IN THE SUPREME COURT OF JUDICATURE QBCOF 1998/1004/4
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, CROWN OFFICE LIST
(MR JUSTICE OGNALL)

Royal Courts of Justice
Strand
London WC2

Tuesday, 23 March 1999

B e f o r e:

LORD JUSTICE MORRITT
LORD JUSTICE AULD
LORD JUSTICE CLARKE

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In the matter of an application for judicial review

R E G I N A

- v -

CRIMINAL INJURIES COMPENSATION BOARD
EX PARTE WAYNE MARSDEN (A MINOR)
by his next friend and mother PATRICIA MARSDEN

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(Computer Aided Transcript of the Palantype Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
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Official Shorthand Writers to the Court)

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MR J O'BRIEN (Instructed by Messrs Gordon Brown Associates, Chester-le-Street) appeared on behalf of the Appellant

MISS A ROBINSON (Instructed by the Treasury Solicitors) 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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A

JUDGMENT

LORD JUSTICE AULD: This is an appeal against the order of Ognall J on 29 October 1997 dismissing the appellant's, Mr Marsden's, application for judicial review of a decision of the Criminal Injuries Compensation Board on 21 November 1995 refusing to make a payment to him under its 1990 Scheme.

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On 25 August 1992 Mr Marsden, then aged 10, while walking along an access track to a sewerage works in Stanley in County Durham, was struck and caused serious head injuries by a motor cycle ridden by Malcolm Brown. Brown was subsequently convicted of dangerous driving in respect of the accident and of driving whilst uninsured. The Motor Insurers' Bureau ("the MIB"), to whom a claim was made on Mr Marsden's behalf for compensation under its Scheme, rejected the claim because the accident, not having occurred on a road, was not within it. On 7 May 1993 Mr Marsden's then next friend applied on his behalf to the Board for compensation under paragraph 4 of its 1990 Scheme for "personal injury directly attributable to a crime of violence".

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By letter of 11 January 1994 the Board informed Mr Marsden's solicitors that a member of the Board, His Honour John Da Cunha, had disallowed the application because, in the words of the letter, he was "not satisfied that the applicant suffered personal injury directly attributable to a crime of violence".

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Mr Marsden requested a hearing before the Board under the provisions of the Scheme. A panel of the Board heard evidence, which they accepted, that Brown had not deliberately driven at Mr Marsden, and therefore rejected the application because they ruled it was excluded from the Scheme by paragraph 11 of it, which read:

> "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."

That provision had been present in that form in previous editions of the Scheme since at least 1979.

Mr Marsden sought judicial review of the decision on three grounds, all of which Ognall J rejected and only one of which he relies on in this appeal, namely that the 1990 Scheme should be construed not as a statute but in a broader purposive way. He maintained that the purpose of the Scheme was to compensate victims of crimes of violence and, in the context of injuries caused by the commission of traffic offences, to compensate victims where no policy of insurance covered the offending accident and where the MIB declined responsibility. Thus, his case was, and is, that the Board, in construing the extent of the exclusion in paragraph 11, should have regard to the history of its earlier application of the Scheme, and confine the exclusion to those cases where the offending driver was insured or in which the MIB has accepted responsibility.

Ognall J was unreceptive to that argument, although he was prepared to concede the scope for some relaxation of the Pepper v. Hart kind, as in the case of statutory construction, if and where the Scheme is ambiguous. He said at page 12E-G of the transcript of his judgment:

> "... albeit that the Scheme is a creature of the exercise of the Royal Prerogative, it still remains to be treated as 'legislation'. It may well be that in the event of any perceived ambiguity then the Court is afforded more latitude in its approach to construing a statutory provision."

However he rejected any ambiguity in the Scheme overall or in paragraph 11 on this issue which would entitle him to override what he regarded as the plain language of the paragraph.

