Case No: C/2002/1358

Neutral Citation Number: [2003] EWCA Civ 234
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
MR JUSTICE SILBER

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 3rd March 2003

Before :

THE LORD CHIEF JUSTICE OF ENGLAND AND WALES
LADY JUSTICE HALE
and
LORD JUSTICE LATHAM

Between :

R (on the application of J.E.)	Appellant
- and -	
The Criminal Injuries Compensation Appeals Panel	Respondent

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Paul Bowen and Henrietta Hill (instructed by Leonard and Swain) for the Appellant
Robin Tam (instructed by The Treasury Solicitor) for the Respondent

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Judgment
As Approved by the Court

The Lord Chief Justice: This is the judgment of the Court.

This is an appeal from a decision of Silber J given on 23 May 2002. Silber J dismissed an application for judicial review of a decision of the Criminal Injuries Compensation Appeal Panel (the "Panel") dated 7 December 1999. Permission to appeal was granted by the full court presided over by Auld LJ on a renewed application. The reasoned judgment of Auld LJ is before us. That judgment provides considerable assistance in determining this appeal.

The Issue on this Appeal

The issue on this appeal is whether the Panel came to a decision which is lawful. The Panel decided that the appellant was not entitled to compensation under the criminal Injuries Compensation Scheme (the "Scheme") because he had consented to the sexual activities on which his application was based. The Panel came to this decision even though it is and was common ground that the applicant was a 'defective' and therefore his consent would not be a defence to a charge of indecent assault contrary to section 15 of the Sexual Offences Act 1956 (the "1956 Act").

The Statutory Provisions

Section 15 of the 1956 Act provides:

> "(1) It is an offence for a person to make an indecent assault on a man.
>
> (2) A boy under the age of sixteen cannot in law give any consent which would prevent an act being an assault for the purposes of this section.
>
> (3) A man who is a defective cannot in law give any consent which would prevent an act being an assault for the purposes of this section, but a person is only to be treated as guilty of an indecent assault on a defective by reason of that incapacity to consent, if that person knew or had reason to suspect him to be a defective."

Section 14 of the 1956 Act is in similar terms to section 15 save that it refers to an assault on a woman.

A 'defective' is defined by section 45 of the 1956 Act as meaning "a person suffering from a state of arrested or incomplete development of

mind which includes severe impairment of intelligence and social functioning".

The Scheme under which criminal injuries compensation was paid was originally non-statutory. However, the Criminal Injuries Compensation Act 1995 (the "1995 Act") authorised the Home Secretary to introduce or amend the Scheme. The Scheme with which we are concerned and to which we will be referring hereafter came into force on 1 April 1996.

Under paragraph 6 of the Scheme, compensation may be paid to:

> "An applicant who has sustained a criminal injury. . .".

A 'criminal injury' is defined by paragraph 8 of the Scheme as:

> "8. For the purposes of this Scheme, 'criminal injury' means one or more personal injuries as described in the following paragraph, being an injury sustained in Great Britain and directly attributable to:
>
> (a) a *crime of violence*... "

What is a "crime of violence" is not defined. Guidance has been given in the cases of R *v Criminal Injuries Compensation Board, ex parte Webb* [1987] 1 QB 74 and *R (August) v The Criminal Injuries Compensation Appeal Panel* [2001] QB 774, to which we shall return.

A '*Personal injury*' is defined by paragraph 9 of the Scheme. That paragraph states that:

> "9. For the purposes of this Scheme, *personal injury* includes physical injury (including fatal injury), mental injury (that is, a medically recognised psychiatric or psychological illness) and disease ... Mental injury or disease may either result directly from the physical injury or occur without any physical injury, but compensation will not be payable for mental injury alone unless the applicant ... (c) was the *non-consenting victim of a sexual offence* (which does not include a victim who consented in fact but was deemed in law not to have consented)..." (emphasis added)

Paragraphs 18 and 64 of the Scheme places the burden of proof on the applicant to show that on the balance of probabilities he has suffered a 'criminal injury'.

