Case No: CO/2239/2001

Neutral Citation Number: [2002] EWHC 815 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday 2 May 2002

Before :

THE HONOURABLE MR JUSTICE MUNBY

Between :

R (LINDA ANNE SOPER)	**Claimant**
- and -	
CRIMINAL INJURIES COMPENSATION APPEALS PANEL	**Defendant**

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

Ms E A Gumbel QC (instructed by T V Edwards) for the Claimant
Mr Jeremy Johnson (instructed by the Treasury Solicitor) for the Defendant

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Judgment
As Approved by the Court

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Mr Justice Munby:

1. Pursuant to permission granted by Forbes J on a renewed oral application on 21 September 2001 (permission having previously been refused on the papers by Jackson J on 20 July 2001) Ms Gumbel QC moves on behalf of Linda Anne Soper for judicial review of a decision of the Criminal Injuries Compensation Appeals Panel (Miss Leeona Dorrian QC, chairman, Mr Peter Weitzman QC and Mr Michael Park CBE, solicitor) dated 6 March 2001.

2. It is common ground that the claimant, who was born on 24 November 1947, was entitled to compensation in relation to an injury she suffered on 26 November 1992. It is also common ground that at the time of the injury the claimant had a pre-existing spondylosis which was liable to become symptomatic in the future and that as a result of the injury the claimant went on to develop symptoms of fibromyalgia.

3. It is likewise common ground that in accordance with paragraph 12 of the Criminal Injuries Compensation Board's 1990 Scheme the claimant's award was to

> "be assessed on the basis of common law damages".

4. Paragraph 19(a) provided, however, that

> "Compensation will be reduced by the full value of any present or future entitlement to ... United Kingdom social security benefits".

5. It is accepted by the defendant that the only benefits to be brought into account for this purpose are those attributable to the injury; there is no deduction for benefits which the claimant would have been entitled to in any event in the absence of the injury. That is made clear in paragraph 9 of the February 1990 Guide to the Scheme.

6. The defendant assessed the gross amount of the award in the sum of £195,968. Included in this was the sum of £32,120 for future loss of earnings to age 60 (£5,538 per annum x multiplier of 5.8) and the sum of £72,720 for future costs of care for the remainder of the claimant's life (£4,848 x multiplier of 15). None of this is directly challenged by Ms Gumbel. Indeed, as Mr Johnson on behalf of the defendant points out, the care multiplier of 15 was that put forward by the claimant.

7. From the gross award of £195,968 the defendant deducted a total of £187,955, leaving the claimant with a net award of £8,013. Included in the deductions was the sum of £84,749 in relation to benefits – including disability living allowance – receivable by the claimant until age of 65 (£8,921 per annum x multiplier of 9.5) and the sum of £49,420 in relation to benefits receivable by the claimant after age 65 (£4,942 per annum x multiplier of 10). The claimant challenges these two deductions.

8. In essence Ms Gumbel's complaint is that the defendant erred in law and/or that it was irrational for the defendant to adopt different multipliers for the future cost of lifetime care – 15 – and the future receipt of care-related benefits – 9.5 + 10 = 19.5.

9. It is a fact, as Mr Johnson points out, that Ms Gumbel declines to be drawn both on the question of whether the multiplier for future care costs should be increased to the multiplier for deduction of future benefits or whether the multiplier for deduction of future benefits should be decreased to the multiplier for future care costs and also on the ultimate question of what the final award should have been. Ms

Gumbel is entitled to adopt that stance but it means that if this challenge succeeds the case will have to go back to the defendant for a re-determination whose outcome is uncertain.

10. The award of disability living allowance is regulated by sections 71-76 of the Social Security Contributions and Benefits Act 1992. It cannot be paid to a person who has reached the age of 65 except by virtue of an award made before that age: section 75. It consists of a "care component" and a "mobility component": section 71(1). Entitlement to the care component is governed by section 72(1) and to the mobility component by section 73(1). The care component can be paid at three different rates (sections 72(3) and (4)) and the mobility component at two different rates (sections 73(10) and (11)). In the present case the deductions calculated by the defendant assumed that the claimant would receive the care component at the middle rate and the mobility component at the higher rate.

