IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST

CASE NO: CO/2990/94

Royal Courts of Justice
Strand
London WC2

Thursday 30th November 1995

B e f o r e:

MR JUSTICE BUXTON

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REGINA

-v-

CRIMINAL INJURIES COMPENSATION BOARD

Ex parte KATHLEEN MILTON

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(Computer Aided Transcript of the Stenograph Notes of
John Larking, Chancery House, Chancery Lane, London
WC2
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Official Shorthand Writers to the Court)

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MISS S YOUNG (instructed by Messrs Goodall Barnett James, Brighton) appeared on behalf of the Applicant.

MR M KENT (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 the Court)

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MR JUSTICE BUXTON: This is an application for judicial review brought by Miss Kathleen Milton, who complains of the rejection by the Criminal Injuries Compensation Board of a claim that she made to it on 29th August 1992.

The claim was an unusual one. Miss Milton was born in February 1943. In her claim to the Board she stated that she had been beaten by her stepfather from the age of 7 and had been raped by him when she was aged 13 (that is to say in 1956 or thereabouts). From 1956 to 1985 she was, unfortunately, for most of the time, a patient in psychiatric hospitals. She claimed to the Board that during that period she had been subject to abuse by the stepfather and, indeed, also by her mother, both on visits to the hospital and when she was temporarily at home on leave or at Christmas. She described a history of more than twenty years of sexual and physical abuse by her stepfather.

She came to London in the early 1970s, to a training centre, and complained that her stepfather had been a source of trouble to her even there, though it is not clear whether further alleged acts of abuse took place. Her parents died in early 1980s, her stepfather dying in early 1983.

Her case was that the traumatic events that she described had been blocked out of her consciousness,

and she only become aware of the events having happened, in the sense of them coming to her active attention, when she had the benefit of psychotherapeutic counselling from about 1986 onwards. It seems that the amnesia and subsequent unlocking of memory applied not only to the acts of which she complained during her childhood but also to the persecution that she had suffered as an adult, as would appear from her case, up to a time when she was well over 20 years of age.

I do not intend to set out the structure and form of the Criminal Injuries Compensation Scheme, which is familiar to those concerned with matters in this court. Under that scheme the application that she made in 1992, complaining of the acts that I have described, was very much out of time. The Chairman of the Board had to consider that matter.

On 21st January 1993 he said this in an interlocutory decision:

> "In all the circumstances I will waive the time limit in this case in which an application must be made. However, in my capacity as a Single Member I reject the application being ineligible under the Scheme since these allegations were never reported to the police. Paragraph 6(a) of the Board's scheme refers."

Miss Milton was dissatisfied with that decision and, as she was entitled to do under the Scheme, she applied for an oral hearing before a panel of three members of the Board which took place on 14th July

1994. Fairly shortly, and I acknowledge only fairly shortly, before that hearing she instructed solicitors, and had the benefit at that hearing of being represented by Miss Young, who has appeared for her on this present application. Miss Milton would have been made aware, from the material that she received from the Board, and in any event her advisers would have been aware, that the Board's Scheme provides, by paragraph 25 of the Scheme, in its opening words:

> "It will be for the applicant to make out his case at the hearing."

Then that paragraph sets out the way the Board will proceed, including:

> "The Board will reach their decision solely in the light of evidence brought out at the hearing, and all the information and evidence made available to the Board members at the hearing will be made available to the applicant at, if not before, the hearing."

Among other requirements placed on applicants to the Board, with which Miss Milton complied, is that they should give authority to the Board to seek medical reports and similar matters from persons who have dealt with the applicant previously. Miss Milton signed the standard form of authorisation, which reads in part:

> "I agree to give the Board all reasonable

assistance, particularly in obtaining medical reports, if they are needed.

I authorise the following to assist the Board in considering my application:

The hospitals I attended, and the doctors, dentists and others who treated me, to give reports on my injuries and treatment."

