IN THE HIGH COURT OF JUSTICE CO/1925/87

QUEEN'S BENCH DIVISION

Royal Courts of Justice,

Wednesday, 8th February 1989.

Before:

MR. JUSTICE MACPHERSON

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THE QUEEN

-v-

THE CRIMINAL INJURIES COMPENSATION BOARD
Ex parte: ANDREW LETTS

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(Transcript of the Shorthand Notes of Marten Walsh Cherer Ltd., Pemberton House, East Harding Street, London, EC4A 3AS. Telephone No: 01-583 0889. Shorthand Writers to the Court.)

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MR. R. ALLEN (instructed by Messrs. Freeth Cartwright & Sketchley, Nottingham) appeared on behalf of the Applicant.

MR. N. PLEMING (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 judge)

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MR. JUSTICE MACPHERSON: On 1st September 1982, the applicant in this case whose name is Andrew Letts was knocked over by a car driven by a man called Brian Hunt. The accident happened at 11.00 p.m. in the car park of the Deerstalker public house in Nottingham. We have pictures of the outside of the public house, and there is a plan which shows that there is a fairly large step situated outside the door at the right-hand end of the public house as one looks at it. The applicant was standing with one foot on that step at the time of his accident. He had one foot on the step and one on the tarmac of the car park, and he was facing the door of the public house. There were several other people on the step with him. One of those people gave evidence. Two others, to whom I will refer later, were not called.

There is some doubt as to the geography of the car park, but it seems to me that although the plan appears to indicate only one entrance and exit (as marked at page 68) it is likely that there was a drive-in at the other end as well. Looking at the photograph, which is not marked but shows a white van almost centrally in the picture, there appears to be an entrance and/or exit in the foreground which is at the opposite end of the public house from that near which the accident happened.

The accident happened in this way. The applicant was standing, as I say, waiting to leave since it was closing time. The driver of the car involved was, to start

with, at the far end of the car park or driveway of the public house, a distance away from where the applicant was standing. It is impossible to say how far away but it looks as if he might have been upwards of 50 yards away.

The evidence shows that the driver was in the driving seat (not surprisingly) and some other people were trying to start the car by pushing it. I refer in this connection to the evidence of Mr. Letts which appears at page 32 of the bundle. He was asked by his solicitor: "Were you aware of others trying to start a motor vehicle? (A) Yes. (Q) Where?", and then with reference to the photographs the applicant indicated that the position was behind the Ford Escort van -- that is the white van in the picture to which I have referred -- near the red sports car.

It is quite apparent, as Mr. Pleming indicated, that the applicant himself knew that a group of people were attempting to push-start a car a little distance from him and coming in his direction. It was suggested at one stage that the applicant helped in the pushing but that was by no means established and appears not to have been the position.

The other witness called was a Mrs. Gittus. She was asked whether she was aware of the activities in the car park, and she said that she was standing on the raised portion (that is on the step which I have indicated). She said that she was aware of the activities in the car

park. "The car was by the red sports car. They were trying to push it. Ray Foster' -- one of the other people to whom I have already referred -- "said, 'Would you like a hand?' They said no." Then this is her evidence in respect of the accident: "Next thing the engine started, I looked over. The driver wasn't watching where he was going. He was looking at the people behind pushing."

It is of some but perhaps not overwhelming importance that the applicant was asked by a member of the Board whether he was saying that it was a deliberate running down, and he answered "No, I'm saying he was careless."

After the accident a lift was given to the applicant and, I think, his sister by those involved in the accident. Unfortunately the applicant was seriously injured. He suffered a very bad break of his leg. He has a measure of permanent injury and I have no doubt that in the Civil Courts, as Mr. Allen indicated, he might recover some thousands of pounds, perhaps even more than £10,000, if he had been able to prove some loss of faculty and earning power and so on.

Unfortunately the driver of the car was uninsured, so that it was impossible to obtain satisfaction against his insurance company. I assume that he was unable to pay damages personally as well. The next step was to consider whether the applicant could recover from the Motor Insurers' Bureau. The Motor Insurers' Bureau however took the point, quite understandably, that this accident did not

happen on a road. Therefore their scheme did not oblige them to consider the case, and they declined to compensate the applicant for his injuries.

Being properly advised, I suppose by Mr. Jones his solicitor, the applicant then decided to look in the only other direction available which was towards the offices of the Criminal Injury Compensation Board. In due course he filed an application for compensation under the scheme which is now statutory and which is managed by that Board.