11. The defendant's decision is explained in a statement by the chairman, Miss Dorrian, dated 25 October 2001. I think it best if I set out the key paragraphs in full:

> "9 ... The discount rate applied by the Panel throughout the calculation of the Claimant's award was 3%. The multiplier applied for future loss of earnings was taken from Table 24 (multipliers for loss of earnings to pension age 60 (females)) of the Ogden tables for a woman aged 53 at a discount rate of 3% which produced a multiplier of 6.24. This multiplier was reduced to reflect economic factors by using Table C on page 15 (loss of earnings to pension age 60) by 0.94, producing a multiplier of 5.8.
>
> 10 Counsel for the Claimant suggested a multiplier of 15 to be applied to future care costs. This was considered by the panel to be a reasonable and fair figure having regard to the terms of table 20 where the 3% discount rate showed a life multiplier of 19.75 for a woman of 53. The reduction to 15 in our view properly reflected the fact that in any event the claimant would have had an increased requirement for care as she grew older and as the effect of the degenerative changes in her spine were felt with age.
>
> 11 The multiplier applied to future benefits was taken from Table 20 for a woman aged 53 at a discount rate of 3% which produced a multiplier of 19.75. The Panel noted the rate of benefits paid to the Claimant would change when she reached the age of 65, and adjusted and apportioned the multiplier to reflect this and for other contingencies. Table 26, (multipliers for loss of earnings to pension age 65 (females)), for a woman aged 53 at a discount rate of 3%, produced a multiplier of 9.84 which was adjusted in the Claimant's favour for other contingencies to 9.5 and applied to the benefits up to the age of 65. A multiplier of 10, rather than 10.25 (19.75 less 9.5), again in the Claimant's favour, was applied to the balance of benefits for life.
>
> 12 The challenge on behalf of the Defendant states "only those benefits that are attributable to the injury ought to be deducted". This principle is in accordance with the approach taken by the Panel in all cases in accordance with the terms of the scheme set out at Paragraph 19. In the Claimant's case the benefits deducted were the benefits that were paid as a result of the injury. In regard to future benefits the Panel deducted the benefits which they considered would have remained in payment to the Claimant which she would receive as a result of the incident.
>
> 13 The Panel considered that Disability Living Allowance would continue in payment as the effects of the injuries on the Claimant were unlikely to diminish with time; and deducted the future entitlement to Disability Living Allowance after applying an appropriately adjusted multiplier. The Panel had a number of reports from Dr Chikanza which made it clear (a) that the pursuer's symptoms arose from her fibromyalgia,

> which was precipitated by trauma; and (b) that she would continue to have pain from the fibromyalgia and to require treatment for this for the foreseeable future. ... In the circumstances we felt (i) that the claimant was likely to continue to have problems from fibromyalgia for the rest of her life and to receive disability living allowance accordingly; and (ii) that had it not been for her fibromylyagia her other conditions were not of such a degree that she would have been likely otherwise to qualify for disability living allowance. Further, although we considered that she would in any event have required increased care with the effects of ageing, the evidence did not suggest to us that her condition would have led to an entitlement for disability living allowance had it not been for the accident. The continuation of disability living allowance would thus be wholly attributable to the accident and as such required to be deducted."

12. There is no challenge as I understand Ms Gumbel's submissions to the defendant's evaluation of the medical evidence as summarised in paragraph 13 of Miss Dorrian's statement nor to the defendant's finding that but for the injury the claimant would never have become entitled to benefit.