Mr Joseph O'Brien has submitted that the judge was wrong to treat the Scheme as if it were legislation, and to require some ambiguity on its face before looking outside it to determine its true intent. He referred to the following words of Lawton LJ in R v. Criminal Injuries Compensation Board Ex parte Webb [1987] 1 QB 75, at 77H to 78B, in which the court upheld the Board's decision that statutory trespass on a railway line endangering the safety of persons travelling on the railway was not a crime of violence under the Scheme:

> "The words 'crime of violence' are not a term of art. The scheme is not a statutory one. The government has made funds available for the payment of compensation without being under a statutory duty to do so. It follows, in my judgment, that the court should not construe the scheme as if it were a statute but as a public announcement of what the government was willing to do. This entails the court deciding 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."

Mr O'Brien also referred to an observation to like effect of Lord Parker CJ in R v. Criminal Injuries Compensation Board, ex parte Schofield [1971] 2 All ER 1011, DC. at page 1013D.

Mr O'Brien suggested that ambiguity lay in the lack of any definition in the Scheme of the words "traffic offence". He referred to the history of the Scheme which, he submitted, showed that its intention was only to exclude from compensation victims of crimes of violence taking the form of traffic offences where the offender was insured or where the MIB would accept responsibility. He referred to the Board's treatment of the problems since its formation in 1964, conveniently summarised by Ognall J at pages 4D to 8C of the transcript of his judgment.

Mr O'Brien's point was that, if the construction of paragraph 11 is so clear and obvious and to the effect now contended for by the Board, why is it that it has had such difficulty with it over the years and for a long period has taken a contrary stance to that which it takes today.

Looking briefly at the history, in the early years the Board took the view that whether the offence in question was charged under the Road Traffic Act of the day or under section 35 of the Offences Against the Person Act 1861 for wanton or furious driving, it was excluded from the Scheme under the predecessor of paragraph 11. There followed a period of uncertain and inconsistent attempts by the Board to rationalise the

connection, or lack of it, between a crime of violence and injury resulting from traffic offences of various sorts.

In 1978 a departmental working party reviewing the Scheme reported on the lack of need to apply it to traffic offences constituting crimes of violence because the offenders would normally be covered against claims for compensation by the statutorily required third party insurance or under the MIB Scheme. However, the working party seemingly did not recommend any change to the Scheme to provide for those injured in traffic cases who were not so protected.

In 1980 the Board was advised by the Home Office that in such cases it could consider the grant of compensation. It thereafter did so and granted it as appropriate when such claims arose. All that changed in about 1994 or 1995 when this and another similar claim was made under the 1990 Scheme. A feature of that edition of the Scheme is that the Board, in paragraph 13 of its guide to it (but not in paragraph 11 of the Scheme itself), set out to reflect the Home Office advice given so many years before. It mentioned the exclusion in paragraph 11 for injuries caused as the result of traffic offences, but referred to it, as the Scheme did not, as "injuries caused as a result of traffic offences on the public highway". The guide stated that

> "in such cases the victim's remedy is through the driver's insurance company or, if the driver was uninsured or unidentified, through the Motor Insurers' Bureau...".

As stated by Lord Carlisle of Bucklow, the Board's chairman, the Board in giving that guidance intended:

> "... to make clear which category of case was excluded from the scope of the Scheme; but it left open to consideration on their own facts those cases arising from incidents occurring other than on a public highway, for which the MIB arrangements were not available."

In the meantime, Parliament had intervened with a view to replacing the prerogative scheme with a statutory one in the Criminal Justice Act 1988.

Section 110(7) of that Act sought to make clear what a further inter-departmental committee which had reported in 1986 considered the Scheme did not make clear, the relationship between cover under the Scheme and cover under insurance, or the MIB arrangements. The section provided:

> "Where any criminal injury is sustained in circumstances such that compensation in respect of the injury is payable -
>
> (a) under any policy of insurance maintained in pursuance of Part VI of the Road Traffic Act 1972...; or
>
> (b) under any arrangements for the compensation of victims of uninsured or unidentified drivers to which the Secretary of State is a party;
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> that injury is not a qualifying injury."