Before turning to the scheme I should indicate that allegations were made that the driver of the car had had too much to drink. He may have been drinking, but there is no first-hand evidence of any kind that he was affected by drink or that he would have been guilty of any offence if he had driven on the road and so on. Indeed, as I have indicated, he gave a lift to the applicant and his sister afterwards. The suggestion is made that therefore it is unlikely that anyone thought that he was so affected. It would be quite unjust to the driver to assume that he was so badly affected that drink played a part in this accident. It may have, but we simply do not know.

The real heart of the allegation therefore against the driver was that he had done something which was to be criticised in respect of his management of the car. I put it in that way at present since it is suggested that his conduct might slot into one of three different definitions. I will return to those shortly.

The factual position is that he was seen to be in the driving seat as the car approached the step. There is no doubt that he must have been too close to the step and should have observed the applicant standing where he was. There is little doubt but that probably at the last second, or in the last seconds, he looked backwards at those who were pushing him. Unfortunately, almost simultaneously, the engine started and the car went forward much faster, and the accident happened before he was able to stop. That is the factual nature of the allegation against him insofar as it can be reconstructed from the evidence to which I have already referred and of which we have a full note. There is no doubt that in a Civil action the driver would automatically have been found to have been negligent. That goes without saying since either he should have seen the applicant or he should not have been looking over his shoulder and, in any event, he should not have struck him. But that is as far as the allegations might have gone in Civil proceedings. However, as I say, I must look at this matter simply under the provisions of the Criminal Injuries Compensation Board scheme.

That scheme is set out in the bundle from pages 45 onwards, and I have been referred by Mr. Robin Allen to all the relevant parts of it. The scope of the scheme is set out at paragraph 4, and it is well known that the Board will entertain applications for ex gratia payments of

compensation in any case where an applicant has sustained personal injury directly attributable "(a) to a crime of violence (including arson or poisoning)..." Those are the words of the scheme.

A few lines down it is said: "In considering for the purpose of this paragraph whether any act is a criminal act, any immunity at law of an offender, attributable to his youth or insanity or other condition, will be left out of account." So that that matter is specifically dealt with by the scheme itself.

I turn then to paragraph 11 which reads as follows: "Applications for compensation for personal injury attributable to traffic offences will be excluded from the Scheme, except where such injury is due to a deliberate attempt to run the victim down."

One might have thought therefore, stopping at paragraph 11, that any use of a motor vehicle (other than the use of the vehicle as a weapon in itself) was to be excluded from the scheme. But it appears that that is not so since the Board have, on other occasions and on this occasion, considered a case of this kind which involved no deliberate attempt to run the victim down but conduct which might have fitted into one of three categories of criminal behaviour.

That is dealt with to some extent in the Board's statement issued for the benefit of applicants and their advisers as a guide as to how the Board are likely to

determine applications in respect of incidents occurring on or after 1st October 1979. It is emphasised of course that each application will be decided on its own merits.

The point is that that guide contains two paragraphs upon which Mr. Robin Allen relies. The first is paragraph 4D, headed "Crime of Violence". It reads as follows: "An assault which, of course, is a crime of violence, may be carried out intentionally or recklessly." Then a definition of recklessness is included. "All claims", says that paragraph, "must be founded on a crime of violence. Carelessness or negligence of itself is not a crime."

Looking at paragraph 11 of the guide the following passage appears: "If the injuries are due to a deliberate attempt to run a victim down, the case is within the Scheme. Although certain traffic offences are crimes of violence (eg motor manslaughter and furious driving, also reckless driving or cycling), they are also traffic offences. An application based on an injury arising from these offences will be considered by the Board only if compensation is not available to the victim under motor vehicle or cycle insurance or under one of the agreements between the Secretary of State for Transport and the Motor Insurers' Bureau."

So that ordinarily traffic offences involving reckless driving or even motor manslaughter are not considered by the Board. The proviso is that if the various schemes do

not apply and there is no insurance, they will then look at the case in point. That is exactly what they have done in this instance.

I should pause to indicate that there is no question in this case of assault. It may be, as Mr. Allen has indicated to me, that there is a creature known in crime as a "reckless assault", but I do not have to consider that in this particular case since there is no allegation that what Mr. Hunt did was deliberate or in the nature of an assault at all. What is said is that his conduct slots or fits into one of the categories of motoring offences which may or may not involve violence, depending upon the conclusion of the Board in each individual case.

That then is the scheme. I have outlined the evidence and I turn then to the law and will finally turn to the written decision of the Board.