In additional written submissions Mr Tam, on behalf of the Panel, explains the manner in which applications for compensation are considered under the Scheme. We gratefully set out the following

account of how claims are usually dealt with, based on his submissions:

> *The Criminal Injuries Compensation Authority is a public body which has been established to administer the Scheme. Decisions made by the Authority whether to award compensation are essentially administrative decisions. The award of such compensation is a disbursement from public funds in circumstances in which Parliament has decided that it is in the general public interest to do so. The Authority has a general duty to the public at large to make payments where they are provided for by the Scheme, and a corresponding general duty to the public not to make payments which are unnecessary or unjustified.*
>
> *Initially, such decisions are made by claims officers, as provided by section 3(4)(b) of the 1995 Act. The 1995 Act also requires that provision be made for reviews of first instance decisions. Such reviews are also conducted by claims officers. There is nothing akin to litigation at either of these stages.*
>
> *The Panel becomes involved if an applicant wishes to appeal from a decision of a claims officer. Appeals are determined by adjudicators appointed under the 1995 Act. The Panel's members are carefully selected to reflect the experience and expertise necessary to deal with cases which are often complex and difficult.*
>
> *In discharging its functions, the Panel adopts an inquisitorial approach, consistent with the administrative nature of the Scheme and with its fundamental purpose of disbursing public funds in the circumstances prescribed or authorised by Parliament. The Scheme also provides that hearings should be informal. The Panel is assisted in its task by Presenting Officers. Unlike the 'Board Advocates' under the previous non-statutory scheme, Presenting Officers are not required to be (and generally are not) qualified lawyers. They are in general civil servants of (or acting at) Higher Executive Officer grade.*
>
> *Presenting Officers are trained and encouraged to act impartially, and to explain to applicants that their function is to act impartially but, as part of doing so, to test the facts and evidence by asking questions which are sometimes "difficult".*
>
> *It would not be in the general interests of applicants for the Panel to adopt a more adversarial approach to its hearings. Many applicants are unrepresented or represented by non-professionals. An inquisitorial approach is more likely in these circumstances to ensure that all the relevant facts are brought out into the open for proper consideration.*

The Significance of the Panel's decision

No transcript is available of the hearing before the Panel to which this appeal relates. It was, however, presided over by a distinguished lawyer, Sir Richard Gaskell, and we have his notes. There is no statutory right of appeal against the decisions of the Panel. The only remedy is by way of judicial review. As there is no appeal, it is the findings of the Panel to which we must pay particular attention and we can only interfere with the

decision of the Panel if it did not reach its decision properly or its decision is one to which it could not legally come. It is also the evidence which was before the Panel which is critical. However, in relation to the law we are not necessarily confined to the legal position as it was when the Panel came to their decision. We are entitled to take into account decisions of the courts that have clarified the law since that time. This is particularly relevant in this appeal because there has been an important decision of this court in *R (August) v Criminal Injuries Compensation Appeal Panel; R (Brown) v Criminal Injuries Compensation Appeal Panel* [2001] 2 WLR 1452 ("*August*") which post dates the decision of the Panel.

The Facts

The fact that the present case was awaiting the outcome of the decision in *August* explains why this appeal has been delayed. However, the decision in *August,* while it is important, is by no means conclusive to the outcome of this appeal. This is because, as we will see, the facts of this case differ from those in *August.*

We are dependent, for the findings and reasons of the Panel, on Sir Richard's note of his decision and the notes prepared by the applicant's counsel who appeared before the Panel, Miss Henrietta Hill.

