LEVEL 1 - 1 OF 3 CASES

R v Criminal Injuries Compensation Board ex parte Cummins

Queen's Bench Division (Crown Office List)

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

HEARING-DATES: 17 January 1992

17 January 1992

COUNSEL:
RM Stewart QC and KL May for the Applicant; GF Pulman QC and A Foster for the Respondent

PANEL: Hutchison J

JUDGMENTBY-1: HUTCHISON J

JUDGMENT-1:
HUTCHISON J: By this application for judicial review, the applicant,

Michael Cummins, challenges a decision of the Criminal Injuries Compensation Board of 14th April 1989. The award, in respect of very grave injuries, was for a total sum of L392,686. However, this was the figure after deduction of DHSS benefits. The figure at which the Board had arrived in valuing the claim was L455,671.

The applicant, born on 23rd September 1966, sustained his injuries on 18th January 1985 when, as he slept in the house where he lived with his mother, a young man who was a guest there attacked and repeatedly stabbed him. One of the stab wounds caused a severe lesion of the spinal cord. In a statement of reasons provided by the Board, at the request of the applicant's solicitors, on 5th August 1989, they described him as follows:

"We accepted the evidence of Dr Walsh that the applicant had an incomplete tetraplegia. He could do more for himself than most tetraplegics and his position really was in some ways akin to a paraplegic with a hand disability."

It is to be assumed that this was a reference to the following passage in Dr Walsh's report of 27th July 1988:

"In brief, he requires the amount of help of an able-bodied person somewhere in between a complete tetraplegic which he is not and a complete paraplegic at

chest level."

For reasons which will become clear, there is no need to embark upon a more
6 detailed review of his disabilities. Plainly, they are extremely severe and he is, for practical purposes, confined to a wheelchair life with all the consequences that are unhappily so familiar to the courts.

The relief sought is an order that the decision of the Board be set aside and
11 that they be directed to re-hear the application and determine it according to law. Form 86A then continues, in what must be taken to be the grounds on which relief is sought, in the following terms:

"1. An award of $80,000 for pain, suffering and loss of amenity in 1989 is
16 not adequate for an (incomplete) quadriplegic whose expectation of life is not significantly reduced on the only evidence and was considered by the Board as extending to retirement age.

The applicant was born on 23.9.66. He is now aged 23. His expectation of
21 life on the Board's own assessment is 42 years. The medical evidence was an expectation of 50 years from January 1985.

26

2. A multiplier of 15 for future care and attendance as a certain need is adequate for a period of 42 years or more (Taylor v O'Connor) [1971] AC 115,
31 [1970] 1 All ER 365.

3. An award of L7,300 per annum in respect of all future necessary care, holidays, physiotherapy and property costs was inadequate upon the evidence.

36 4. An award of some L2,900 per annum in respect of all other necessary expenses was inadequate upon the evidence.

5. An assessment of compensation by the Board being assessed upon the basis of common law damages should carry an award of interest at appropriate rates
41 on appropriate heads of damage.

The contentions advanced in paragraphs 1 and 5 were abandoned before the hearing began. Accordingly, the attack on the adequacy of the award was confined to items in respect of future loss. However, on the basis of
46 criticisms made in the affidavit evidence filed on behalf of the applicant, it was contended (without objection from Mr Pulman on behalf of the respondents) that the Board's reasons were inadequate. Mr Stewart made it clear that this argument was advanced as a distinct ground but that he also relied on it as part and parcel of his attack on what he describes as the manifest inadequacy of
51

the awards in respect of future loss. As to these, he accepts that the applicant can succeed only if he persuades me that the figures awarded by the Board are so low that it can be said that no reasonable Board, properly directing itself, could have arrived at such figures -- ie that their conlcusion is unreasonable in the Wednesbury sense.

As is well known, the Board administers a scheme for compensating victims of crimes of violence. For present purposes, it is necessary to cite only part of paragraph 12 of the scheme. This paragraph is headed "Basis of compensation" and contains the following words:

"Subject to the other provisions of this Scheme, compensation will be assessed on the basis of common law damages and will normally take the form of a lump sum payment, . . ."

There follow a number of qualifications, none of which is material in the present context. They have to do with such things as the limitation on the compensation for loss of earnings or earning capacity, and credit to be given in respect of benefits, insurance payments and so on. It is common ground that it was incumbent upon the Board to approach the assessment of damages on the basis of the same principles as apply to the assessment of a common law claim. However, Mr Stewart submitted that the words that I have cited from paragraph

12 of the scheme bore the further meaning that no only must the Board apply common law principles, but that they must, in seeking to apply those principles, adopt the methods of assessment that a judge adopts in an ordinary personal injuries case.

The point that Mr Stewart makes can be illustrated by an advance reference to what is the crucial part of the case -- the assessment of damages for future care. As will become clear, what the Board did was to take a round sum of L100,000 which plainly they did not arrive at by means of the application of a multiplier to a multiplicand. Mr Stewart submits that the words "compensation will be assessed on the basis of common law damages" obliged the Board not only to award a sum which reflected the principle that, in such cases, a plaintiff at common law is entitled to be compensated for the reasonable cost of future care, but also to calculate that compensation by the coventional multiplier/multiplicand method. Mr Pulman disputed this submission, arguing that all that was required was that the Board should assess damages in accordance with common law principles.

On this point, I consider that Mr Pulman is correct. There is nothing in the scheme to suggest that there was being imposed upon the Board an obligation slavishly to follow the conventional methods of assessment. I reach this conclusion as a matter of construction of the scheme as a whole, and of the

crucial words of paragraph 12 viewed in isolation.