I have been referred to the definition of "reckless driving" as it stands now in the road traffic legislation. I have been referred to the definition of "wanton" or "furious" driving as it appears in the Offences Against the Persons Act 1861 in section 35. I have been referred also to the well-known offence of careless driving, which may be an offence triable on its own, or there can be a conviction recorded of careless driving where there is a prosecution for reckless driving or causing death by reckless driving.

The two cases to which I have been referred are useful in general terms. The first in point of time is R. v. Criminal Injuries Compensation Board, ex parte Clowes (1977) 1 WLR 1353. I should indicate that this case is one of a line of cases dating back to the early seventies in which it was established that the Board is susceptible of judicial review. The Court of Appeal decided in the early days that "the High Court can interfere if the Board makes an error of law or misrepresents its scheme, or acts contrary to natural justice, or does any other act or thing which calls for the intervention of the court." That is a quotation from the judgment of the late Wien J. at page 1363H in the Clowes case.

The case of Clowes concerned injury to a Police Sergeant as a result of an explosion when he was investigating the suicide of a man who had broken off the end of a gas standpipe in his house. The facts and the decision itself matter little, but it is of interest to note that the judges in that case indicated their own view as to what might or might not be a crime of violence.

Eveleigh J. (as he then was) at page 1359 at A, after looking at the word "violent" itself went on with these words: "With those reflections in mind I seek to discover a meaning to be attributed to 'a crime of violence' in this case. I have regard to the whole sentence and 'personal injury directly attributable to a crime of violence' means in my opinion 'personal injury directly attributable to

that kind of deliberate criminal activity in which anyone would say that the probability of injury was obvious.' This is not meant to be an exhaustive definition. It is rather an indication of an approach."

Lord Widgery, who dissented in the decision itself, used these words when dealing with the understanding and defining of the phrase "crime of violence". "'Crime' of course is a well-known word, and one rarely has difficulty in deciding whether a particular act is or is not a crime; but a 'crime of violence' is not a term of art. It does not bear any universal definition which should be adopted, and therefore, applying ordinary principles, one must give the phrase 'crime of violence' the sort of meaning which it would be given by educated people in the ordinary use of the English language in 1969 when this scheme was prepared.

"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 probably interfere with their deliberations to the minimum. It is not unlike the last case we had in this court where similar considerations arose over the word 'dishonest' in the Theft Act 1968. I think that so far as it would be appropriate to attempt to guide a jury in a decision on this point one would suggest to them for their consideration that a crime of violence is

a crime which is accompanied by violence, or, as Wien J. put it, 'concerned with violence.'

"Furthermore, I think that they could properly 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. As I say, it seems to me quite clear that what this definition is all about is defining a crime which is injurious to the person. It is the threat to the person which matters in my view because it is the threat to the person which is the concern of the public and no doubt would stimulate the laying down of this scheme.

"It is said on the other side by Mr. Scott Baker that a crime of violence should mean a crime of which violence is an essential ingredient. That, if he will allow me to say so, is a very neat and tidy package in which to put this problem."

Those are the useful passages in that particular case. The second case was decided in 1987. It is called R. v. Criminal Injuries Compensation Board, ex parte Webb (1987) Q.B. 74. That was a case in which the four applicants were railway engine drivers who suffered mental illness after their trains had run over and killed persons on the line. Each applicant sought compensation alleging that the offence committed by the victims, who were trespassing on the railway line, was a crime of violence within the Board's scheme. The appeals were dismissed and it was

held "that the words 'crime of violence' were not a term of art and since the scheme was not a statutory scheme it was for the board, as a fact-finding body, to decide whether unlawful conduct, because of its nature and not its consequences, amounted to a crime of violence within the scheme; that, accordingly, the board had to apply a reasonable and literate man's understanding of the circumstances in which compensation could be paid; and that, on the facts, the applications had been rightly refused."

It does not seem to me to be necessary to read much of the judgments, but I refer to one passage in the judgment of Lawton L.J. at page 79H. The case of Clowes had been referred to, and the Lord Justice went on with these words: "In my judgment, Mr. Wright's submission that what matters is the nature of the crime, not its likely consequences, is well founded. It is for the board to decide whether unlawful conduct, because of its nature, not its consequence, amounts to a crime of violence. As Lord Widgery C.J. pointed out in Clowe's case ..... following what Lord Reid had said in Cozens v. Brutus..... the meaning of 'crime of violence' is 'very much a jury point.' Most crimes of violence will involve the infliction or threat of force but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the board, as a fact-finding body, have to apply to the case before them. They will recognise a

crime of violence when they hear about it, even though as a matter of semantics it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences, as in the case of the Road Traffic Act 1972 offence to which I have referred."

