IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

CO/566/91

Royal Courts of Justice
Friday, 16th July 1993.

Before:

MR JUSTICE HIDDEN

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Crown Office List

THE QUEEN

- v -

CRIMINAL INJURIES COMPENSATION BOARD

Ex parte JAMES POWELL

- - - - - - - - -

(Computer Aided Transcript of the Stenograph Notes of
John Larking, Chancery House, Chancery Lane, London WC2
Telephone No: 071-404 7464
Official Shorthand Writers to the Court)

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MR R McMANUS (instructed by Messrs Evill & Coleman, Putney) appeared on behalf of the Applicant.

MR P LAURENCE for MR R DOGGETT (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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Friday, 16th July 1993

MR JUSTICE HIDDEN: This is an application for judicial review of a decision of the Criminal Injuries Compensation Board. The applicant, James Powell, was the victim of an assault in December 1984. The decision he seeks to impugn is that of the Criminal Injuries Compensation Board of 15th November 1990 which refused his claim for compensation. The applicant was present when the Board's decision was communicated orally to him on that date. However, he only received the Board's written reasons on 22nd February 1991. The reasons were then sent pursuant to a request by his solicitors dated 4th February 1991.

Mr Powell's original application to the Board was made on 20th October 1986 and it was rejected by the single Member on 18th July 1988. The letter of that date to the applicant from the Board says this at the first paragraph:

> "This application for an ex gratia payment of compensation has been placed before Miss Shirley Ritchie QC, a member of the Board, who has disallowed the application and has made the following comments:-
>
> The applicant did not inform the police of the alleged circumstances of the injury (paragraph 6 (a)) of the Scheme."

On 15th September 1988 the applicant sought a hearing by a three Member Board, which hearing took place two years and two months later on 15th November 1990. The decision of that Board was to withold compensation from the applicant.

The applicant sought leave to move for judicial review of that decision and his application was originally refused by Popplewell J on 25th August 1991. Later, on 11th December 1991, the applicant was granted leave to move by Hutchison J. His Form 86 Notice sets out his complaints, in particular, in paragraphs 5 to 8 thereof to which I shall have to refer later. At a hearing on 25th June 1993 he was given leave to amend his grounds of application by adding a further ground in a new paragraph 9.

The respondent Board operates in accordance with the provisions of a scheme which took effect from 1st October 1979 in relation to all injuries on or after that date. The relevant paragraph of the Scheme in this case is paragraph 6(a) which provides:

> "The Board may withold or reduce compensation if they consider that --
>
> (a) the Applicant has not taken without delay all reasonable steps to inform the police .... Of the circumstances of the injury and to co-operate with the police ... or other authority in bringing the offender to Justice."

I have omitted immaterial words.

It is to be noted that the operative verbs controlling the noun "compensation" in the first words of paragraph 6(a) are twofold, namely "withold or reduce".

The facts which impinge on the making of that decision can be shortly stated. In December 1984 the applicant was employed by Threshers Ltd as Manager at an Off Licence in

Roehampton in South-West London. There was a dispute with a lady staff member concerning overtime pay. The husband of that member of staff came to the off-licence, remonstrated with and then abused the applicant and assaulted him causing him a number of injuries and in particular, breaking his cheekbone which necessitated two operations. The attacker then made various threats and stormed out of the premises, leaving the appellant prone on the floor. The Area Manageress happened to be passing sometime later and the police were then called. They attended at the premises. The applicant was taken by them to Queen Mary Hospital nearby and in the car was asked by a police officer, "Who has assaulted you?" He either gave no answer or a wrong answer in that he did not identify his attacker although he knew full well who that attacker was. At the hospital he was bruised, upset and in shock and also said he was,"Very frightened". He feared that the man might come back. It was in that frame of mind that he failed to give the police the name of his attacker.