In the course of his reply to Mr Pulman's submissions, Mr Stewart
6 concentrated exclusively on the award of L100,000 in respect of future care.
In his opening he had also challenged the adequacy of the awards under a
number of other heads, and deployed detailed arguments in support of his
contentions. The reason why, at the end, he sensibly concentrated on the
award for future care is that, on any view, that is both the largest and also
11 much the strongest part of his case, and he recognises that if he fails to
persuade me that the award under that head is so low as to entitle him to
relief, or can be impuged on other grounds, it necessarily follows that he will
similarly fail in respect of the other heads of damage. Accordingly, pausing
only to emphasise that Mr Stewart was in no sense abandoning his contention that
16 the other heads also attracted wholly inadequate awards, I can go straight to
what is, for the reasons just described, the critical issue, the award in
respect of future care. I should record that, as I understand it, Mr Pulman did
not contend that this was other than a sensible approach.

21 I shall begin by mentioning the evidence that was before the Board on the
issue of future care. They themselves put it in this way in their reasons (and
I quote extensively to illustrate not only how they arrived at the figure they
awarded under this head, but also such findings as they made on issues

26

material to their assessment):

31 "We had to consider the applicant's expectation of life. We did not accept
that Mr Cummins could be regarded as having a normal expectation of life. At
the same time we accepted Dr Walsh's view that he had quite a long expectation
of life. We did not consider on the balance of probabilities that his life
would extend beyond the normal retirement age. For this reason we fixed the
36 same multiplier for working life as for life expectancy viz 15 years.

We fixed a multiplicand for loss of future earnings of L10,000 net. The
applicant had urged a higher figure . . . but we did not treat the applicant as
permanently unemployable and the multiplicand reflected the evidence of Dr Walsh
41 that 10-15% of patients with similar problems had obtained full employment, that
the applicant was bright and that there was a chance of employment if only
part-time.

The future cost of care we assessed at a total of L110,000 having looked at
46 the figures put forward. The burden was on the applicant under paragraph 23 of
the Scheme. We had the benefit of hearing from the applicant the extent to
which he managed to cope for himself and in assessing the applicant's needs we
took this into account. We were not satisfied that all the figures put forward
by the applicant were established, but in considering future care we regarded

51

extra holiday costs, physiotherapy and extra costs of running the property now occupied by the applicant (insofar as these were claimable) as coming under this heading."

6

These reasons were supplemented by the affirmation of one of the Board members in these proceedings. He pointed out that there was no express obligation on the Board to provide written reasons but that they always did so on request. He also said that had they been asked to amplify their reasons they would have done so – hence my suggestion that the affirmation can be taken as supplementing the reasons. He emphasised the wide experience that the Board members bring to their task and the fact that, there being no adversary to deploy evidence or argument to counter the evidence and submissions of the applicant (the Board's own advocate very rarely does so), the proceedings are inquisitorial in nature in which the members use their collective experience not only in assessing the evidence but in bringing to bear their fund of knowledge acquired from similar cases. On the specific issue which I am considering he said this:

11

16

21

"As we have already indicated (in our Reasons) we found that the applicant was a paraplegic with a hand disability rather than a standard tetraplegic. I put this proposition to Dr Walsh and he agreed with [it] . . .

26

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

The reports of Dr Walsh disclosed that the applicant had urinary problems. We know that on occasions such a condition can cause deterioration. We were therefore not prepared to accept a full expectation of life and the multiplier was accordingly assessed on this basis. We . . . found [Mr May's] suggested multiplier of 20 to be unrealistic.

31

In considering the likely cost of care in the future we took into account the evidence of the applicant himself, of his mother (who had herself been providing the necessary care until that time) and Dr Walsh. The latter stated that the applicant was not in the category of those patients who required full-time professional nursing assistance and his suggestions for care were set out in his report . . . We reviewed these in the light of the applicant's evidence that he wanted to live an independent life and not to have to rely upon his mother. We had reservations about this because we considered that his mother was likely always to be on call to some extent and to provide care if other arrangements fell through. Although not on all fours with this claim, we reminded ourselves of the general guidance that the Court of Appeal had given about the provision of care in Housecroft v Burnett [1986] 1 All ER 33. Lastly, we brought to bear our own experience of many similar cases in our own practices. In making our award we took into account the possible need on occasions for professional care; the possibility that care might be provided by a member of the family; the possibility that care might be arranged on an informal basis and the

36

41

46

51

possibility that at some point the applicant might require institutional care. We had in mind all aspects of care when making our assessment of the applicant's needs and we concluded that a net figure of L100,000 was the appropriate award. We further valued the extra costs of holidays, physiotherapy, medical examinations and running costs of the applicant's home at L10,000."

The suggestions for care set out in Dr Walsh's report, referred to in the above passage from the affirmation, are suggestions that he made when asked to comment on a very full report from Mr Bart Hellyer of the International Paraplegic Claims Service -- a well known and very experienced expert witness in this field. If Dr Walsh's comments, which I shall cite in a moment, are to be understood I must go first to the relevant parts of Mr Hellyer's report. They are to be found in section 2.3 of his report where, after recording his own assessment of the nature and extent of Mr Cummins' disabilities, Mr Hellyer says this:

"The overall picture is therefore one in which Mr Cummins requires permanent available support from others.

More than a housekeeping function is needed since personal tasks are involved, such as washing, dressing, incontinence etc. We would suggest that someone with a basis training and understanding of Mr Cummins' actual and

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

potential problems is necessary.

Existing sources of help:

(a) His mother Lynne Babbington (44). We understand she is in reasonable health although she can become fatigued. This may be because she has started a new job (full-time) which she has to attend to as well as seeing to her son. She drives. She was working as a school teacher prior to the accident.