Those then are the cases to which I refer before turning to the written decision. The written decision is in the bundle at pages 29 and 30. It is dated 14th July 1987 and it is, presumably, a distillation of the wisdom and decision of the three Queen's Counsel, Messrs. Chedlow, Weitzman and Archer, who formed the board in this particular case.

Originally the matter had gone before Mr. Iain Black of Queen's Counsel. He had disallowed the application, making the following comment: "The circumstances in which the applicant was run over by a car are far from clear. What is clear is that no crime of violence was committed. Paragraph 4(a) is not satisfied." So that the immediate reaction, as a matter of common sense from the single member of the board, was that this case could not fit within the scheme at all.

It may be that that was too summary a disposal, and certainly it was accepted by the board that the matter should be fully heard. But it is interesting to notice the immediate reaction of Mr. Black, which I confess was to some extent mine when I first took a look at these papers. It seemed unlikely that the animal known as

"reckless" or "careless driving" could be described in ordinary parlance as a "crime of violence". But here we are investigating it at length today, and here is the board -- quite rightly in my judgment -- assuming that it would be possible at least for "reckless driving" and "wanton" or "furious driving" to be within the ambit of the scheme.

Nobody took the point, thankfully, that there could be no crime because this was private property. The board was prepared to look at the matter generously and say that if the facts fell into the format of one or other of the relevant crimes they would have been prepared to give compensation in spite of the fact that no crime, apart from wanton or furious driving, could in fact have been prosecuted in respect of this event.

The board set out the facts in full. There is no need for me to refer to that part of the decision. It was submitted by Mr. Jones, as the decision relates in the second paragraph on its second page, "that the driver was reckless within Lord Devlin's definition in R. v. Lawrence (1981) 1 All E.R. 982, which was cited to us."

The decision then goes on to refer to the cases which Mr. Jones cited and to the dictionary definition of the word "wanton" in connection with the Offences Against the Persons Act allegation.

Then the board, which consists of legally qualified Queen's Counsel of course, reached its conclusion in this way. I read the whole of the pre-penultimate paragraph.

"On the totality of the evidence we were not able to find that the car driver was acting recklessly. As Lord Diplock said at page 982 of the report of R. v. Lawrence: 'It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves.'"

That of course is the first half of the classic test of "recklessness" laid down by the House of Lords in Lawrence. There is no reason whatsoever to suppose that the members of the board ignored the other part of the definition and, indeed, Mr. Allen rightly indicates that this is the important part so far as this case is concerned; since if the matter was well and truly within this half of the definition there would, indeed, be the material upon which it could be said that this man drove recklessly.

The decision however shows that the test was applied and the conclusion reached was this, and I continue from the decision itself: "To push-start a car in this place did not seem to us to show recklessness and the fact that for a very brief instant as the car fired, the driver should be looking to the rear to the pushers again did not to us attract the epithet 'reckless'. All those on the steps seemed to know what was going on. It is to be

noticed that the driver negotiated the car park bend after starting and then reversed back satisfactorily."

In my judgment the board did all that they could conceivably have been asked to do in applying the facts of this particular case to that half of the definition in Lawrence. They considered the conduct itself, namely the whole business of the push-starting of the car, and rightly in my judgment concluded that that could not possibly have been held to have been reckless. They then considered the last seconds, for they said that at the very brief instant as the car fired the driver might have been looking to the rear, and so on. In my judgment they looked at all the relevant facts which had been proved before them. Because they did not mention the position of the applicant or the closeness of the car to the place where he stood does not, in my judgment, for a moment mean that they did not consider that aspect of the evidence. It is obvious in my judgment that they must have done so since it was in the forefront of the case put before them that this man had knocked down the applicant when he was actually still standing on the step.

That, in my judgment, is the end of the case so far as "recklessness" is concerned because I see no misdirection of themselves; I see no failure to pose the proper test; and no failure to apply the law to the facts as found by the board.

Looking at the matter if I can from a detached point of view at this stage, it seems to me also palpably that the decision reached was a correct one. I do not believe that a jury of ordinary common sense motorists, standing on the step near to where the applicant was and being directed in accordance with R. v. Lawrence at eleven o'clock at night in that place, and giving the matter their proper attention, would for a moment have convicted this man of any recklessness. That may not be the absolute test and, in any event, the board and their decision are those which concern us today.