The aftermath of the attack was catastrophic for the applicant, he had a complete mental collapse, and has not worked since. The two operations, of which I have spoken, which he had in January and February 1985 were insignificant in comparison with the level of psychiatric damage he suffered. It was in respect of that damage and his consequent lack of employment that he sought compensation

from the Board. The Board's decision, pursuant to paragraph 6(a), was not to reduce the amount of compensation awarded to him, but rather to withold compensation altogether. It is necessary to look at the reasons the Board gave for that decision. The Board's written reasons, supplied with a letter of 27th September 1991, run to 21 paragraphs. Paragraphs 1 to 19 are not really an expression of reasons but a record of what happened at the hearing. Paragraph 20 then states that the Board then retired to consider their decision and the reasons for the decision are given in paragraph 21. The paragraph reads:

> "The Board stated that although they had sympathy for the Applicant, his failure to inform the police of the name of the assailant precluded him from an award under Paragraph 6(a) of the Scheme."

The verb used "it is to be noted" is "precluded". Mr Doggett, for the applicant, drew my attention to the meaning of the word "preclude" in the Oxford English Dictionary as being "To exclude or prevent: make impractical". He says it is apparent from the use of those words in the decision letter, first that the Board carried out no exercise of its discretion at all. Second, they gave no thought to the alternative option to witholding compensation, namely to reduce it. He says, thirdly, that the decision is so unreasonable as to be absurd and perverse. Mr Doggett then drew attention to paragraph 15 of the reasons. At paragraph 15, again dealing with the content

of the hearing rather than any reasons for the decision, the words used are:

> "The Board's Advocate put to Mr Powell the precise terms of Paragraph 6(a) which the Board's Advocate contended the applicant did not comply with."

I note in passing that it may have been at that stage that the proceedings before the Board began to go wrong, because it is quite clear that the case for the Advocate to the Board was in fact the opposite of what was being set out in paragraph 15. It was being submitted by the Advocate to the Board that the words of sub-paragraph (a) of paragraph 6 did in fact apply to the applicant and therefore the appropriate contention for that applicant should have been that the applicant was an appropriate candidate for the witholding or reduction of compensation in accordance with the words of paragraph 6 which immediately precedes subparagraph (a).

I was referred to the affidavit of Sir John Palmer, the Chairman of the particular Board, which affidavit was sworn on 11th February 1992. In that affidavit the deponent swears, in paragraph 3, to this effect:

> "I have now seen the Grounds relied upon for this application for judicial review and would comment as follows:
>
> 1. This ground sets out paragraph 6(a) of the Scheme.
>
> 2. This is factually correct.
>
> 3. Although no evidence was given by a Police Officer we were aware that there had been no prosecution of the alleged assailant Piercy. We inferred from

this, not unreasonably, that this was because of the Appellant's decision not to reveal the name of his assailant.

4. We were fully aware of the Applicant's medical condition following this incident. Although we were sympathetic, we felt that he should have revealed the name of his assailant to the police.

5. Applying the terms of the Scheme we felt it was a decision that was completely within our discretion to reach.

6. The criteria for the interpretation of paragraph 6(a) is to be found in the Statement, of which I enclose a copy marked "JCP 1".

7. The decision of the single member did not form part of our reasons to disallow the application, as a Board at a hearing considers the matter de novo. Full reasons were sent to the Applicant's solicitors by way of letter on 27th September 1991 and a copy is herewith enclosed as "JCP 2".

4. I have consulted my colleagues and they have confirmed the contents of this affidavit."

In referring to criteria for the interpretation of paragraph 6(a) the deponent exhibited a copy of a statement at "JCP 1". Those criteria are therefore set out in a statement which starts with these words:

> "This statement is 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 and after 1 October 1979. However, it is emphasised that each application will be decided on its merits and that what is said in this statement does not limit the discretion of an individual Board Member or Board Members at a hearing."

The statement has numbered paragraphs and it includes a paragraph, coincidentally also numbered 6A, which states as follows:

"A. **Informing the police or other authority of the circumstances of the injury**

1. It is important that the victim reports all the relevant circumstances. If he deliberately leaves out important information or purposely gives the police false information the application for compensation may be rejected.

2. A report made by a person who is not in a position to know the full circumstances of the injury may not satisfy the requirement.

3. It is the police to whom matters should be reported. Reports made to the employers, trade union officials, social workers and the like may not be acceptable.

B. **Co-operating with police or other authority**

1. The Board attach importance to the duty of the victim of crime to co-operate with the police with a view to the offender being apprehended and convicted. Failure to co-operate with the police usually results in no award being made.