Before the hearing the Board, acting through the lawyer who acts as its advocate under the Scheme, provided Miss Milton and her advisers with what is described as a hearing summary, that is to say setting out brief details of the matters that the Board thought to be in issue. That said as follows:

"Issues to be decided by the Board:

1. Whether the applicant informed the police of the circumstances of the injury without delay.

2. Whether the applicant sustained injury directly attributable to a crime of violence."

It went on to say:

"Witnesses to be invited by the Board

Sue Haley (psychotherapist) Christine Sully, Jacqueline Emery."

Those latter persons were persons who had provided reports to support Miss Milton's application. They were all persons who had treated her when she was undergoing the course of psychotherapy to which I have already referred and they testified as to whether her own evidence was credible. They could not, of course, give any direct evidence of any of

the matters of which Miss Milton complained.

At the actual hearing Miss Milton was as I have said represented by counsel. She gave evidence setting out what she alleged had occurred to her. She was also asked, I am told by Miss Young, about specific incidents and gave evidence about that. Two of the therapists that I have referred to gave evidence, it would appear along the lines of their witness statements, and the other evidence referred to was admitted in writing.

The panel of the Board, of which Mr Hugh Carlisle QC was Chairman, rejected Miss Milton's application. It produced a statement of written reasons which indicates the evidence that it had heard and the history of the case and then said at paragraph 13:

> "After hearing all the evidence, the Board retired to consider the matter. The Board gave its decision as follows:-
>
> The burden of proof is on the applicant. Having heard all the evidence the Board is not satisfied that the applicant was the victim of a crime of violence and accordingly this application is refused."

Reference was made to paragraph 4(a) of the Scheme, the paragraph that had already been mentioned as being in issue in the hearing summary to which I have referred earlier.

The Chairman of the Board then went on as follows:

> "The Board reached its decision having heard the

applicant in full, having considered all that she said in evidence, having considered all the papers, the evidence and the supportive views of those who came to the hearing of the applicant and, of course, the submissions made on her behalf by her Counsel. The Board was asked to accept that this applicant had suffered what, if true, would have been a horrific series of assaults both physical and sexual, and those at a time when, for the most part, she was in the care of professional staff, who were there to protect her and to aid her. Despite the acceptance of her account by the two counsellors called on her behalf, the Members of the Board were unable to accept the applicant's evidence of what she said had occurred. The Board was not satisfied that, on the balance of probabilities, she had been the victim of a crime or crimes of violence."

In the application to this court there is therefore in issue a decision of that specialist tribunal on a question of credibility and fact after that tribunal had heard and seen witnesses deployed by the applicant in support of her case, including herself. There is obvious difficulty, in those circumstances, in asking this court to interfere. Miss Young, before me today, has made plain that the finding that the Board reaches is not disputed on the evidence that was before the Board. She complains of the Board's conduct and finding broadly on two grounds that she has developed in argument. For completeness, however, I ought to say first that there were other grounds adumbrated in the Form 86 A, on the basis of which the single judge gave leave, which have not been pursued before me. The first of those is that the applicant alleged in her application, and swore in an affidavit in support of

her application, that she had been in effect misled by an agent of the Board to think that she did not need to obtain medical evidence to support her application and indeed had been told that part of the case was established to the satisfaction of the Board. Evidence has been filed on behalf of the Board by the lady who dealt with this matter and with the applicant on behalf of the Board, in which she clearly denies that any such assurance had been given. Of course it would be difficult to reconcile such an assurance with the fact that what was put forward as corroborative evidence by the psychotherapists was adduced on Miss Milton's behalf at the hearing. Whatever the reason for all this I will say no more in this judgment than that point has been abandoned by the applicant.

Secondly, the applicant complained in her grounds (grounds 27 to 29) that the Board had not questioned the psychotherapeutic counsellors in respect of the phenomenon known as false memory syndrome and that they erred, if they based their finding on that, in not taking expert evidence in respect of it. That has not been developed at all before me by Miss Young but it has not been specifically abandoned. It seems to me that it is a point which cannot stand on its own without the other points that are pursued. From the decision there is no reason to think the Board did decide on that ground, as opposed to the grounds of credibility and plausibility in respect of which its

conduct is criticised in the way that I have indicated. I shall therefore say no more specifically about paragraphs 27 to 29 of the grounds.

