Hearing - applicant's fitness to give evidence
(coop with Board - withholding information

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
(MR JUSTICE TURNER)

QBCOF 96/1682/D

Royal Courts of Justice
Strand
London W2A 2LL

Thursday 24th April 1997

Before

LORD JUSTICE STUART-SMITH
LORD JUSTICE HENRY
LORD JUSTICE ALDOUS

REGINA

v.

THE CRIMINAL INJURIES COMPENSATION BOARD — Appellant
ex parte DEBBIE KATHLEEN MATTISON — Respondent

(Computer Aided Transcription of the Stenograph Notes of
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Official Shorthand Writers to the Court)

MR MICHAEL KENT QC (instructed by The Treasury Solicitor) appeared on behalf of the Appellant.

MR NICHOLAS BLAKE QC and MR LESLIE THOMAS (instructed by Messrs Emsleys, Castleford, Yorkshire) appeared on behalf of the Respondent.

JUDGMENT
(As approved by the court)

LORD JUSTICE STUART-SMITH: This is an appeal from a judgment of Turner J given an 16th October of 1996 in which he quashed a decision of the Criminal Injuries Compensation Board refusing Miss Mattison's claim for compensation under the statutory scheme and ordering a re-hearing before a differently constituted panel of the Board. The relevant facts are these.

In about July 1988 Miss Mattison moved in and began co-habiting with a man called Roy Kilvington. Shortly after they began living together he became violent to her. In November of that year she became pregnant. In May of the following year Mr Kilvington was sentenced to a term of imprisonment apparently for violently assaulting his wife with whom he had previously lived. He was released from that sentence in either August or October 1990 and, although the applicant, Miss Mattison, said she wanted to have nothing more to do with him, according to her he said he was unwilling to terminate the relationship and in the few weeks that she continued to live with him he raped her.

On 30th October she attended her GP, Dr Berry, with her mother and she told the doctor that Mr Kilvington had had intercourse with her against her wishes and had committed buggery on her, although she did not realise that that was an offence at the time, because they were living together. The doctor advised her to go to the police and on 30th November she did go to the police. She made a full written statement in December of that year which contained allegations of rape and buggery. She said she had ceased living with Mr Kilvington and did not intend to do so again. The police arrested and interviewed Mr Kilvington the next day.

He denied that he had committed rape. He said that everything that had happened between them had been consensual. The police took a statement from Dr Berry later in that month but she was unable to give any evidence which could corroborate the non-consensual intercourse.

On 10th April 1991 Miss Mattison made a further complaint to the police of indecent assault. She made a statement on 23rd April and in that statement she made no mention of the fact that they either were or had recently been living together, that is to say the applicant and Mr Kilvington. It is now clear that in March and April of that year the two of them had resumed co-habitation for a period of about eight weeks.

In May 1991 Miss Mattison signed a claim form claiming compensation from the Criminal Injuries Compensation Board. In the body of the form she identified the date of the incident as being in July 1989. In answer to the question, "Were you and the person who injured you living together as members of the same family at the time of the incident?", she replied, "Yes" and also replied yes to, "Was the incident reported to the police?".

On the next page she refers to an incident when her ankle was hurt and damaged by broken glass thrown by Mr Kilvington and she attached, or said that there was to be attached, to the form a statement from a social worker which appears at page 34 and which fully sets out the applicant's case. Amongst other things, in that statement, which was dated 17th September 1991 - so although the application form was made in May the application was not forwarded to the board until September - Miss Jayne Robinson, the social worker, said this:

"Debbie lived with Roy Kilvington from early 1989 until November 1990. However during the time Roy served a prison sentence."

There is then a reference to the incident when her ankle was damaged, and then a paragraph which refers to the physical and sexual assaults on her and then she said:

"Debbie left Roy at the beginning of this year but the mental and physical abuse has continued."

And the final paragraph:

"Debbie has had a lot of problems with Roy and unfortunately he refuses to leave her alone even now".