I turn to the question of wantonness. That allegation is sometimes made in criminal courts where it is impossible to bring road traffic offences because the place is private and not a public road. In this instance Mr. Jones had addressed the board on the question of wantonness. He referred them to the dictionary definition of "wanton". I am not sure that that was in the end particularly helpful since usually the adjective which is applied to a crime is best left to the jury itself. However he did so, and Mr. Allen has put before me the relevant definition.

When considering this part of the case the board said this: "Further on all the facts here we did not find any breach of section 35 of the Offences Against the Persons Act 1861. We did not consider that this driving

was wanton nor did it amount to wilful misconduct in all the circumstances here."

That, in my judgment, was all that the board could possibly have been asked to decide. They had seen the definition of the section 35 offence. They knew what the applicant said that "wanton" meant. The words "wilful misconduct" speak for themselves. Applying the law to the facts again they found that there was no breach proved in the circumstances. I see no misdirection, no error of law and no failure by the board to apply itself to the task which it had to perform, being itself judge and jury in connection with this decision.

That leaves only one matter over. Mr. Allen argues that since careless driving is an alternative which is available where an allegation of reckless driving is made, the board should have considered whether this was a case which could have fitted into the mould of careless driving and should have concluded in favour of the applicant that if that were so careless driving was, in the circumstances of this case, a crime of violence entitling him to recover.

I do not believe that it was necessary for the board to apply its mind specifically to that problem, particularly because Mr. Jones (quite rightly on behalf of the applicant) was saying that this was nothing to do with carelessness but was a case of recklessness. I understand why he had to do that, and it may well be that

he appreciated that if this was simply a careless driving case he had not a hope of fitting that matter into the words "crime of violence".

However I am not prepared to believe that the board wholly failed to consider the possibility. What they said in the last sentence was this: "In the result we were not satisfied the applicant suffered injury as the result of any crime of violence or recklessness and that he did not satisfy paragraph 4(a) of the Scheme."

Be that as it may, if I assume for the moment that they did not consider the possibility of careless driving I am absolutely convinced that it would have been impossible to fit the facts of this case into the definition of careless driving and to move from there to say that it was established that this was in the nature of a crime of violence upon the facts of this case.

It may be that there are some instances more extreme than this where careless driving might lead to recovery before the board, so that I am not prepared wholly to exclude careless driving from their consideration. That is entirely a matter for the board should such an allegation be made in the future. But I am wholly satisfied that even if the board had spent half an hour considering and dilating upon the subject of careless driving they would never have been able to say, rightly and properly, that these facts led them to believe and to

find that this was a crime of violence entitling Mr. Andrew Letts to recover compensation.

Those then are the three ways in which the matter is put. It must be remembered that this court is not a Court of Appeal from the Criminal Injuries Compensation Board. This is judicial review. I have to look to see whether there has been any misleading of the board by itself, or misdirection or failure to apply the law to the facts, or such a flawed conclusion as would entitle the applicant to judicial review of the decision of the board.

The board is now statutory but it controls itself. It has highly experienced lawyers sitting upon it and it reaches its own conclusions in the light of its own scheme. It is quite wrong to interfere unless there is an error of law or some properly judicially reviewable matter which arises.

I should finish by saying that Mr. Allen mooted the possibility that the decision of the board in one or other respects was perverse. I am sorry that that allegation was ever made. There is no possible way in which perversity or irrationality could be alleged against the board in this instance and I dispose of that suggestion (somewhat tepidly made) with the conclusion that it simply does not arise. For all those reasons, in my judgment, this application must be refused.

I should mention -- since I omitted to do so earlier -- the case of Chief Constable of Avon and Somerset

Constabulary v. Shimmen (1987) 84 Cr.App.R. 7, to which I was referred. I have taken it into account but I do not find that it is directly in point in this case. It deals with a different kind of allegation and, in my judgment, while the general principles are applicable and have been applied by me and by the board there is no direct help to be obtained from the decision in that case.

MR. PLEMING: I understand that a legally aided application is being made. There is no application for costs, save for legal aid taxation of the applicant's costs.

MR. JUSTICE MACPHERSON: You do not apply even for an order not to be enforced without the leave of the court?

MR. PLEMING: No.

MR. ALLEN: Mr. Pleming has made my application for legal aid taxation, and I would ask for that.

MR. JUSTICE MACPHERSON: Yes. Mr. Allen, of course everyone will think that I am hardhearted, and I am sorry that your unfortunate client goes without compensation. But there it is: I fear he is not within any of the schemes so his appliction must be refused. There will be no order as to costs save legal aid taxation of your client's costs under the legal aid and advice scheme.

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