She provides the bulk of the assistance needed at present. This is both personal and additional domestic assistance.

Domestic assistance consists of cooking, washing, cleaning the house etc bearing in mind there is an additional amount of this for someone who is disabled. Personal assistance includes help in the evenings (in particular on bowel evenings, help with turns and other attention at night), seeing to her son if he is ill in bed and being 'on call' whenever he requires assistance at unpredictable moments.

(b) His sister Nicola (15). She is at school at present and lives at home. She will often provide additional help in the afternoon such as errands, making tea etc, as she gets home earlier in the afternoon than her mother.

1 The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

. . .

(d) Other personal assistance. Mr Cummins has already employed a nurse from
6 British Nursing Association to provide some support when his mother took a holiday.

. . .

11 (e) Domestic assistance . . .

(f) Physiotherapy . . .

(g) . . .

16

Based on all the above we recommend the following assistance to cover the tasks caused by Mr Cummins' disabilities, based on him living independently: . . .

21 (B)FUTURE CARE

We set out below the full range of care Mr Cummins would require to live at home on a permanent basis.

26

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

(i) Permanent help (permanent personal/domestic attendant)

31 We would allow for the value of permanent live-in help here because Mr Cummins would not be in a position to live independently from all others because of his disability. This is the function fulfilled by his mother at present.

In general this help would be required to:

36

(a) Help Mr Cummins up in the morning -- washing, toileting etc.

(b) Organise meals, drinks and generally run the home.

41 (c) Deal with extra cleaning tasks.

(d) Do any errands required by Mr Cummins (eg collect prescriptions, shopping).

46 (e) Assist with bowel and bladder management.

(f) Be available during day and night hours at all times when others are not available to give help to Mr Cummins as and when required, eg to help with standing exercise.

51

(g) Deal with all other tasks previously indicated.

Evaluation of Permanent Assistance:

Agencies quote various rates for this type of semi-skilled nursing/domestic service; this is now in the range of approximately L140 per week exclusive of expenses in the London area.

We calculate that to achieve approximately L140 per week free of tax, insurance and living expenses, the overall weekly cost would work out at approximately:

	L
Wages (net)	133.96
Employees NI contributions	18.04 (approx)
Tax	48.00 (approx)
Cost to Employer:	
Gross wages	200.00
Employers NI contributions	20.95

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

Expenses:	22.32
Extra feeding, light, heat etc. (based on L3.18 per day approximately to FES figures)	
Weekend Relief Help:	
One full day at nursing agency rate (BNA)	33.00
Weekly total	276.27
Expressed on an annual basis	L14,366.04

NB Expenses such as NI contributions and extra feeding etc would only be incurred once an outsider as opposed to relative is required to provide attendance. If one discounts thse extra expenses (except on one day off each week) for the period his mother continues to fulfil his function the annual cost reduces to L166.96 per week or L8,681.92 [per annum]."

I can now go to Dr Walsh's comments referred to in the affidavits. They are as follows:

"Section 2.3 -- Personal Domestic Assistance -- this section is quite reasonable except for some over-statements eg . . .

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

[Mr Hellyer says that the applicant] requires permanent available support from others. This is quite untrue as he can be left for long periods on his own.

Briefly, he requires assistance from an able-bodied person for only 2-3 hours per day. He does not need the help of a trained nurse, merely somebody who has had basic training or experience in caring for a disabled person. He can be left for long periods during the day on his own but I think it is very reasonable to ensure that he always has an able-bodied person within call in the house during the night. He is quite fit to turn himself in bed so would not need any particular attention during the night except in an emergency.

. . .

In brief, he requires the amount of help of an able-bodies person somewhere in between a complete tetraplegic which he is not and a complete paraplegic at chest level. Living independently, he would require a live-in attendant not with nursing qualifications and available for 2-3 periods during the day and present at night.

. . .

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

With regard to the other points you raised,

Firstly,

(1) The plan for the future would probably be better not centred on Mrs Babbington being the key figure in his care, particularly as she is doing full-time work.

(2) He needs an able-bodied assistant, as I mentioned, for at least two periods a day for one to two hours. This would have to be on a permanent basis including an able-bodied assistant during the night . . . In addition, he will of course need domestic help for cleaning, laundry and probably providing meals. Whether or not his full-time assistant will undertake this will be a matter for arrangement.

I have now recounted all the relevant parts of the Board's findings and of the evidence on which they relied, and I shall attempt to summarise their conclusions under a number of heads.

1. Expectation of life. The Board, on the basis of Dr Walsh's evidence, concluded that Mr Cummins' expectation of life was to the age of 65, that is to say, 42 years from the date of the award.

2. Multiplier. They undoubtedly took a multiplier of 15 in respect of future wage loss. The phrase ". . . we fixed the same multiplier for working life as for life expectancy" is somewhat obscure, but probably means that, finding that his life expectancy coincided with what would, but for the accident, have been his retirement age, they felt it unnecessary to discriminate in the matter of multipliers between future wage loss and other items of future loss. Support for this is to be found in parts of the award with which I am not at present concerned, namely the figures of L7,500, L9,750 and L11,250 allowed respectively for aids etc, special equipment and extra household expenses. All of these figures are arrived at by applying a multiplier of 15 to the annual cost arrived at by the Board.

Mr Stewart challenged this refusal to discriminate by contending that even if 15 was not manifestly too low for a 42-year period in respect of future loss of earnings, there should have been a higher multiplier for future loss, where the only significant contingent risk (that of death) has already been allowed for in arriving at 42 years expectation, in contrast to loss of earnings, where all sorts of other contingent risks have to be reflected in the multiplier.