The third point that appeared to be in issue on the grounds is the argument, and controverted by way of the skeleton argument which has been provided by counsel representing the Criminal Injuries Compensation Board, that even if there is no public law error to be discerned in the tribunal's approach to the case, nonetheless it is open to this court to interfere by way of certiorari. That raises large issues on which I am bound to say my own view is clear, but which I do not need to expound because Miss Young explicitly told me that her case was limited to complaints of breaches of public law duties on the part of the Board. She did not seek to pursue a separate argument that relief was available even if the Board had not strayed outside the limits on such a body (such as were, for instance, recognised as the available grounds of complaint in public law matters by Lord Diplock in his judgment in the Council of Civil Service Unions v. Minister of the Civil Service [1985] AC 374 at 410). If the Board have not failed in any of those respects she did not claim that she had any other ground for relief.

Having dealt with those matters, which I feel obliged to do because they have been the subject of the Form 86 A and of exchanges between the parties, I

now turn to the matters of substance which have been argued before me today. Between the granting of leave and the hearing before me the applicant's advisers have obtained from hospitals that were responsible for treating her during the 1960s and 1970s a very large bundle of material, some of which is in the form of reports written very recently by persons at those hospitals who examined the notes, and some of which is in the form of actual medical notes dating back at least to 1961. That material runs to some 180 pages. I will seek to explain what its alleged relevance to this case is said to be. Miss Milton's first complaint, of those that are sought are to be pursued, is that contained in paragraph 15 of the grounds, as follows:

> "The Board have a duty to take reasonable steps to obtain and provide evidence and make reasonable inquiries."

Reliance is placed upon the judgment of Hutchison J in

R v. Criminal Injuries Compensation Board, ex parte Parsons, an unreported case to which I shall have to return.

The application then says:

> "The applicant made out a prima facie case. If the Board were of the view that there were circumstances which threw doubt on the applicant's claim, the Board should have made investigations prior to the hearing. The Board failed to make any or reasonable inquiries into the applicant's case prior to the hearing. In

particular, the Board failed to contact any of the doctors, pyschiatrists, hospitals or rehabilitation centres where the applicant received treatment."

It is the material now before me that is said to comprise of the material that the Board would have obtained had it made such inquiries.

The basis of this complaint, as explained to me by Miss Young, is that the Board is an inquisitorial body. It is not, she says, a court of law in the technical sense and therefore it has a duty corresponding to its power to obtain evidence in appropriate cases. For the argument that the Board, as an inquisitorial body, has not merely power but a duty to obtain evidence, reliance is placed on the case of R. v. National Insurance Commissioner Chancellor, ex parte Viscusi [1974] 1 WLR 646. True it is that in that case the Master of the Rolls said that such a body was charged with making an inquiry as an investigating body, rather than simply adjudicating upon a lawsuit between opposing parties. As such a body, where issues were raised before it that it ought properly to investigate, it had a power, subject to the circumstances, to make such investigations. There is no doubt that the Criminal Injuries Compensation Board has power, if it is so minded, to make its own inquiries. Nonetheless, it has to be remembered that the Board's scheme provides that it is for the applicant to make out his or her own case at the hearing. When I asked her

whether she was contending that that provision was ultra vires the Board, Miss Young said that she was not. To start with, therefore, whatever the technical categorisation of this body as inquisitorial or otherwise, it is for the applicant to make out his or her case. The trial is not a trial in the formal sense of the word, not least of course because there is no party opposing. But it is for the applicant, in my judgment, to take the initiative. Parallels with other bodies such as the National Insurance Commissioners may not be very helpful. More helpful in guiding me as to how I should look at this matter seems to me to be the judgment upon which the applicant relies, the judgment of Hutchison J in the case of R. v. Criminal Injuries Board, ex parte Parsons (CO/1523/88, heard on 7th January 1990). In that case opposing contentions were advanced as to whether or not the Board should make inquiries, it having been contended by the applicant in that case that an interview note with a police officer, that might have shed light on whether or not the accused had committed the offence of which the applicant complained, should have been obtained by the Board when it was not produced by the police officer who gave evidence. The Board resisted that suggestion, and I am not minded to do what Miss Young invited me to do and construe the report of the Board's argument on that occasion in a narrow and pedantic way in order to limit the case that the Board was apparently

making on that occasion. Hutchison J said this at page 14 B:

> "It seems to me that, in the light of the provisions as to the burden of proof [the learned judge obviously had in mind the part of the Board's scheme to which I have already referred] and in the light of the passage in the judgment of Nolan J [I shall return to that]
> Miss Foster's submissions on behalf of the Board are to be preferred. Nowhere can I find any indication that the obligations of the Board extend to the making of full inquiries on its own initiative or the gathering of evidence, in the sense to which Miss Lang contends. Accordingly I reject her first submission."

The passage in the judgment of Nolan J, to which Hutchison J referred, is to be found in the case of R. v. The Chief Constable of Cheshire and Another, ex parte John Berry (unreported - 30th July 1985) at page 11 of Hutchison J's judgment, where he refers to the Board's scheme and then says:

> "The applicant may bring with him a legal adviser to assist him in putting his case, at his own expense. It is, however, the duty of the Board's staff -- generally known as the Board's Advocate -- to bring out all relevant evidence in the Board's possession, whether it is for or against the applicant. The proceedings are inquisitorial in nature. They are as informal as is consistent with the proper determination of applications, and are generally held in private."

What Nolan J was referring to and what Hutchison J mentioned was that it was not a duty of the Board to go out and look for evidence but rather a duty, if it had material in its possession, to make sure that the

applicant was apprised of it before the Board relied on it. That is something quite different from the requirement to make inquiries of its own initiative.

It seems to me that on any proper construction of what Hutchison J said in the Parson's case he was rejecting any suggestion that the Board should go out and gather evidence when that evidence has not been put forward or drawn to its attention by the applicant herself. I see no other explanation of his specific reference to what he describes as "the provisions as to the burden of proof". That is a judgment of another judge of this court which I am bound to follow unless I am satisfied that it is plainly wrong. Far from being satisfied that it is plainly wrong, I am, with the greatest of respect, satisfied that it is plainly right.

The implications of any other view are graphically illustrated by what I was told should have happened in this case. Miss Young argued that, irrespective of the duty on an applicant, the Board had a duty, shared with the applicant, to ensure that it had all the necessary information and had to satisfy itself that it had all the information that it needed. She said that in pursuit of that duty the Board should have written to every hospital where Miss Milton had been a patient, asking if they had evidence of the matters of which she complained and then, if necessary, they should have obtained hospital notes and an expert opinion on the basis of

those notes. I have to say that that contention seems to me to be entirely unrealistic. I do not start to understand how the Board, without help on those matters from the applicant, can be expected to work out, of its own initiative, what might, on the applicant's case, support her case. I also am bound to comment that it is far from clear that the material that it is said should have been obtained, and has now been obtained by the applicant, would in fact have presented itself to the Board as being obviously supportive of the applicant's case or relevant to its own inquiry. The only person who can know that, even as a matter of contention, must be the applicant herself and her advisers. In my judgement, therefore, the provisions of the Scheme, which are not in issue in this case, that is to say that it is for the applicant to make out her case, mean what they say. It is of course possible that there might be circumstances in which either the applicant persuaded the Board, or it became clear to the Board, that an applicant had particular difficulty in obtaining information or evidence about which it needed the Board's assistance. That is a different matter. But I cannot accept that it is the duty of the Board, of its own motion, if it considers that a case has not been made out on the matter put before it, then to consider whether the applicant's case might be better put than she had put it herself, and itself go out and seek evidence to support that

case.

