurious after-effects brought on by the shock and such injurious after-effects must, of course, satisfy the financial limitations for claims imposed by the Scheme. Secondly, it will be necessary to establish that the nervous shock related injury was caused by the finding of the body. Whilst foreseeability is in no way the test for entitlement to compensation, clearly the less foreseeable a consequence of an event is, the more difficult it may be to establish the necessary causal link. Thus it would not be improper for the Board to have in mind foreseeability in determining whether the evidence established causation in a case such as this.

In Mrs Johnson's case, it has not been suggested that she is not suffering from a condition which amounts to personal injury nor that it was not caused by the experience of finding her friend's body which seems clearly established by the evidence from Dr Cooper.

I turn, therefore, to consider the appropriate form of the relief to be granted to the applicant. Mr. Hewitt invites us to order that the decision of the Board be quashed and since he says that once any question of foreseeability is removed there can only be one reasonable answer to the question of causation, he invites us to order that the Board proceed to assess the compensation to which the applicant is entitled.

Mr. Kent, with realism, acknowledges that it may be the case that there is only one outcome on the question of entitlement to compensation but contends that the matter ought simply to be sent back to the Board for reconsideration in the light of our conclusions on the correct legal approach to the claim. Difficult though I find it to see any other answer other than that Mrs Johnson is entitled to compensation on the facts as they have been presented before the court, I think it is right simply to quash the decision of the Board and remit the matter to the Board for the applicant's claim be further considered.

Lord Justice Steyn: I agree