The appellant, E, made an application for compensation under the Scheme based on a number of alleged indecent assaults to which he was subjected by his cellmate, F, while on remand at HM Prison Winchester between 13 and 22 January 1998. E's application was refused by the Panel, presided over by Sir Richard. Sir Richard's note is in the following terms:

> "The applicant's IQ is sufficiently low to indicate to us that he could not have consented at law to the acts of buggery upon him. We had then to consider whether he had consented in fact despite his low IQ. The applicant, in his two statements to the police and his one statement to his cell mate PGN mentioned a number of incidents in which he was buggered by F, a number of incidents of masturbation and finally of two occasions when he buggered F. In his evidence before us he denied absolutely that he buggered F on any occasion. The police officer in her evidence said that she believed what the applicant said in the two statements she took from him and Counsel for the appellant urged us to accept that the contents of the three statements were to be preferred to the applicant's evidence today.
>
> In his evidence the applicant also said, and accepted that it was a variation from his three statements, that he pressed the flap about 5 times in attempts to call prison officers to his cell to stop

F from molesting him. He said that the alarm, which would have been triggered by pressing the flap, brought no response from prison officers. He said to us that F did nothing although he knew that the applicant had pressed the flap twice, nothing nasty and did not hit him but merely moved him away from the flap. Although the applicant told us he was afraid that F might "have his mates on me" it had not stopped him from pressing the flap. As to whether the applicant ever did press the flap we were not satisfied. However, in the fortnight they had been together in a cell the applicant did not apparently complain to prison officers. Although the applicant was separated from F for part of the day during which time he did not report F's conduct to prison officers apparently.

As to whether or not he consented in fact we took account of this failure to alert the prison authorities and we considered the question of the applicant's buggery of F. Again the applicant's evidence was of fear of what F's mates might do and therefore he buggered F but he did not say that F had done or threatened to do anything to him if he did not do those acts or suffer the acts done upon him by F. We were not unmindful of the physical difficulties that might be experienced in buggering another when afraid of the consequences particularly when on one occasion the act, according to the applicant, lasted some 20 minutes.

In all the circumstances of the evidence we heard and considered we formed the opinion that whilst the applicant could not give consent at law he did consent in fact."

Mr Bowen, on behalf of E, submits that in view of the decision and the evidence before the Panel, the following facts, that are critical to the outcome of this appeal, are really not in issue:

Although the Panel did not say so in terms the applicant is in fact within the statutory definition of a defective and so for the purpose of the statutory offence of indecent assault he could not consent. E was therefore the subject of a criminal offence.

E, who was 22, had had no previous sexual experience before what occurred between him and F. F was a much older man. He was 45 years of age, but looked much older, and was in prison on remand for sex offences against young boys.

The police officer, who took the appellant's statement, believed the appellant was speaking the truth in his statements.

The evidence of the chartered clinical and forensic psychologist (Joanna Brook-Tanker), contained in her report of 19 January 1998, which was unchallenged, made it clear that the applicant was vulnerable to the influence of others, "highly suggestible" and had "many psychological and social needs".

F, prior to the offences occurring, was "grooming" E. It is likely that E would have been very receptive to this "grooming" because E had been the victim of bullying in

the past and would have been anxious to retain the protection which F could give him. Accordingly, F was in a position where he could exert undue influence on E. F was clearly determined to obtain the Governor's agreement to share a cell with E and he was successful in obtaining authority to do so, notwithstanding his record and the offences with which he was charged.

The Law

The question as to when an applicant, under the Scheme, is entitled to compensation has been subject to considerable debate. But there now has been a series of authorities culminating in the decision in *August* which reviewed the earlier authorities. The courts have come to the conclusion that in order to be entitled to compensation, under the Scheme, it is not sufficient, particularly in the case of sexual offences, for the applicant to show that another person has been guilty of what would be a criminal offence, even though that offence would involve a degree of force.

The decision in *R v Brown* [1994] 1 AC 212 provides an example of why the policy is to require an applicant usually to show a lack of consent to what had happened. In that case, although there was clear consent to what happened, the appellants being a group of sado-masochists, the House of Lords, by a majority, decided that the appellants were guilty of committing criminal offences under sections 20 and 47 of the Offences Against the Person Act 1861 and that the victims' consent afforded no defence to those charges. In the case of such an offence, it would be an absurd result if a willing participant could obtain compensation for the injuries, the infliction of which had been welcomed. A willing participant is hardly a victim and the Scheme is intended to compensate victims. It is to avoid this absurdity that, as the authorities make clear, consent can be fatal to a claim for compensation for an offence of violence. Very much the same result could have been achieved by a separate route, namely that provided by paragraph 13(d) of the Scheme which states:

> "A claims officer may withhold or reduce an award where he considered that:
>
> (d) The conduct of the applicant before, during or after the incident giving rise to the application makes it inappropriate that a full award or any award at all be made."