13. Ms Gumbel and Mr Johnson are, in effect, agreed that the defendant's selection of a multiplier of 15 for the claimant's care costs to reflect the increased care which the claimant would in any event have needed as she got older for her spondylosis means that after the expiry of the appropriate period represented by that multiplier – according to Mr Johnson at about the age of 72 – there will be a need for care unrelated to the injury. In other words, until she is about 72 the claimant will need care solely as a result of the injury; from about the age of 72 the claimant would have needed care in any event as a result of her pre-existing condition.

14. The claimant's challenge is two-fold:

    i) First, as I have said, that the defendant erred in law and/or that it was irrational for the defendant to adopt different multipliers for the future cost of lifetime care and the future receipt of care-related benefits.

    ii) Secondly, and in any event, that the defendant's assessment of the claimant's likelihood of receiving benefits in future was flawed.

15. I shall consider these in turn.

16. Ms Gumbel submits that the effect of assuming that the claimant would have required care in any event and making a reduction of 4.75 in the multiplier for this contingency was to deduct benefits for a period when the defendant had assumed that the claimant would have required care even without the injury – so the defendant did not in practice deduct like from like. The defendant, in other words, deducted benefits for a longer period than that for which it calculated care was required as a result of the injury. It is, says Ms Gumbel, difficult to see how the defendant can have assumed that disability living allowance would become payable *only* because of the injury if the claimant was going to require care in any event. Furthermore, she says, the logic of the defendant's approach as summarised in paragraph [13] above requires that the deduction of benefits paid as a result of the claimant's need for care deriving from the injury should also have been capped at a multiplier of 15.

17. As Mr Johnson points out, Ms Gumbel's entire case on this point assumes that a need for care as a result of a particular injury and an entitlement to future disability living allowance as a result of the same injury are logically and legally equivalent, in other words that an entitlement to disability living allowance is a logical and legal consequence of the need for care.

18. Mr Johnson submits that there is no such logical or legal equivalence. He points to two matters:

i) Not every person who needs care is entitled to disability living allowance: the specific statutory criteria have to be fulfilled.

ii) The effect of section 75, which prevents a person over 65 from making a fresh claim.

19. The effect of these two factors in a case such as this, he submits, is that inevitably the multiplier for deduction of future benefits will be higher than the multiplier for future care costs.

20. So far as concerns the multiplier of 15 for future care costs Mr Johnson submits – and I can see no answer to this – that it was entirely correct to reduce the multiplier of 19.75 to reflect the fact that, even if the claimant had not suffered the injury, she would have needed care at some time in the future in any event. As he points out, the claimant's own case was presented to the defendant on that basis and it was the claimant's own counsel – not, I should make clear, Ms Gumbel – who proposed the multiplier of 15 which in the event was accepted by the defendant. He says, and I agree, that the multiplier of 15 was consistent with both the claimant's own submission and the medical evidence and that there is simply no basis for a finding that it was irrational.

21. So far as concerns the multiplier of 19.75 for future benefits that was, says Mr Johnson, plainly the correct starting point if the defendant was justified – as he says it was – in finding that the claimant would continue to receive benefits for the rest of her life. Subject only to Ms Gumbel's alternative argument which I address below that was, he says, and I agree, a finding of fact that the defendant was entitled to make.

22. So far so good. But it is the next part of Mr Johnson's argument which is crucial. Given that 19.75 was the correct starting point, why not reduce the multiplier to 15 in just the same way as the other multiplier? Mr Johnson gives two answers:

i) Given that the claimant's pre-existing condition was such that she would have needed care from her earlier 70s – see paragraph [13] above – this does not mean that there should be a commensurate reduction in the multiplier for future benefits. This, says Mr Johnson, is because if the claimant had never suffered the injury but become disabled in her late 60s or 70s section 75 would have precluded any award of disability living allowance.

ii) Even if the claimant's pre-existing condition would have become symptomatic before the age of 65 it does not follow that she would have become entitled to disability living allowance. The defendant, he submits, was entitled to find that although she would have required care, she would not have qualified for disability living allowance.