The Board investigated the complaint. They obtained medical evidence from the doctor who dealt with the ankle injury, from the GP and also from Dr Zaman, which was a psychiatric report. That showed that she had been an in-patient in a psychiatric hospital between 28th May 1990 and 6th June 1990. That was at a time when Kilvington was in prison. Then there was a record of other attendances at out-patients. There is a brief description of what is alleged to have happened and her present complaints, that she gets nightmares, has irregular periods, is on anti-depressants; presumably that means she is suffering from depression. The prognosis was said to be guarded. In the light of the answers which had been given in the claim form the board also sent two further forms to the applicant. They are at pages 35 and 36. So far as the first one is concerned, the questions asked are these:

"Q. What is the relationship between you and the offender?
A. No relationship.

Q. Has the offender been prosecuted as a result of the incident?
A. No.

Q. If NO give reasons.

A. Frightened of the offender - still together in the relationship - offender went to prison on another charge shortly after the injury was caused.

Q. Are you and the offender still living together as members of the same family?
A. No.

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Q. If NO give the date (including the year) when you ceased living together?
A. December 1990.

Q. Do you intend to live together in the future?
A. No."

C That was signed by the applicant and dated 26th August 1992.

The other form requires an explanation of the delay in reporting the matter and I do not think I need refer to much of that. This was written, again, by the social worker but amongst other

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things it is said:

> "Prior to meeting Roy Debbie had had no problems with her nerves but although it is nearly two years since she ended their relationship she still suffers very badly".

E It is pointed out that that form, which was received by the Board on 27th August 1992, also appears to confirm that the relationship ended at the end of 1990. Indeed, that is again made clear in the last paragraph of that form when it is said:

> "Debbie is now free of Roy and when she left him in December 1990 she felt able to

F talk about what had happened.

That was the material which was before the single member who considered the case on paper.

G On 21st October 1992 (at page 38) the board member, Sir Derek Bradbeer, refused the application. He said:

> "I am afraid that in the absence of any corroborative medical evidence and any prosecution, I am unable to be satisfied that the applicant was the victim of crimes of

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violence as alleged by her - Scheme paragraph 4(a)."

She is then told she can apply for an oral hearing if she wishes. She did apply for an oral hearing. The actual form appears to have been written by the social worker, again, although it is not signed. Amongst other things, the reasons why it is said that she is entitled to an ex gratia payment:

> "Debbie does want to appeal as she feels that the panel have not taken into account her mental state. Since Debbie's involvement with Roy she has suffered from bad nerves and is likely to be under a psychiatrist for some time to come. As previously mentioned in the initial application Roy had quite an emotional hold over Debbie. This 'hold' has prevented her from pursuing prosecuting Roy as it has hindered her ability to give evidence in court. Roy continues to pester Debbie and she has to continually renew the injunction to keep him away from her.
>
> Debbie feels strongly about the decision that was made and would like to be given the opportunity to present herself to the panel despite the anxiety this would cause her."

That is accompanied by a long handwritten letter from the applicant herself. I do not think it is necessary to read much of that. She says at one stage,

> "I was still in shock, the words [this is reference to the interview with the police] they said to me were, Debbie, do you want to take all this to court, so I asked them what they thought and they said it would be hard for me with me being nervous. He [that is the police officer] said if I dropped court they would never get rid of the files."

Then a little later on she says:

> "I haven't had nothing to do with him [that is Roy], since I have had 5 injunctions against him and I am just waiting for another".

The hearing before the Board took place on 13th March 1995. There had been a previous date given but the applicant had been unable to attend it. The hearing was before two members of the Board of whom the chairman was Mr Graeme Hamilton QC. They refused the application for compensation. The applicant then applied for judicial review of that

decision. On 24th November 1995 the Court of Appeal gave leave to move for judicial review. The Form 86A set out some of the history of the matter. The grounds of the application were said to be three-fold (page 15, paragraph 19):

"For the reasons stated below the Board:-

(a) failed to take into account relevant matters,

(b) breached the rules of natural justice,

(c) came to a perverse decision."