However, in the authorities, so far, paragraph 13(d) has not played a prominent role. This is surprising since the advantage of the paragraph is that it enables the Panel not merely to either grant or refuse compensation but to modify an award to reflect the merits of the claim.

Turning to the decision in *August*, this court was considering two cases together, the case of *August* and the case of *Brown*. The facts of these cases are different from those here.

August, at the time of the offences was 13. Buggery took place when August met a man aged 53 in a public lavatory. August had gone to the lavatory specifically "looking for homosexual congress". The buggery relied upon, involved August penetrating the man. August had gone to the lavatory to obtain money from an activity of this sort.

Brown involved boys at an approved school who were all of the same age and in relation to whom the Chairman of the Panel had stated, "it was more likely to have been consensual conduct between boys than something forced on him or which he had done through fear or because of assaults".

In both cases therefore, it was decided that there was consensual conduct, the nature of which, in accordance with the policy to which we have already referred, meant that compensation was not be payable. Neither August nor Brown were thought capable of being described as victims of the particular crimes in question. This does not mean that earlier in their lives they were not the subject of crimes in relation to which they would have been victims.

Correctly, Mr Tam, who appears on behalf of the Panel, does not rely on the decision in *August* because of its facts but because of the statements it contains as to the law. The first judgment in *August* was given by Buxton LJ. In considering the proper construction of a "crime of violence", Buxton LJ referred to *R v Criminal Injuries Compensation Board ex parte Webb* [1987] 1 QB 74 ("*ex parte Webb*") and the six propositions of law which it was submitted by counsel could be drawn from *ex parte Webb*. Buxton LJ then added that:

> "21. I agree with [Mr Crow, counsel for the Panel] as to the first five of these. The sixth is a matter of more difficulty, a difficulty that has some bearing on the appeal in *Brown's* case. The six propositions were: (a) the concept of "crime of violence" is not a term of art. (b) The issue for the panel of whether a crime of violence has taken place is a jury question. As it was put in *Ex p Webb* [1987] QB 74,78, it depends on "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". (c) That question is not technical or complicated: as it was put in *Ex p Webb*, the panel, (at p80):
>
> "will recognise a crime of violence when they hear about it, even though as a matter of semantics it may be difficult to

produce a definition which is not too narrow or so wide as to produce absurd consequences . . . "

(d) The correct approach is not to classify particular offences, i.e. particular crimes such as "buggery" or "assault", as crimes of violence. Rather, the task of the panel is to decide whether the events that actually occurred were (i) a crime; (ii) a crime of violence. (e) In performing that task, the panel has to look at the nature, and not at the results, of the unlawful conduct. (f) A test (or possibly the test) for the existence of a crime of violence is whether there has been the infliction or threat of force or the doing of a hostile act.

22. All of these propositions are amply justified by *Ex p Webb* apart from the last of them. In that regard, what Lawton LJ said in *Ex p Webb*, at that, at pp 79-80, was that:

"Most crimes of violence will involve the infliction or threat of force but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the [panel], as a fact finding body, have to apply to the case before them." (emphasis added)"

As far as August was concerned Buxton LJ stated that his case was not that he had not consented but rather because of his psychological state and history his consent was vitiated. He said, however, that the Panel's view was that while such considerations might excite sympathy they did not mean that August did not consent in fact.