It has to be remembered, however, that in the event the Board did not arrive at the L100,000 by the multiplier/multiplicand method, so the criticism just rehearsed has to be adapted. One can start, as the applicant does, by working

backwards and pointing out that, on the basis of a multiplier of 15, the award represents only L6,666.66 per annum for care; and continue by arguing that if a higher multiplier for future loss was appropriate, that annual figure reduces as follows:

16 = L6,250.00
17 = L5,882.35
18 = L5,555.55

3. What level of care is required, and by whom is it to be provided?

Dr Walsh's views about this are clearly expressed and, given that they were unchallenged and that on other aspects of the case the Board expressly accepted Dr Walsh's evidence, my initial inclination was to infer that the Board were accepting this aspect of his evidence also, namely that they were finding that Mr Cummins needed an unqualified but basically trained live-in attendant, always present at night and able to give 2-3 hours' help during the day; and that in addition he needed help for cleaning, laundry and (probably) the provision of meals. However, the fact is that in their reasons the Board do not say that they have accepted these views and, while it might be suggested that their award shows that they have not, the affirmation gives no clear indication whether they have or not. As to who should provide such care as is necessary,

the applicant had indicated the wish to live an independent life, ie not to rely on his mother or other family members for care. It is, I am confident, a proper inference that the Board accepted that this was a genuine desire and that it was, in the main at least, likely to be achieved. I say this because there is nothing in the reasons or affirmation to suggest that they regarded him as untruthful, because many of their calculations under other heads impliedly reflect their acceptance of his evidence in this regard, and because where they do specifically advert to the point (in the affirmation) they say:

"We reviewed these in the light of the applicant's evidence that he wanted to live an independent life and not have to rely upon his mother. We had reservations about this because we considered that his mother was likely always to be on call to some extent and to provide care if other arrangements fell through."

The last few words must, I think, reflect the Board's acceptance of the fact that other arrangements were to be made and that help from Mr Cummins' mother would only be occasional. The reference, in the passage immediately following that quoted, to Housecroft v Burnett [1986] 1 All ER 332, does not contradict this conclusion. It must, in the context, be taken to be a reference to the way in which the value of such services by the applicant's mother should be assessed.

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

4. What was the care going to cost? This is an important -- it might be said vital -- aspect of the case on which, unhappily, the views of the Board are by no means clear. Mr Hellyer was not called before them, but they would of course have been familiar with his reports in this type of case. They say (reasons paragraph 8) "We were not satisfied that all the figures put forward by the applicant were established" (my emphasis). It does, however, seem most improbable that they were doubting Mr Hellyer's costings, because:

(1) Had they been sceptical of these, they would, on so important an area of the case, surely have said so in terms; and

(2) looking at those costings, I think I am entitled to say that they appear to be consistent with the sort of figures frequently advanced and allowed and are certainly by no means extravagant.

However, the question I am here considering has two aspects and the second is what, accepting Mr Hellyer's costings, the expenditure to the applicant in meeting what the Board assessed to be his needs was going to be. Mr Stewart argued that the L14,366 was Mr Hellyer's figure for precisely the sort of care and assistance that the Board accepted that he would need: Mr Pulman that it was a figure for a higher order of care, the necessity for which had been rejected by Dr Walsh (and the Board) and that, since the applicant advanced no other

assessment, the Board had to do their best, making some broad assumptions. That assessment would have to reflect not only the difference between Dr Walsh's and Mr Hellyer's but also that between Dr Walsh's and the Board's assessment of
6 need. Mr Pulman went so far as to suggest that if there was in Mr Hellyer's report a figure representing his view of the cost of the degree of care accepted by the Board as being necessary and likely to be provided, it was the final figure that I have quoted of L8,681.92 per annum.

11 Mr Hellyer's L14,366 represents his assessment of the costs of full-time assistance -- someone employed and present "at all times when others are not available to give help to Mr Cummins". He describes the person whom he is putting forward with the words "Permanent help (permanent personal/domestic attendant) . . . a permanent live-in help" to perform the tasks he mentions in
16 the passage I have quoted. It is however, as Mr Stewart points out, undoubtedly of significance that Mr Hellyer is contending for only one carer: that (and the words ". . . at all times when others are not available to give help to Mr Cummins") show that he cannot have been talking of full-time 24-hour help which plainly would have involved, Mr Stewart submits and I accept, two carers.
21 Moreover, Mr Hellyer envisages that, for the quoted salary, the one carer would be expected to do meals, drinks and run and clean the home -- services which Dr Walsh accepts as being necessary in addition to the 2-3 hours a day which he says are necessary for other needs. On any view, this carer's time would be

26

pretty fully occupied.

31 I am inclined to accept Mr Stewart's submission that this figure of L14,366 can fairly be regarded as Mr Hellyer's assessment of the cost of what Dr Walsh considered necessary. I cannot entertain Mr Pulman's suggestion that the figure of L8,682 represents the cost of what the Board appear to have accepted was necessary. It represents the cost of the services if performed by a relative --
36 and whatever the Board may have thought about the nature of care necessary, they do not appear to have been assuming that all care would always come from relatives.

Mr Stewart invited my attention to a number of cases, summarised in Kemp,
41 which he submitted showed that a multiplier of 15 in respect of future expenditure over a period of 42 years was inadequate. I do not propose to review them, or other cases to which Mr Pulman referred me on the same topic, because, as I have already pointed out, the Board did not assess damages in respect of future care on a multiplier/multiplicand basis. I content myself
46 with saying that, insofar as there is in the Board's round figure of L100,000 an assumption that 15 is an appropriate multiplier for the cost of future care, I unhesitatingly conclude that such a figure is not so unreasonably low as to be capable of being impugned on Wednesbury grounds. I say this because:

51

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

(1) Mr Stewart felt unable to challenge 15 years for loss of future earnings: his attack was based on the failure to discriminate on grounds to which I have already referred.