It is only (b) that is now pursued or indeed pursued before the judge. Under what might be described as the particulars of the breach of the rules of natural justice are three subparagraphs:

> "(5) The applicant was not called upon to give an account of the alleged discrepancies."

That was incorrect and is not pursued.

> "(6) The applicant was not in a fit state to give an account.
>
> (7) The board were well aware of the matters referred to in (i) and (2) [that must be paragraphs (5) and (6) above] because it knew that the Applicant had just been released from a psychiatric hospital that day for the purposes of the hearing and that she was distressed and weepy in front of them."

That application was supported by an affidavit from Miss Mattison and an affidavit from Miss Smith, the social worker, who accompanied her to the hearing. So far as material the applicant's affidavit said as follows:

> "15. At the time of the oral hearing I was an inpatient at Pontefract General Infirmary, Psychiatric Department. Accordingly, I was only released for the day to attend upon the appeal. I was on medication and I was extremely distressed and weepy.
>
> 16. I was not called to give any evidence. My mother was asked some questions and Caroline Smith addressed the Board and attempted to assist my case. She contended

that I had suffered from a severe psychiatric condition arising out of the treatment which I had received from Mr Kilvington over the years and in particular she pointed out that I had come from Pontefract General Infirmary Psychiatric Department that day. She went on to point out that I had been persecuted by Mr Kilvington over a lengthy period of time and that I was totally under his control and was terrified to tell anybody about the whole extent of the abuse which I had suffered.

17. The board retired for approximately 10 minutes. When they came back they refused my appeal on the grounds that in my application form I stated that I had finished living with Mr Kilvington in or about December 1990. However, in a statement which I had made to the police I apparently admitted that he had returned to live with me for an 8 week period in April 1991. This was seen as seeking to deceive the Board. Therefore the Board determined that it was not satisfied that I had sustained an injury caused by a crime of violence and that I had misled the Board.

18. I had no intention to mislead the Board. I do not believe that I was living with Mr Kilvington when either the application form was completed or when it was lodged with the CICB."

I would simply add that that was not the point which was being made by the Board and there is still no explanation offered in that affidavit as to why she did not disclose either to the police or the Board that she had returned to live with Mr Kilvington in March/April 1991.

So far as Miss Smith's affidavit is concerned, she says that it was Jayne Robinson who had been the social worker up to the day which she attended the appeal. She had been asked to accompany Miss Mattison to the appeal. She read the file of papers that had been prepared by Jayne Robinson. She said that she had never attended such an appeal before and did not expect to play any active part in the appeal. She says at paragraph 6:

"The oral hearing was a nightmare. I was totally unprepared for what occurred. I was asked to conduct the appeal on Ms Mattison's behalf. Having no previous experience, I did the best I could.

7. The appeal lasted approximately 30 minutes. The Board was concerned that Ms Mattison had attempted to mislead them."

Then she refers to the discrepancies. At paragraph 8 she says:

> "On behalf of Miss Mattison I advised the board as follows..."

Then she refers to the fact that she told them that the applicant had suffered from a severe psychiatric condition arising out of the treatment and that she was accordingly not able to recall details such as dates; that people do not always tell the full story regarding sexual abuse at the first interview; that Miss Mattison had been persecuted by Mr Kilvington over a lengthy period of time and that she was totally under his control and terrified to tell anybody of what had happened; and that she had not appreciated that buggery was a criminal offence.

Then In paragraph 11 she says:

> "I do not believe that Ms Mattison had a fair hearing. She was not called upon to give any evidence herself. She was clearly in a very bad state. She was distressed and very weepy. The medical evidence which was before the Board was extremely brief and sketchy and gave no real indication of the severe psychiatric condition which Ms Mattison suffers from."

In answer to that, and the granting of leave to move for judicial review, Mr Graeme Hamilton QC swore an affidavit and he exhibited to that affidavit the Board's written reasons in the case for refusing the application. He refuted the fact that the Board had not given the applicant an opportunity to give evidence. He says:

> "She gave her evidence and she was questioned by the Board's Advocate. It is probable that I and/or Mr Churchouse [the other member] asked her questions although I have no direct recollection of this. The Board does not take evidence on oath. Perhaps this has led to the error."