I think I have said enough to indicate that that is not the law, nor did Hutchison J think it the law nor did Nolan J think it to be the law. The practical implications of it are far reaching and alarming. If the law were different it would be open to an applicant, as far as I can see on the argument before me, to make a case in outline terms and then expect the Board to pursue the matter from then on. Good practical sense as well as the justice of the Board's scheme prevent that from happening. I therefore reject the first ground.

The second complaint was not developed before me in quite the way it is developed in the grounds but it comes down to this. In paragraphs 19 to 22 of the grounds and further in paragraphs 24 and 25 of the grounds, complaint is made that there was no evidence called that put the applicant's credibility in question, and the Board therefore had no sufficient evidence on which it could, in effect, disbelieve her. Without the benefit of the material now to hand it was irrational for the Board, on the evidence before it, to disbelieve the applicant. That submission, I have to say, is quite impossible. If, as I have found, and as is not disputed, it is for the applicant to make her case it is clearly open to the Board to disbelieve her without there being specific evidence in contradiction of her. For the reasons that they have given the members of the Board

found Miss Milton's account to be implausible, indeed, incredible.

She was on notice from the Board's statement for the case that credibility was in issue, and the affidavit of Miss Ajose, who was the Board's Hearing Officer on that occasion, states, and there is no reason to think it not to be the case, that it was clearly understood at the hearing that the question as to whether the assaults against the applicant had actually taken place was in issue. It was entirely open to the Board to act on the evidence it did. It was not irrational either to act upon the evidence that it had or to fail to seek the evidence that the applicant would now seek to put before this court. The second ground of challenge is therefore also rejected.

I was asked by Miss Young to approach this case in a different way from the foregoing, and to look first at the material that she sought to put before me to see whether it supported the applicant's case, and only if I failed to have that view to go to other matters that I have now given judgment on. I am not prepared to approach the matter on that basis, not least because it seemed to me wrong to take the court's time in reading some 180 pages of new material with the detail and attention that would have been required if I had been minded to rule it out of hand in any event. Since the Board committed no error in not looking at it, it is irrelevant for

me to look at it now. I will, however, go so far as to say this. I have rejected this application without consideration of the merits, bearing or implications of the new evidence. But I have looked at some of that evidence, indeed a great deal of it. It does not contain, in my estimate, first-hand evidence of the assaults complained of, but rather medical reports of Miss Milton's condition and statements to her medical advisers. It seems to me -- and I hasten to say this is on a fairly rapid reading of it -- to contain little or nothing to corroborate, even by way of assertion by Miss Milton, the continual history of assaults and violence whilst in hospital which she claims to have induced the undoubted psychiatric problems from which she has very regrettably and unfortunately suffered. I emphasise that I decided the case on the grounds that I have indicated above, and not by way of assessment of the new evidence. However, having looked at a certain amount of that evidence, I thought it right to record my initial view that, even if admitted, it was unlikely, and I say no more than that, to advance the matter. But as I have made, I hope, abundantly clear, this case is dismissed without consideration of the new evidence. That evidence, whatever it said, would not have been admissible at this stage.

MR KENT: My Lord, can I ask that the application be

dismissed with costs, although the applicant is legally aided and therefore ask for the usual order that they should not be enforced?

A

MR JUSTICE BUXTON: You cannot resist that can you, Miss Young?
Application dismissed with costs.

B

MISS YOUNG: I would just ask your Lordship to bear in mind that this applicant's position is that not only is she legally aided but she is somebody who, having been in psychiatric care for such a long period, is extremely unlikely to ever be in a position to pay any costs. I would ask for legal aid taxation.

C

MR JUSTICE BUXTON: No. The Board is entitled to have an order for its costs, not to be enforced without the leave of the court. I am sorry to hear of your client's position, as I hope I made plain at the end of my judgment, but there is absolutely no reason why the normal order should not be made. If she continues to be unable to pay then she will not have to pay.

D

MISS YOUNG: My Lord, I would ask for an order for legal aid taxation.

MR JUSTICE BUXTON: Yes, you can have an order for legal aid taxation. Costs of this application shall be those of the respondent, not to be enforced without leave of the court. There will be a legal aid taxation of the applicant's costs.

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