(2) Such a failure could not possibly be said to be unreasonable in the Wednesbury sense. In this connection I bear in mind a passage in an unreported decision of the Court of Appeal (Woodrup v Nicol, 24th April 1991) where a judgment of Wright J was attacked on the same basis and Russell LJ said:

"There has been in the past no hard and fast rule about multipliers for very obvious reasons. There are so many imponderables in the individual case and the exercise of fixing on a multiplier is not an exact science. In this court it is, in my judgment, quite impossible for us to say that in doing as he did Mr Justice Wright was wrong to the extent that we should interfere."

These words apply with added force in the present case, which is not an appeal but a challenge on Wednesbury grounds. It is convenient to record in passing that I cannot accept an argument advanced -- I think with an increasing lack of conviction as it was explored -- by Mr Stewart to the effect that given the principles on which the Court of Appeal act, any successful appeal on quantum implicitly involves the finding of Wednesbury unreasonableness. Plainly, the Wednesbury threshold is a far higher one.

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

Mr Stewart's essential argument is not to do with multipliers, but with the (as he contends) manifest inadequacy of the round figure of L100,000 and the manifest inappropriateness (given the evidence they accepted) of fixing on such a figure rather than embarking on a conventional calculation which, he contends, must have produced a figure of a wholly different order under this head. It seems to me that this argument can be put, or at any rate tested, in two distinct ways:

(1) Was it unreasonable to the point of absurdity for the Board to arrive at a figure in respect of cost of future care in the way that they did, rather than by applying a multiplier to a multiplicand?

(2) Whatever the answer to that question, can the figure of L100,000 be said to be so unreasonably low as to be susceptible to challenge on such grounds?

Mr Stewart submits that, in the light of the evidence accepted by the Board, both those questions must be answered in the applicant's favour.

Mr Pulman, in advancing the contrary argument, referred me to a number of authorities. The first was Stanley v Saddique (Mohammed) and Others [1991] 2 WLR 459. The point at issue there was the method of assessment of the value to a child of the care of a mother -- found by the judge to have been unreliable

– over a period of the child's dependency. The judge had taken a multiplier of 12 and applied it to a diminishing multiplicand (to reflect diminishing dependency as the child grew older). The Court of Appeal held that on the facts
6 of that case this was an inappropriate approach. It is worth noting (see Purchas LJ at 469D/E) that counsel for the appellant had contended that the uncertainties attendant on the mother's future conduct "called for a far more substantial discount either by reducing the multiplicand or, in my judgment more appropriately, the multiplier before reaching the figure which the judge in fact
11 reached of L24,000". Stating his conclusions at 470H, Purchas LJ said:

"In the end, the assessment of damages for loss of dependency, as apart from that element of the dependency which could be related to financial support, is a jury question. I have no doubt that the judge's computation was plainly too
16 high and was on a wrong principle in as much as it omitted to make a proper discount for the real possibility that the mother would not have stayed with the family and that, therefore, this finding cannot be upheld on appeal. That having been said, the duty of the court is to do the best it can to arrive at some figure which a jury might well have awarded had it taken into account all
21 the circumstances. I consider that such was the lack of steady prospect of support that the multiplier/multiplicand approach is, as the judge indicated at one point in his judgment, quite inappropriate, although in the event he carried out an exercise of this kind. In carrying out an assessment on a jury award

26

basis, I have reached a figure for loss of services of L10,000."

31 This authority undoubtedly shows that there are cases where calculation is inappropriate and a round "jury" figure should be taken. However, one hardly need emphasise the different considerations which the court was there considering.

36 Mr Pulman also relied on Spittle & Others v Bunney [1988] 1 WLR 847. However, this again is a case where the essential issue was how appropriately to value the loss of a mother's care and services, and the Court of Appeal rightly pointed out that whereas the cost of a nanny might be the appropriate yardstick in the early years, a valuation by commercial standards became less and less
41 appropriate as the child grew older. This, like Stanley v Saddique [1991] 2 WLR 459 is a case which shows that a multiplier/multiplicand approach is in certain circumstances inappropriate. It does not determine the question whether it was inappropriate in the present, wholly different, case.

46 I have already indicated my rejection of Mr Stewart's argument seeking to equate an appealable decision with one which is unreasonable in the Wednesbury sense, and I should make clear my acceptance of the submissions advanced by Mr Pulman as to the principles that should govern my approach to this application. This is not an appeal against the Board's assessment. There is (at present)

51

no means of appeal against their decision. I should therefore (see Preston v IRC [1985] AC 835, [1985] 2 All ER 327) guard against, in effect, creating a right of appeal which Parliament has not seen fit to allow. I must have always in mind the various colourful phrases used in a number of well known decisions to emphasise the heavy burden that lies on an applicant who seeks to impugn a decision on Wednesbury grounds. In this connection I find particularly helpful the words of Lord Lowry in Ex parte Brind [1991] AC 696 at 764G-766A, which I shall not quote but have very much in mind.

In arguing that, in the light of these principles, I cannot properly find that the Board's assessment was so unreasonable as to justify the court's interference, Mr Pulman naturally emphasised those words in the reasons and supplemental affirmation which indicated the Board's rejection of parts of the evidence and their doubts about some aspects of the claim for future loss. Fundamental to his argument, as it seems to me, were the following propositions:

(1) What had been costed by Mr Hellyer was something more elaborate than Dr Walsh said was necessary; but since Mr Hellyer's figures had not been re-costed to take account of that, the Board had no reasonable cost estimates on which to proceed. I have already commented on this contention.