Buxton LJ emphasised that the presence of consent was not conclusive of whether or not an applicant had been the victim of "crime of violence". Buxton LJ said, and we agree, that such "an assumption, if it were to be made, would in my view be inconsistent with the approach laid down in *ex parte Webb* [1987] QB 74". However, in *August* this was the only live issue. Here it is relevant to point out that the paragraphs of the Scheme, on which the court in *August* focused, were paragraphs 6-12 which come under the heading "Eligibility to Apply for Compensation". In this case we would again draw particular attention to paragraph 13(d), to which we have referred above, and which comes under the heading "Eligibility to Receive Compensation". The paragraphs dealing with eligibility (13-16) underline the discretionary nature of the Scheme and the fact that a broad approach is required. It is clear that it would be wrong to adopt a narrow, black and white, approach to the question of consent. Rather, there needs to be a broad approach, a jury approach, an approach which involves Claims Officers and in turn, the Panel, asking themselves whether the conduct suggested as amounting to a bar to recovery (here consent) does make

it inappropriate that an award shall be made. Put another way, should the applicant be described properly as a victim?

Sir Anthony Evans, in his judgment in *August* referred in detail to *ex parte Webb* and cited from the judgment of Lawton LJ (at pages 79-80) that, "most crimes of violence will involve the infliction or threat of force but some may not". Sir Anthony added that Lawton LJ "contemplated therefore a "crime of violence" for the purposes of the Scheme where force was neither threatened or used" (paragraph 73). Another point of importance made by Sir Anthony was that "the correct approach" to determining whether or not a "crime of violence" was committed for the purpose of the Scheme is first, to identify the crime that was committed and then to consider whether in the circumstances of the particular case the crime can properly and naturally be described as a crime of violence, taking account of the following factors in particular:

> "(1) "Crime of violence" includes personal injury caused by arson and by poisoning (I do not read these references as extending the scope of the statutory definition);
>
> (2) The statutory definition implies a non-consenting victim . . . ;
>
> (3) It also implies a non-consenting victim in fact as distinct from any deemed lack of consent at law . . .; and
>
> (4) "Non-consenting" means an absence of "real" consent, freely and voluntarily given."

Sir Anthony repeatedly makes references to "real" consent. He later coupled this with the need for the applicant to be able to be properly described "as the victim of the offence in the circumstances of the particular case" (paragraph 82). He considered that August was not entitled to compensation because he could not properly be described as "the victim".

Pill LJ adopted very much the same approach as the other members of the court. In particular, he made it clear that, in assessing whether the events constitute a crime of violence, it is necessary for "all relevant events [to] be considered including whether consent was given and, if so, in what circumstances" (paragraph 104). He added, referring to unlawful sexual intercourse "It would be necessary to weigh the degree and culpability of the conduct of the other party against the conduct of the claimant".

In our judgment, properly understood, the court in *August* recognised that a crime could be a crime of violence as long as there was not "real

consent". Real consent may exclude a crime from eligibility under the Scheme. Consent that is not real will not do so. Nor will submission, which is not the same thing as consent. It is always important to assess whether the applicant can still properly be regarded as a victim. In each case, the Panel has to ask itself whether the proper conclusion on the facts is that the applicant was, in relation to what happened, a victim of a crime of violence. This will be the situation if there was no real consent.

Mr Bowen attaches great importance to the decision of Butler-Sloss LJ in *Re MB* [1997] 2 FLR 426 at pages 433 and 437. In that case Butler-Sloss LJ perceptively analysed the circumstances that need to exist for there to be *capacity* to consent to medical treatment. Mr Bowen contends that the Panel's decision was defective because they did not consider "capacity to consent" as a separate issue from the question of whether consent existed. Mr Tam, on the other hand, contends that there is no requirement to consider "capacity to consent" separately since if a person has in fact consented as the Panel found, this means that the individual concerned must have had the capacity to consent. We accept that Mr Tam's contention does have some force as long as the consent to which he refers is a real consent. Nonetheless we very much bear in mind the approach of Butler-Sloss LJ in *Re MB* and Lord Donaldson MR in *Re T (Adult Refusal of Treatment)* [1993] Fam 95 which she applied. While we do not accept that the failure of the Panel to refer to specifically to E's capacity to consent amounted to an error of law, we recognise that the fact that he is a "defective" for the purposes of section 15(3) of the 1956 Act is an important feature of his case.