2. Fear of reprisals is not as a general rule a valid excuse for failure to co-operate with the police."

I pause to note that the last passage states that fear of reprisals, (which was the situation in the applicant's case), is not, as a general rule, a valid excuse for failure to co-operate with the police. It is does not suggest that it is an automatic exclusion. That statement also includes, at paragraph 23, indications as to the way the hearing will conducted. It says:

"At the hearing the applicant must prove all aspects of his case. First, he must prove that he was the victim of a crime of violence or within one of the other categories mentioned in Paragraph 4 and that his application should not be rejected for any reason, for example, his conduct. Second, that there should be no reduction. Third, the nature and consequences of injuries in a non-fatal case. Fourth, any loss of

earnings, dependency and expenses claimed. Fifth, any other matter he alleges. No award will be made unless a majority of the three members at the hearing are satisfied on the balance of probabilities that the application is within the terms of the Scheme."

At this stage I should refer to the second affidavit of Sir John Palmer sworn on 30th June 1993. In paragraph 2 he says:

"I refer to Paragraph 21 in the Board's written reasons for on the decision in relation to this application. I confirm that in stating that the applicant's failure to inform the police of the name of his assailant precluded him from an award under Paragraph 6(a) of the Scheme, I and my colleagues on the Board, Mr Stuart Shields QC and Lord Macaulay QC, were exercising the discretion given to the Board by that paragraph of the Scheme and did not regard the Board as bound to refuse the award on those grounds."

Paragraph 3 states:

"I respectfully draw attention to Paragraph 3.4 of my first affidavit dated 11 February 1992 in which I stated that in applying the terms of the Scheme the Board felt that the decision to refuse an award in the circumstances of this case under Paragraph 6(a) of the Scheme was completely within our discretion to reach. The refusal of an award in this case was accordingly on the exercise of the Board's discretion under Paragraph 6(a) of the Scheme and the use of the word "precluded" in the Board's written reasons was not to indicate that the Board had in any way considered itself bound by the non disclosure of the name of the assailant to refuse an award."

I shall have cause to come back to that affidavit a little later in my judgment.

I was referred to three authorities -

R. v. Lancashire County Council, Ex parte Huddleston [1986] 2 All ER 941 R. v. Civil Service Board, Ex parte Cunningham [1991] 4 All ER 310 and finally, R. v. Criminal Injuries

Compensation Board, Ex parte Cummins reported in The Times, 21st January 1992. Of the three decisions I have referred to, I need only cite from R. v. Criminal Injuries Compensation Board, Ex parte Cummins in which Hutchison J held:

> "The failure by the Criminal Injuries Compensation Board to show in its reasons the basis of fact on which it relied to award what it considered the appropriate sum for the cost of the future care for a victim of crime of violence rendered those reasons inadequate and the award perverse."

In the course of his judgment, he said:

> "The applicant contended, inter alia, that from the original reaons given by the Board, three Queen's Counsel, there was virtually no indication of what evidence they had accepted or rejected and none as to how they had arrived at the figure for the cost of future care. And even in the amplified reasons given four months later after leave was granted to move for judicial review many questions were still left unanswered.
>
> His Lordship said that there had to be differences between cases where the obligation to give reasons was a statutory one, not the present case, and those whereit was not: R. v. Civil Service Appeal Board, Ex parte Cunningham (The Times March 11, 1991; [1991] 4 All ER 310, 319).
>
> Even in a case where there was no obligation to give reasons, his Lordship would assume that a body which in fact gave reasons was obliged to do so in a way which met the requirements of adequacy which the law imposed in cases where the duty to give reasons existed."

He went on to indicate what the reasons had not indicated. He said:

> "If the Board rejected those views the applicant needed to know its conclusion. Moreover, given the inference that the board accepted the genuineness of the applicant's desire to live independently, a clearer

indication was required as to the level of care it found to be necessary and how it was to be provided. What was at issue after all was the cost of care for no less than 42 years."

He concluded his judgment by saying:

"It was not clear from those reasons whether the board rejected the expert's assessment of the necessary level of care or the evidence that the applicant would employ persons outside the family to provide most of the care."