(2) The last and longest of the passages I have cited from the affidavit shows that the Board had in mind and sought to give effect to a number of uncertainties, ie, the four specific matters which they state that they took into account. Those, Mr Pulman submitted, were matters to which the Board could properly have regard, and they reflect just the sort of circumstances that, as their experience would have told them, might actually arise in the future. In this regard they were not obliged to accept and act upon all that Dr Walsh said, but were entitled to give effect to their own appreciation of likely or possible eventualities.

(3) Approaching the matter in this way, the Board could, at one end of the scale, have said that they accepted everything that Dr Walsh said and (because Dr Walsh's requirements were not costed) done their best to attribute figures to that level of care. At the other end of the scale they might have taken the cost of a "Crossroads Care Attendant" for only two hours a day (see the reference to the Crossroads Care Attendant Scheme at page 31 of Mr Hellyer's report). This would have amounted to no more than L2,848 per annum. An intermediate position might be to allow the Crossroads Care for 2 hours a day and assume a member of the family, living with the plaintiff and spending each night there, entitled to a modest remuneration for being there on call. Again, said Mr Pulman (envisaging an arrangement which, so far as I can detect, no one but he has thought of) the member of the family might be replaced by a friend

or lodger who, in return for free accommodation, would be prepared to provide unpaid services at night and, to a modest extent, in the day time. Then, given that any such arrangements would not necessarily continue for ever, allowance
6 had to be made for professional and/or institutional care.

(4) All these are just the sort of matters which the Board can and must be entitled to take into account, as the passage in the affirmation already referred to shows they did. Accordingly, their figure of L100,000 cannot
11 possibly be challenged in judicial review proceedings. Even if it represents an incorrect figure, with which in an action for personal injuries the Court of Appeal might be prepared to interfere, it is not so plainly and wholly wrong as to justify my acceding to this application for judicial review.

16 Responding to these arguments, Mr Stewart began by concentrating on his contention that the Board had not given proper reasons, and that the result was that it was not possible for the applicant to know from what they had said whether their award was one which could be challenged. They are a body whose members are distinguished and experienced lawyers (three Queen's Counsel in this
21 case) and, he submitted, they were performing a judicial function which required that they should give a judgment sufficiently reasoned to indicate how they had arrived at their conclusions on the principle issues, and to demonstrate that they had made their assessment in accordance with common law principles. As

26

it was, their original reasons dealt with this crucial issue in a way which gave virtually no indication of what evidence they accepted and what they rejected
31 and none as to how they arrived at their figure. Not until some four months later, after leave to apply for judicial review had been given by a judge who raised the issue of the adequacy of the reasons, were those reasons amplified in the affirmation, and then in a manner which still left many questions unanswered and did not explain why they had decided not to calculate the award rather
36 than take a round figure, or what findings of fact they had made.

Mr Stewart addressed the four matters raised in the passage in the affirmation on which Mr Pulman principally relies. As to the first -- "the possible need on occasions for professional care" -- it was, he argued, wholly
41 inconsistent with the applicant's expressed desire, the genuineness of which the Board plainly accepted, to live independently, to categorise his need for outside care as occasional. As to the second, he posed the question: Why should the applicant, whose mother already had a full-time job, and who envisaged normally having paid help, have to rely on a member of the family, save perhaps
46 now and then, when for one reason or another his normal paid help was not available? As to the third and fourth, the possibility that care might be arranged on an informal basis and the possibility that at some point the applicant might require institutional care, Mr Stewart told me that neither of these matters was ever canvassed with the applicant, his mother or Dr Walsh,

51

though the Board members had the opportunity of questioning each of them. Mr Pulman's idea of a lodger living free in return for services he categorised as fanciful.

Turning to consider the practical consequences of the Board's award, Mr Stewart pointed to Mr Hellyer's figure of L8,681, his assessment of the value of care by members of the family. Even if, which Mr Stewart disputes, a multiplier as low as 15 would have been appropriate for the calcuation for the loss of future care. the multiplicand to which this gives rise (L6,666) is only about three quarters of the assessed cost of family care. What possible justification can there be, Mr Stewart asks, for a figure so low in this case, confining the applicant to inadequately remunerated family care for the 42 years he is expected to live?

It will be seen that, as they finally emerged, Mr Stewart's submissions on the issue of the cost of future care embraced two distinct but nevertheless inter-related contentions: that given the evidence before them no reasonable Board could have concluded that a lump sum of L100,000 represented appropriate compensation under this head; and that such reasons as have been given by the Board for their conclusion that it did are wholly inadequate. As I have said, I detected in his response to Mr Pulman's submissions a shift of emphasis to the second of these contentions, and I propose now to mention the authorities to

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

which I was referred in relation to it.

Save Britain's Heritage v Number 1 Poultry Limited [1991] 1 WLR 153 was a case in which the House of Lords considered the adequacy of the reasons given by the Secretary of State for the Environment in a planning matter, where, by virtue of the provisions of Rule 17(1) of the Town and Country Planning (Inquiries Procedure) Rules 1988, the Minister is obliged to give reasons. Lord Bridge cited, as being "particularly well expressed" a passage from the judgment of Phillips J in Hope v Secretary of State for the Environment 31 P&CR 120, 123:

"'It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues.'"

Then, at page 166, commenting on a passage from the judgment of Woolf LJ in Ward v Secretary of State for the Environment 59 P&CR 486, Lord Bridge Said:

"I certainly accept that the reasons should enable a person who is entitled to contest the decision to make a proper assessment as to whether the decision should be challenged."