However the statutory scheme was never implemented and the existing Scheme and its well-established formula in paragraph 11 remain. The change in attitude of the Board in 1994/1995 seems to have resulted from a change in personnel from those members of the Board customarily dealing with this type of claim. The new members were apparently unaware of the Home Office's 1980 advice. In construing the Scheme, in particular the terms of the longstanding paragraph 11, they took the view that it was

clear and excluded from compensation all injuries caused by traffic offences constituting crimes of violence wherever they occurred and irrespective of the availability or non-availability of cover through insurance or the MIB Scheme unless deliberate in nature.

Mr O'Brien, returning to Lawton LJ's broad approach in ex parte Webb, cited Sir Thomas Bingham MR's observation in R v. Wandsworth LBC ex parte Mansoor [1997] 1 QB 953, at 967D-E, in support of his submission that the Board's interpretation of the 1990 Scheme and its predecessors over the years, though not determinative, may be persuasive authority for the construction of paragraph 11 in the absence of any definition in the Scheme of the words "traffic offence". It is, he submitted, a pointer to which a reasonable and literate man would understand the words to mean, namely that one committed on the public highway or one in which the Motor Insurers' Bureau would stand behind the uninsured offender, thus taking Brown's dangerous driving outside the exclusion. A reasonable man, he submitted, would look at the purpose behind the Scheme and the way in which the Board had dealt with it since 1980.

Miss Robinson, on behalf of the Board, also relied on Lawton LJ's approach in ex parte Webb. She submitted that whether any particular crime is a traffic offence within paragraph 11 is a question of fact for the Board, as is the question whether the conduct complained of is a crime of violence for which the Scheme makes general provision. She referred to a passage of Lawton LJ's judgment at page 79H to 80B. Subject to one reservation, I have some unease about that approach, based as it was on Lord Reid's largely ignored dictum in Cozens v. Brutus [1973] AC 854 at 861D, that the meaning

of an ordinary word of the English language, unless it is used in an unusual sense, is not a question of law: see Glanville Williams "Law and Fact" [1976] Crim LR 472 and 532; DW Elliott "Brutus v. Cozens; Decline and Fall" [1989] Crim LR 323; R v. Spens (1991) 93 Cr.App.R 194; and R v. Paul [1998] Crim LR 79.

Ordinarily the true meaning of a public policy or Scheme is for the Court to decide. Misinterpretation by the policy maker of its own policy or by the body charged with implementing it, render the decisions of either defective in the same way as would ignoring it: see R. Criminal Injuries Compensation Board ex parte Schofield, R v. Criminal Injuries Compensation Board ex parte Ince [1973] 1 WLR 30 and 34, CA, and Gransden & Co Ltd v. Secretary of State for the Environment [1986] JPL 519. Where the policy or Scheme is not as clearly or fully expressed as it might be, there is, as Lord Mustill said in R v. Monopolies and Merger Commissions, ex parte South Yorkshire Transport [1993] 1 WLR 23, HL, at 32G-H, a spectrum of meaning, and a court should respect the policy maker's evaluation of it unless it is irrational.

That line of thought may or any not extend to a body like the Board in this case which is closely concerned in the effective administration of its Scheme. But whether it does or not, the spectrum of meaning is just another term for ambiguity. Unless there is ambiguity, the policy maker or administrator of a policy or scheme is in no better position than the Court to determine the meaning of an ordinary word.

Somewhat inconsistently with her first written submission, Miss Robinson supported Ognall J's treatment of the exercise before him as one akin to statutory construction, amenable to guidance from outside its own terms only where they are ambiguous.

Certainly, the fact that the Scheme has its origin in the Royal Prerogative rather than statute does not of itself invite a looser form of construction: see CCSU v. Minister for the Civil Service [1985] 1 AC 374, HL per Lord Fraser at 399 B-F.