In paragraph 4 he says:

> "The board were informed that the applicant was an in-patient at a psychiatric hospital and had been released in order to attend the hearing. I expect she was distressed and she may have cried. This is not unusual in cases of this nature. Applicants usually

find it distressing to talk about their sexual experiences. Her behaviour gave us no cause to think that she was unable to take her proper part in the proceedings and no suggestion was made by or on her behalf that she was unfit to do so. Had she given us cause to believe otherwise or had such a suggestion been made I have no doubt that we would have adjourned the hearing. We would probably have directed that the Board should obtain suitable medical evidence.

We did not believe the applicant's evidence. This led to our conclusions set out in the written reasons."

So far as the written reasons are concerned, I can go to paragraph 6 where there is a reference to her being an in-patient at a psychiatric hospital but the hospital had allowed her to attend the hearing. I will read verbatim the reasons that appear in paragraph 7 and thereafter (page 95 of the bundle):

"7. (a) It became clear in the course of the evidence called before the Board, and was not in dispute, that the Applicant had returned to live with Mr Kilvington in 1991 and remained with him for about 8 weeks.

(b) It also became clear that the Applicant's main complaints now were of Mr Kilvington's alleged sexual assaults on her and not the incident alleged to have occurred in July 1989 referred to in her application form and document 2b.

8. The board heard evidence from WDC Smith. She told the Board that the Applicant had complained to the police on 30 November. She told WDC Smith that the incidents had taken place over several months. When asked why she had not reported them earlier she said that it was because she was very frightened of Mr Kilvington. He was arrested and he insisted that all sexual intercourse with the Applicant was with her consent. The Crown Prosecution Service took the view that there was insufficient evidence to proceed.

9. WDC Smith told the Board the Applicant made a further complaint, of threat to kill and indecent assault, which was placed on a crime file on 10 April 1991. The allegations were investigated. Mr Kilvington was arrested and charged with indecent assault. The Applicant made a further statement on 23 April 1991. In that statement she did not reveal that she had returned to live with Mr Kilvington. During police investigations it came to light that she had indeed, between her two complaints, returned to live with him for about 8 weeks. She

had never told the police of this. She told the police that this was because she did not want her parents to know. When the Crown Prosecution Service became aware of this they withdrew proceedings against Mr Kilvington. Further the Applicant told the police that she did not wish to proceed with the complaints. She told them that she was no longer in contact with Mr Kilvington and wanted to make a fresh start.

10. The Applicant gave evidence and was asked questions by the Board's Advocate. She said that she continued to see Mr Kilvington because he had said that he would kill her and their daughter Kimberley and that she believed that he would carry out his threats. She said that she was more scared of him than of her parents finding out.

11. The Applicant was asked why she failed to tell the Board and the police that she had returned to live with Mr Kilvington. She was unable to give an explanation. When asked about document 2b [which is the one in which she said that she had finished living with him in December 1990] she said 'I am sorry about it. It is my mistake.'

12. The Applicant told the Board that as far as back as 1988 she was having intercourse with Mr Kilvington when she did not want to. She said that he had had sex with her against her will three times in 1988 before she became pregnant. She said that she did not know that it was rape until she went to her doctor.

13. The Applicant's attention was drawn to the terms of paragraph 8 of the Scheme [to which I will refer in a minute]. She confirmed that she had told the police that she wanted to withdraw both her complaints. She agreed that on document 2b she ought to have told the Board that she ceased living with Mr Kilvington in April 1991."

There is then a reference to the mother's evidence and to Miss Smith addressing the Board and making the points to which I have already referred in the affidavits of Miss Smith and the applicant. Taking it up again at paragraph 16:

16. The Board considered the whole of the evidence and the demeanour of the witnesses. They were unable to accept the Applicant as a truthful witness. She had misled the police and she had tried to mislead the Board. It was only the police evidence which revealed that she had returned to live with Mr Kilvington in 1991.