Of course, if an applicant were so mentally disabled that he lacked the capacity to consent to the acts in question, then he should undoubtedly be regarded as a victim. But, as the Law Commission pointed out in its report on Mental Incapacity (1995, Law Com No 231) from which the test adopted in *Re MB* is derived, the question has to be asked in relation to the particular decision being made. We do not consider that any evidence in this case suggests that E would not in the appropriate circumstances be capable of freely consenting to a homosexual or a heterosexual relationship. Any assumption to the contrary would be very harmful to E. Although Parliament in section 15(3) has made the consent of a defective no defence to a charge of indecent assault and has therefore given parliamentary recognition to the need to protect defectives from indecent sexual advances, those whom the section classifies as defective are not necessarily unable, in the right circumstances, to sustain a normal sexual relationship.

In the course of argument, the court raised the question as to whether the fact that E is admittedly a "defective" for the purposes of section 15

means that the Panel should have adopted a starting point of presuming that he had not consented unless the contrary was shown. In other words, while a person who is defective can give a real consent to a sexual assault, he should be presumed not to do so. We are, however, persuaded by Mr Tam that this involves adopting an inappropriate approach. The degree of E's mental impairment is no more than an important part of all the circumstances to be weighed by the Panel in coming to their conclusion.

Were the panel entitled to come to the conclusion for the reasons they gave that there had been no crime of violence for the purposes of the scheme?

This does not mean that in a case involving someone with the appellant's disadvantages it is sufficient for a decision to be reached on the basis of whether there was consent or not. It is part of E's case that the relationship between him and F was one in which he was at a significant disadvantage. To ask whether he consented makes no allowance for E's vulnerability. While the fact that he may have consented to what happened between him and F was part, even an important part, of the issue to be determined, its resolution was not the end of the story. It was also necessary to ask whether, despite the fact he consented, that consent was real so as to prevent his being a victim. This part of the exercise was not resolved by the Panel. If it were not for E's vulnerability this inquiry would not be necessary.

We attach particular importance to the fact that the Panel, although they referred to E's low IQ, did not address the imbalance in his relationship with F when F was clearly playing the dominant role. He is approximately double E's age. He was sexually experienced while E was without any experience. There is reason to think that F was also a paedophile. On the other hand there was no evidence that E, prior to his coming into contact with F, had shown any interest in a homosexual relationship. Once F had achieved his objective of sharing a cell with E, E would have been dependent upon him and vulnerable to F's sexual overtures. The Panel refers to the fact that E did not alert prison officers to what was happening. However, the Panel appear to have attached little, if any, significance to the fact that E, at the first opportunity, complained to a member of his family and, in consequence of his doing so, a different prisoner shared his cell who assisted him in preparing a full account of what happened. The Panel also discount the concern of E as to what F's "mates might do".

More importantly, while the Panel attached significance to the fact that E, on two occasions, played the more active role in buggery, the Panel appear to have failed to take into account the fact that, if initially he was not a consenting party, he would have been a victim of a "crime of

violence" for the purpose of the Scheme, even though, having been corrupted by F, he subsequently played an active part.

Finally, the Panel do not appear to have considered the relative degrees of responsibility of E and F for what happened. In this case, unlike *August,* there can be no doubt that, if the Panel had considered the relative responsibilities, they would have very likely come to the conclusion that F was substantially, if not entirely, to blame for what occurred.

We cannot go so far as to say that the only decision that the Panel could have reached was one in favour of E, but we certainly can say that, contrary to the submission of Mr Tam, this was a case where the Panel's reasoning discloses that they have not tackled the problems involved in coming to the decision which they did.

In coming to this conclusion, it should not be thought that we are in any way critical of the Panel. They did not have, as we have had, the advantage of the decision in *August.* Nor was the proper approach to the Scheme in law as fully argued before them as it has been before us. Looking at the decision as a whole, we are satisfied that it should be quashed and that E's application be re-heard by a different Panel. To deprive E of any right to compensation under the Scheme is a decision which cannot be justified by the reasoning which was given by the Panel.

Order