Mr Doggett submitted that the Board's decision in this case was a decision to which no Board properly directing itself on paragraph 6(a) could come. He said that the purpose of this scheme was to compensate victims of violence and the Board's discretion was to arrive at a decision which ranged between the making of a full award and the reducing of it from that figure down to nothing. Mr Doggett submitted that discretion here was not exercised. He said, in dealing with the statement to which I have referred, that in so far as the statement set out matters of policy that slavish adherence to such a policy is a fetter of the Board's discretion. He took me to the grounds set out in his Notice of Motion. I need, I think, only refer to three paragraphs thereof:

"5. The decision to withold compensation from the Applicant because he had not, immediately following the assault and out of fear of reprisal, told the police the name of his attacker was a decision which in the circumstances of the Applicant's case was a decision which no reasonable Board, properly directing itself as to the criteria to be applied under Paragraph 6 of the Scheme, could have reached.

6. The Applicant invites the Court to find that the Board should have applied the following criteria in exercising its discretion under Paragraph 6 namely:

(1) The Board should only withold or reduce compensation if satisfied that the failure to cooperate with police following the assault was unreasonable or such as could fairly be criticised in all the circumstances.

(2) The Board should only withold or reduce compensation if satisfied that the non-cooperation by the Applicant for compensation had or probably had a material effect on the inability or failure of the prosecuting authority to bring the assailant to justice having regard to the availability of other evidence as to the identity or guilt of the assailant and the reasons, if any, of the police or prosecuting authority for not taking steps to bring the offender to justice or for the failure of such proceedings.

(3) Where the Board is satisifed that (a) the Applicant's non-cooperation was in all the circumstances justified and unreasonable and (b) that nevertheless it probably played no material part in the fact that the assailant was not brought to justice, the Board should save in exceptional circumstances not withold all compensation but should only reduce the compensation it would otherwise have awarded."

(Mr Doggett drew my attention to the availability of other evidence which would be a quicker way of identifying the assailant)

Finally, paragraph 9, added by amendment:

"The Board failed to exercise its discretion under Paragraph 6(a) of the Scheme. The Board erred in law in deciding that it was precluded by Paragraph 6(a) and the Applicant's admitted failure to tell the police the name of his assailant from awarding any compensation."

Mr McManus, for the Board, referred to the first affidavit of Sir John Palmer. In particular, he referred me

to paragraphs 3, 5 and 6:

> "3. Although no evidence was given by a Police Officer we were aware that there had been no prosecution of the alleged assailant Piercy. We inferred from this, not unreasonably, that this was because of the Applicant's decision not to reveal the name of his assailant."

Paragraph 5:

> "Applying the terms of the Scheme we felt it was a decision that was completely within our discretion to reach."

Paragraph 6:

> "The criteria for the interpretation of paragraph 6(a) is to be found in the Statement, of which I enclose a copy marked "JCP 1".

Mr McManus submitted that the contents of paragraph 5 were indeed the position and that this decision was completely within the Board's discretion to come to. In referring to the criteria, he took me to paragraphs in the Guide which were set out in the exhibit of the affidavit of Mr Foster. I should, for the purpose of clarity make it clear here that we are dealing with three different topics, that called the Scheme, that called the Statement and the third, the Guide, which is formerly called a Guide to the Criminal Injuries Compensation Scheme. In that document, Mr McManus took me to paragraph 17 which says:

> "Even if there is no doubt that you have sustained "personal injury directly attributable to a crime of violence" for which compensation could be awarded under the Scheme you will also have to show the Board that an award should not be refused or reduced for one of the reasons set out in **paragraph 6** of the Scheme. You should read this paragraph with particular care. The following notes are to help you anticipate the Board's likely approach."

"Informing the police (Paragraph 6(a))

18. It is not necessary that the offender should have been convicted before an award can be made. Some offenders are never found. However, the Board attach great importance to the duty of every victim of violent crime to inform the police of all the circumstances without delay, and to co-operate with their enquiries and any subsequent prosecution.

19. The condition that the incident should have been reported is particularly important since it is the Board's main safeguard against fraud. A victim who has not reported the circumstances of the injury to the police and can offer no reasonable explanation for not doing so should assume that any application for compensation would be rejected by the Board altogether. Failure to inform the police is unlikely to be excused on the grounds that the victim feared reprisals or did not recognise his assailant or saw no point in reporting it -- I stress the word 'unlikely'-- Reporting such incidents may help the police to prevent further offences against other people.