17. The Board were not satisfied that the Applicant was not a consenting party to

the sexual acts of which she now complains. They were not satisfied that any injury she may have suffered to her ankle occurred in circumstances in which she was the innocent victim of a crime of violence. In these circumstances the application failed under paragraph 4(a) of the Scheme.

18. The Board were not satisfied that there was any justification for the Applicant's delay in reporting the alleged incidents to the police and, furthermore, they were satisfied that she deliberately hid from the police the fact that she had returned to Mr Kilvington in 1991. Accordingly the Board was required to exercise its discretion under paragraph 6(a) of the Scheme.

19. The Board were satisfied that the Applicant deliberately withheld from the Board the fact that she had returned to live with Mr Kilvington in 1991. Accordingly the Board was required to exercise its discretion under paragraph 6(b) of the Scheme.

20. The Board considered whether, had they been satisfied that she had sustained injury directly attributable to a crime of violence, a full award, a reduced award or no award would have been appropriate in the exercise of their discretion. They concluded that in view of the Applicant's aforesaid deliberate deceit no award would have been appropriate."

So it is apparent from that reasoning that the Board were not satisfied that she had sustained a crime of violence or with her explanation as to the delay in reporting the matter. They were satisfied that she had deliberately concealed from the police the fact that she had returned to live with Mr Kilvington and that she had deliberately misled the Board.

I must turn briefly, before coming to the judge's judgment, to the relevant provisions of the 1990 scheme. Under paragraph 4 the applicant has to satisfy the Board that she sustained personal injury directly attributable to a crime of violence. Paragraph 6 states:

"The Board may withhold or reduce compensation if they consider that -

(a) the applicant has not taken, without delay, all reasonable steps to inform the police, or any other authority considered by the Board to be appropriate for the purpose, of the circumstances of the injury and to

co-operate with the police or other authority in bringing the offender to justice; or

(b) the applicant has failed to give all reasonable assistance to the Board or other authority in connection with the application; ...

8. Where the victim and any person responsible for the injuries which are the subject of the application (whether that person actually inflicted them or not) were living in the same household at the time of the injuries as members of the same family, compensation will be paid only where -

(a) the person responsible has been prosecuted in connection with the offence, except where the Board considers that there are practical, technical or other good reasons why a prosecution has not been brought; and

(b) in the case of violence between adults in the family, the Board are satisfied that the person responsible and the applicant stopped living in the same household before the application was made and seem unlikely to live together again."

Then it is said:

"For the purposes of this paragraph a man and woman living together as husband and wife should be treated as members of the same family."

In the light of the chairman's affidavit it would appear that the Board were fully entitled to conclude that, first, they were not satisfied that a crime of violence had been committed because they did not believe the applicant's evidence; secondly, that they were not satisfied that there was sufficient justification in delay in reporting the matter, and that she had deliberately concealed from the police that she had returned to live with Mr Kilvington in 1991; and, thirdly, that she had deliberately withheld that information from the Board. If that is so, then plainly they were justified in not making an award. But the judge held that there was a breach of the rules of natural justice. He said that there was a failure of

communication which led to the impression that the applicant did not receive a fair trial. After referring to the affidavits of Miss Smith and the applicant he said this at page 8E, and I must read this passage because it is the basis of his judgment. The judge also referred to paragraph 4 of Mr Graeme Hamilton's affidavit which I have also read. He said this:

> "It has to be accepted that the chairman was doing his best from recollection. It is unfortunate that his affidavit was not expressly prepared in response to those particular passages in the affidavits of the applicant and Mrs Smith, which I have read.
>
> The chairman does not seek to controvert those matters, yet it is accepted by him as a matter of reasonable interpretation of the paragraphs that I have read, that had the applicant's behaviour given the Board cause to think that she was unable to take proper part in the proceedings he had no doubt that he would have adjourned the hearing.
>
> What seems manifest to me is that there is here clear evidence of a failure of communication or appreciation which has led to the creation of the impression that the applicant did not receive a fair hearing, and I put it no higher than that. Were I to do so, I may be unjustly criticising the Board. I might also be encouraging over-optimism on behalf of the applicant, that when the matter, as it must in my judgment, goes back before a differently constituted sitting of the Board, it is reconsidered. The strong inference which arises from paragraph 4 of the chairman's affidavit is here was a distressed woman; this is what we commonly find in these cases; there was nothing to indicate that we cannot safely embark on our inquiry. In my judgment, having regard to the uncontroverted evidence, particularly of Mrs Smith, in relation to the applicant's state and what she said about it, this was a case which the appearance of injustice has been created."

No doubt, if the Board had not given the applicant an opportunity to give evidence and explain the matters that concerned them, there would have been a failure to provide a fair hearing, but it is now accepted that Miss Mattison and Mrs Smith were wrong when they asserted that the applicant had not given evidence.

Mr Blake QC submits that a serious allegation was put to the applicant without prior warning

A and in those circumstances the Board should have done more to satisfy themselves that she was in a fit state to answer questions about that matter. He submits that they were put upon enquiry that she might not be fit to do so, because she had a history of psychiatric treatment B and had come from in-patient treatment on the day in question and it was not disputed that she was weepy and distressed.

C The mere fact that someone is a psychiatric patient or has psychiatric problems does not mean that they cannot give evidence, though it sometimes afford an explanation as to why their evidence is not reliable. In this case it seems to me that the Board were entitled to conclude from the fact that the hospital (where she had been an in-patient) allowed her to attend the D hearing, the medical authorities considered her fit to do so. Those authorities must have appreciated that she might be required or wish to give evidence. Moreover, the Board were also entitled to conclude that, if the social worker who accompanied her had doubts about her E ability to give evidence, she would have said so and then the matter of an adjournment would have been considered.

F The fact that the applicant appeared to be weepy and distressed is not, in my judgment, a reason for concluding that she was not capable of giving evidence. As Mr Hamilton said, unhappily that is the common experience of the courts in relation to women when they have G to give evidence about sexual offences committed against them.

It is plain from Mr Hamilton's affidavit that the Board did not consider the fact she had come

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from a psychiatric hospital or was weepy and distressed as a sufficient reason for thinking that she might not be able to give full and truthful answers to questions or explain why she had concealed matters from the police and given a patently false answers to the enquiries as to when she and Mr Kilvington last lived together. Even now, as I have pointed out, there is no evidence that she was not fit to give evidence and there is no finding of the judge to that effect.

There is now before the court a report from Dr Zaman, the psychiatrist who was in charge of her at the time. That was not before the Board, but it was before the court in the judicial review proceedings and it gives no support for any proposition that she was unfit at the time. On the contrary it shows that she was released for the purpose of attending the appeal hearing.

It is not sufficient, in my judgment, that the applicant herself conceives the idea she has not been given a fair hearing. It must be shown that there is some procedural step which fairness required the Board to take and that they failed to take it. Although the judge does not spell out what that step was, I think it is implicit in his judgment he thought that the Board of its own motion should have adjourned the case and obtained medical evidence to satisfy themselves that she was fit to give evidence. But having regard to the chairman's affidavit it seems to me that there was nothing in the matters which either were or should have been apparent to the Board that required such a course.

The criticism that the chairman did not answer the affidavits is, I think, misconceived, with

all respect to the judge. I agree that it is pity he did not refer explicitly to those affidavits, but it is obvious that he had read them and was answering them. He specifically refers to the allegation that she was not asked to give evidence and refutes it, and he deals with the position of her distressed condition. I differ with reluctance from a decision of such an experienced judge as Turner J but I have come to the clear conclusion that he was in error in this case. He gave too much weight to the subjective feeling and faulty recollection of the applicant which was clearly not justified by what actually occurred.

I would allow the appeal.

LORD JUSTICE HENRY: I agree.

LORD JUSTICE ALDOUS: I also agree.

Order: Appeal allowed; order of court below be set aside; legal aid taxation of respondent's costs.