Mr O'Brien suggested that that case and Lord Fraser's words in it were distinguishable because there the Order in Council incorporated the provisions of the Interpretation Act 1978. But it appears that that Act had no role in their Lordships' construction of the instrument before them. In my view, in substance the same approach should govern the construction of such public instruments, statutory and otherwise, where the task is simply to determine the meaning of the instrument and the specific words in issue in it.

The exclusion provided by paragraph 11, Miss Robinson submitted, is only qualified in its reference to personal injury attributable to traffic offences by the words "where such injury is due to a deliberate attempt to run the victim down". She maintained that the words are clear and suggest no basis for further qualification by adding, say, the words "committed on a road or a public highway" or "unless compensation is not payable under any insurance policy or by the MIB".

In my view, there is more force in the second of Miss Robinson's submissions. The words of the exclusion are broad and clear, referring to traffic offences without qualification according to where caused or whether compensation was otherwise recoverable, and expressly exempting from the exclusion traffic offences involving deliberate attempts to run victims down. Although the Board may have taken other

views from time to time, that could only be persuasive if there were some ambiguity. Here, my view is that there was not. But in any event, as Sir Thomas Bingham MR said in Mansoor at page 967D-E, commenting on Lord Hoffmann's speech, assented to by all their Lordships, in R v. Brent LBC ex parte Awua [1996] AC 55, HL. at 70A, it must bow to the Court's determination of what the meaning is. This is what Sir Thomas Bingham said:

> "Lord Hoffmann expressly accepted that his construction differed from that to be found in successive editions of the codes of guidance issued by the Secretary of State for the Environment. This is not surprising, since the codes very properly reflected the rulings of the courts over the years, from which Lord Hoffmann was quite deliberately departing. The codes can amount at best to persuasive authority on the construction of the Acts; to the extent that the guidance they contain has now been criticised by the House of Lords, in my view they cease to be persuasive."

Further to qualify paragraph 11 in the manner suggested by Mr O'Brien would, as Miss Robinson submitted, have the strange result that dangerous driving would be a traffic offence for the purpose of paragraph 11 only if committed on a public highway, but not if committed in some other public place. Yet since 1992 it, like other traffic offences as defined in section 6(8) of the Road Traffic Act 1988, may be committed on a road or other public place: see, for example, sections 1 to 4 of that Act. There is also the offence of wanton or furious driving under section 35 of the Offences Against the Person Act 1861 which, like those offences under the 1988 Act, would, as a matter of ordinary language, be regarded as a traffic offence.

The fact that the Board may have given a different meaning to the exclusion in the past pursuant to advice it received from the Home Office in 1980, cannot determine its true meaning. Though, as Lord Carlisle indicated, it may indicate a discretionary extent to which the Board was prepared in an appropriate case not to apply the exclusion in its full sense.

Accordingly, as in my view the wording of paragraph 11 and its effect on the operation of the Scheme are clear, it does not require or justify the gloss on it contended for by Mr O'Brien, whatever the inconsistencies of the Board's approach to the matter in the past. I would dismiss the appeal.

LORD JUSTICE CLARKE: Mr Marsden suffered a serious injury. In the light of the decision of Ognall J he deserves every sympathy given the history of the respondent's approach to paragraph 11 of the 1990 Scheme and its predecessors, which has been described by Auld LJ, and given also the fact that he is not entitled to compensation under the MIB contract. But however purposive a construction is given to the 1990 Scheme, the question whether Mr Marsden is entitled to compensation under the Scheme remains a question of construction. However purposive a construction is adopted, I do not see how as a matter of construction it could be held that the injury to Mr Marsden was not attributable to a traffic offence, namely dangerous driving, for which Mr Brown was convicted.

It follows that, sympathetic as I am to the fact that Mr Marsden will not be compensated, his application is plainly excluded by paragraph 11 of the Scheme. For these short reasons, and those given by Auld LJ, I too would dismiss the appeal.

LORD JUSTICE MORRITT: I agree the appeal should be dismissed for the reasons given by Auld LJ.

ORDER: **Appeal dismissed; section 18 costs order made against the Legal Aid Board.**