Subsequent passages in Lord Bridge's speech emphasised that he was considering the question of the adequacy of reasons in the context of planning legislation where, by virtue of section 245 of the Town and Country Planning Act 1971, there existed a statutory appeal procedure. I have in mind, but in the circumstances do not feel it necessary to cite, what he said on pages 166 and 167 of his speech. I do, however, cite a passage beginning at page 167H where Lord Bridge says this:

"Here again, I regret to find myself in disagreement with Woolf LJ who said, 60 P&CR 539, 557:

'Once it is accepted that the reasoning is not adequate, then in a case of this sort it seems to me that, apart from the exceptional case where it can be said with confidence that the inadequacy in the reasons given could not conceal a flaw in the decision-making process, it is not possible to say that a party who is entitled to apply to the court under section 245 has not been substantially prejudiced.'

The flaw in this reasoning, it seems to me, is that it assumes an abstract standard of adequacy determined by the court and then asserts, in effect, that a failure by the decision-maker to attain that standard will give rise to a presumption of substantial prejudice which can only be rebutted if the court

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

is satisfied that the inadequacy 'could not conceal a flaw in the decision-making process.' But this reverses the burden of proof which the statute places on the applicant to satisfy the court that he has been substantially prejudiced by the failure to give reasons. When the complaint is not of an absence of reasons but of the inadequacy of the reasons given, I do not see how that burden can be discharged in the way that Woolf LJ suggests unless the applicant satisfies the court that the shortcomings in the stated reasons if of such a nature that it may well conceal a flaw in the reasoning of a kind which would have laid the decision open to challenge under the other limb of section 245. If it was necessary to the decision to resolve an issue of law and the reasons do not disclose how the issue was resolved, that will suffice. If the decision depended on a disputed issue of fact and the reasons do not show how that issue was decided, that may suffice. But in the absence of any such defined issue of law or fact left unresolved and when the decision was essentially an exercise of discretion, I think that it is for the applicant to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process which would afford a ground for quashing the decision."

In R v Civil Service Appeal Board, ex parte Cunningham [1991] 4 All ER 310, the Court of Appeal considered a case in which the Civil Service Appeal Board

refused to give reasons for its assessment of a figure to compensate a prison officer for unfair dismissal. It will be seen, therefore, that the issue was not the adequacy of reasons but whether, despite the absence of any statutory
6 requirement, it was incumbent on the Board to give reasons. However the judgments contain helpful observations on the former point.

At page 319 Lord Donaldson MR cited a passage from Lord Lane CJ in R v Immigration Appeal Tribunal, ex parte Khan (Mahmud) [1983] QB 790, [1983] 2 All
11 ER 420 (which he said he believed owed nothing to the fact that in that case a statutory requirement to give reasons existed). Lord Lane CJ said:

"'The important matter which must be borne in mind by tribunals in the present type of circumstances is that it must be apparent from what they state
16 by way of reasons first of all that they have considered the point which is at issue between the parties, and they should indicate the evidence upon which they have come to their conclusions. Where one gets a decision of a tribunal which either fails to set out the issue which the tribunal is determining either directly or by inference, or fails either directly or by inference to set out
21 the basis on which it has reached its determination on that issue, then that is a matter which will be very closely regarded by this court, and in normal circumstances will result in the decision of the tribunal being quashed. The reason is this. A party appearing before a tribunal is entitled to know,

26

either expressly stated by it or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious
31 without any express reference to it by the tribunal; in other cases it may not. Second, the appellant is entitled to know the basis of fact on which the conclusion has been reached. Once again in many cases it may be quite obvious without the necessity of expressly stating it, in other cases it may not.'"

36 Lord Donaldson MR continued:

"Judged by that standard the board should have given outline reasons sufficient to show to what they were directing their mind and thereby indirectly showing not whether their decision was right or wrong, which is a matter solely
41 for them, but whether their decision was lawful. Any other conclusion would reduce the board to the status of a free-wheeling palm tree."

McGowan LJ, at 322H said this:

46 "To this day neither [the applicant] nor for that matter this court, has any idea why the board recommended that he receive so little.

As Mr Pannick says, it cries out for some explanation from the board. As I would put it, not only is justice not seen to have been done but there is no

51

way, in the absence of reasons from the board, in which it can be judged whether in fact it has been done. I find that a thoroughly unsatisfactory situation, in which this court should hold, if it can properly do so, that the board ought to give reasons for its recommendation.

In reaching a conclusion as to the propriety of Otton J's order, I am influenced by the following factors:

1. There is no appeal from the board's determination of the amount of compensation.

2. In making that determination the board is carrying out a judicial function.

3. The board is susceptible to judicial review.

4. The procedure provided for by the code, that is to say the provision of a recommendation without reasons, is insufficient to achieve justice.

5. There is no statute which requires the courts to tolerate that unfairness.

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

6. The giving of short reasons would not frustrate the apparent purpose of the code.

7. It is not a case where the giving of reasons would be harmful to the public interest.

These considerations drive me to the view that this is a case where the board should have given reasons and I would, therefore, dismiss the appeal.

I add only that I see no reason why the board need take more than a few simple sentences to state those reasons, or why the necessity to do this should in any way prejudice the informality of the proceedings or, in Mr Forman's words, lead to 'bodies of precedent and legalistic concepts.'"

Leggatt LJ concluded his judgment with these words:

"In my judgment the duty to act fairly in this cae extends to an obligation to give reasons. Nothing more onerous is demanded of the board than a concise statement of the means by which they arrived at the figure awarded. Albeit for reasons which go wider than those relied on by the judge, I too agree that the appeal should be dismissed and the cross-appeal allowed."