20. It is for the **victim** to report the incident personally unless he was prevented from doing so because of the nature of his injuries."

I need not read further in that paragraph nor read from later paragraphs, save to stress that paragraph 23 deals with exceptional cases and paragraphs 25 and 26 contain matters which are material to this application:

"25. Even if the incident has been promptly reported to the police the Board have discretion to refuse or reduce compensation if the victim subsequently fails to co-operate with the police in bringing the offender to justice.

26. Essentially the Board make a decision between two situations:

a. An applicant refuses to co-operate with the police, for example, refuses to make a statement, attend court or such like conduct. The Board make

no award.

b. The applicant was willing an identification parade, name the assailant, attend court or it is then his duty to contact the police and co-operate with their enquiries as soon as he is able to do so. It is not sufficient to assume that the incident will have been reported by someone else because, even if it has, that person may not have known the full circumstances. Reports by, or the evidence of friends, relatives or workmates will not be sufficient if there was no good reason for the victim not informing the police as well."

Mr McManus submitted that I should look at the material before the Court and I must accept the affidavit as true. He said that it showed that the Board looked both at the factual and at the policy basis. He stressed the importance of paragraphs 19 and paragraph 26(a) where he said, "I regard paragraph 26(a) as of particular importance in this case." Mr McManus contended that the Board had not fettered its discretion and had given acceptable reasons. As to perversity, he said the Board had considered all matters and had come to a conclusion that was appropriate.

Bearing the two conflicting arguments in mind, I am satisfied that the last paragraph of the Board's reasons, which is in fact the only paragraph dealing with the Board's decision, does not in fact provide any reasons for coming to the decision to withold compensation completely. It is silent as to the reasons which "preclude" the award of compensation, which means that no reasons have in fact been given. I wish it to be clearly understood that I accept the affidavits of Sir John Palmer were sworn with care and with

honesty but such later documents cannot override the actual words given by the Board at the time in explanation of their decision. An attempt to look back and reconstruct what was in the mind a long time ago cannot alter or overide or prevail over words actually used at the time. It follows that there has therefore been no explanation of why the Board came to the decision it did. It therefore follows that the absence of such reasons conflicts with the necessity to give adequate reasons which was referred to by Hutchison J in Ex Parte Cummins.

It may well be that perhaps subconsciously the Board were following the words of paragraph 26(a) of the Guide. If they were, they were effectively giving effect to a policy decision. The Board has, of course, every right to formulate a policy provided they do not follow slavishly that policy but in each case look properly at the facts and circumstances of the instant case. They must look to see whether it is appropriate in that case to follow that policy or whether the circumstances of the case make it appropriate for the Board to adopt a different course and to arrive at an award which is appropriate. If they do not carry out that exercise, they decide the case purely on policy and not in relation to the facts of the particular application.

There are, here, no valid reasons for the way in which the Board's discretion came to be exercised. I am satisfied that the Board in coming to its decision was not, in fact,

directing its mind to a discretion on the facts but only to declared policy. It will follow that I find that there was no proper exercise of discretion and the Board's decision in this case was the result of a fettering of that discretion. It follows that the Board's decision, in failing adequately to demonstrate the reasons for its decision and in saying, wrongly in law, that the applicant's, "failure to inform the police of the name of his assailant precluded him from an award under paragraph 6(a) of this scheme" was Wednesbury unreasonable and was one to which no Board properly directing itself could have come. It is clear that in the decision letter the failure to give adequate reasons was perverse.

I therefore quash the decision of the Criminal Injuries Compensation Board set out in the decision letter sent with the letter of 27th September 1991, that decision being the decision of the Criminal Injuries Compensation Board 15th November 1990, and I direct that there be a rehearing of the appellant's application for compensation before a differently constituted Board of Members.

MR LAURENCE: My Lord, do you award the applicant the costs of the application?

MR McMANUS: My Lord, obviously I cannot resist the application for costs.

MR JUSTICE HIDDEN: Very well, there will be costs. Is there an application for legal aid taxation?

MR LAURENCE: Yes, my Lord.

MR JUSTICE HIDDEN: Yes, you may have legal aid taxation. Thank you both for being so accommodating in relation to time that the Court has had to sit.

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