Mr Pulman invited me to treat ex parte Cunningham as the more relevant authority, and one showing that there is a distinction between cases where reasons are required by statute and cases where the obligation to give reasons
6 is founded, as in Cunningham, on the requirements of natural justice. He was also at pains to request me to refrain from deciding whether the present was a case in which reasons were required -- a topic on which he made no submissions -- because, since reasons had been given, the only material question was whether they were adequate. As to these submissions, I consider:

11

1. That there must be differences between cases where the obligation to give reasons is a statutory one and those where it is not. The words used by Lord Donaldson MR in introducing the citation from Lord Lane CJ's judgment indicate as much. However, insofar as it is sought to suggest that in the context of the
16 present case that should lead me to regard ex parte Cunningham as laying down some significantly different principle to that formulated in Save Britain's Heritage v Number 1 Poultry Limited, I doubt if that is so. If there is a difference, I propose to make further pursuit of it irrelevant by taking as my guiding principle Lord Lane CJ's statement and the words of Lord Donaldson MR
21 which immediately follow it.

2. As to the second matter, I shall assume (which Mr Pulman's invitation impliedly invites me to do) that, even in a case where there is no obligation

26

to give reasons, a body which in fact gives them must do so in a way which meets those requirements of adequacy which the law imposes in cases where the duty to
31 give reasons exists. This enables me to defer to Mr Pulman's request not to decide whether the Board are under a duty and (with more difficulty) I shall also resist the temptation to record the clear provisional view that I hold on that topic.

36 I must now state my conclusions:

1. I confirm (which I have already indicated) my view that I should treat as embodying the Board's reasons what they say in their written reasons supplemented by the Chairman's affirmation. I must, however, reject a
41 contention advanced by Mr Pulman that there can be no challenge to the adequacy of reasons where the Board, having given reasons, has offered to amplify them. What the Chairman says (in paragraph 3 of his affirmation) is that if a further request had been made to amplify the reasons given in response to the initial request, it would have been granted. I take what follows in the affirmation to
46 be, in effect, such amplification. It would, I think, be unrealistic and unfair to treat paragraph 6 as a continuing offer to provide yet further reasons and the applicant's failure to avail himself of it as disqualifying him from pursuing his complaint as to the adequacy of the amplified reasons.

51

2. Is it apparent from the amplified reasons that the Board have considered the point which is at issue between the parties and have indicated the evidence upon which they have come to their conclusions, on the issue of the appropriate level and cost of compensation for future care? Does what they have said enable Mr Cummins to know to what the Board were addressing their minds and the basis of fact on which their conclusion has been reached on this issue? Have they given outline reasons sufficient to show whether their decision on this issue was lawful?

3. There can, I consider, be no doubt that the amplified reasons show that the Board had considered the point at issue, ie, the need for a valuation of the cost of future care, but do they enable the applicant to know the basis of fact on which the Board's conclusion that L100,000 was appropriate was reached? In seeking to answer this crucial question, I pose various subsidiary questions which seem to me to have required determination on this issue:

(a) Given their acceptance of Dr Walsh's evidence that the applicant was an incomplete tetraplegic "in some ways akin to a paraplegic with a hand disability", did they accept or reject Dr Walsh's views as to his need to have someone always on call at night and someone available to give 2-3 hours help in the day and, in addition, domestic help with cleaning, laundry and meals? I have already indicated that I cannot discover from what they say whether or

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

not they have accepted this view and I have to say that, given the extent of the applicant's disability and the clarity of the views expressed by Dr Walsh, supported by Mr Hellyer, I consider that if Dr Walsh's views were rejected by the Board, the applicant was entitled to know that this was their conclusion.

(b) I have already stated that I infer that the Board accepted the genuineness of the applicant's desire to live independently. If, which one does not know, but which as a matter of probability seems more likely to be the correct inference, the Board did accept Dr Walsh's assessment as to the level of care needed, how did they conclude that it was going to be provided? To list the four possibilities already discussed was surely no substitute for a simple clear statement as to whether they concluded that the applicant was in the main going to be cared for by paid carers or by members of his family; and, if the latter, by which members? In fact the words, "We considered that his mother was likely always to be on call to some extent to provide care if other arrangements fell through" suggest that the Board did accept that ordinarily care was going to be provided from outside the family. If that was their conclusion, some indication was surely required as to why that care was assessed at a lower cost than it was suggested would have been appropriate for remunerating care by members of the family? What was at issue was, after all, the cost of care for no less than 42 years which made it much the most important issue in the case.

4. The conclusion to which I am driven is that the amplified reasons did not enable the applicant to know the basis of fact on which the Board's conclusion that L100,000 was appropriate was based. Nothing elaborate was necessary. All that was required was an indication whether on this issue they accepted or rejected the evidence of Dr Walsh, the applicant and his mother; the level of care they found to be necessary and how it was to be provided; and the factors which led them to reject calculation in favour of a round figure.

5. In my judgment, therefore, this challenge to the Board's conclusion succeeds principally on the ground that the reasons given were inadequate. It seems to me, however, that another way in which the matter can be put -- as Mr Stewart put it -- is that on the basis of such reasons as they have given, it is not clear that the Board have rejected Dr Walsh's assessment of the level of care necessary or the evidence that the applicant would employ persons outside his family to provide most of that care and if that was their conclusion, it does appear to me that an award reflecting (on the basis of the lowest multiplier they could possibly have taken of 15) no more than L6,666 per annum in respect of the cost of that level of care was so low as properly to be categorised as perverse in the Wednesbury sense.

6. I therefore grant the relief claimed and direct that there be a rehearing before the Criminal Injuries Compensation Board.

The Times 21 January 1992, CO/2177/89, (Transcript:Marten Walsh Cherer)

DISPOSITION:
Judgment accordingly

SOLICITORS:
Evill & Coleman; Treasury Solicitor

1