23. Mr Johnson suggests that although the effect of the defendant's decision is that the claimant receives from public funds – the defendant's funds – an amount less even than the award of general damages, there is no injustice because, he says, the difference is made up by her entitlement to future benefits from other public funds.

24. Ms Gumbel's riposte is that part at least of this involves reading into the defendant's decision reasoning which is not to be found explicitly set out. That may be so, but since her entire challenge is based on the assertion that the defendant's decision is irrational it is legitimate for Mr Johnson to point out, if he can, that there is a rational basis for it.

25. At the end of the day the point, as it seems to me, really comes down to this. Is Ms Gumbel correct in asserting that the defendant's reasoning as explained in paragraph 10 of Miss Dorrian's statement is simply logically inconsistent with its reasoning as explained in paragraph 13 of that statement?

26. Put rather differently, is there, as Ms Gumbel would have it, some necessary inconsistency between:

i) the finding in paragraph 10 that the claimant would have required care in any event as she grew older as a result of her pre-existing spondylosis – and, consequentially, the finding that the correct multiplier is 15, and

ii) the findings in paragraph 13 (a) that the claimant's pre-existing spondylosis would *not* have led to any entitlement to disability living allowance and (b) that the fibromyalgia would entitle her to disability living allowance for the rest of her life – and, consequentially, the finding that the correct multiplier is 19.75 (rounded down in favour of the claimant to 19.5)?

27. In my judgment the answer to this question, however it is put, has to be in the negative. Each of the defendant's findings as set out in paragraphs 10 and 13 of Miss Dorrian's statement was, in my judgment, one that was open to it given the evidence before it. There is, in my judgment, nothing irrational, illogical, or unlawful in the defendant's reasoning and decision.

28. I turn now to Ms Gumbel's other point, namely that the defendant's assessment of the claimant's likelihood of receiving benefits in future was flawed.

29. Ms Gumbel makes two separate points:

i) There should have been a reduction in the multiplier applied to future benefits to reflect the possibility that there will at some time in future be a loss or reduction of entitlement to the claimant's disability living allowance. In support of this Ms Gumbel points to the undoubted fact that, as correspondence from the Benefits Agency makes clear, the claimant's benefit is to be reviewed on 24 October 2003.

ii) Quite apart from that, she says, the defendant fell into legal error in failing to apply the proper test. Relying upon the decisions of the Court of Appeal in *Doyle v Wallace* [1998] PIQR Q146 and *Langford v Hebran* [2001] EWCA Civ 361, Ms Gumbel submits that the future benefits ought to be valued not, as she says the defendant did, by applying a balance of probabilities test but rather by assessing the chance of the benefits accruing and calculating the award accordingly.

30. So far as concerns the first of these complaints Mr Johnson submits that, although there may be a theoretical possibility of a loss or reduction of benefit, the practical reality is that it is overwhelmingly likely that the claimant will continue to receive the benefits as found by the defendant. I agree that this was a conclusion to which the defendant was plainly entitled to come. He accepts that there can be cases in which an applicant will cease to be entitled to disability living allowance without any improvement in her condition – one such case being that given in her skeleton argument by Ms Gumbel – but he says, correctly as it seems to me, that there is simply no evidential basis for asserting that such will happen to the claimant in the present case. He submits that the defendant, on the totality of the evidence before it, was entitled to conclude, as it did, that the claimant would remain in receipt of benefit for the rest of her life and that the very modest adjustment made in the claimant's favour to the multiplier sufficiently reflected the overwhelming realities. I agree with Mr Johnson when he asserts that the defendant's approach simply cannot be faulted on judicial review grounds.

31. The second point involves a point of law which, so far as I can see, was not ventilated before the defendant (nor, for that matter, in the claimant's N461).

32. As Mr Johnson points out, both *Doyle* and *Langford* are really nothing more than applications of the principles to be found in Stuart-Smith LJ's judgment in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602. He says that the claimant's future entitlement does not depend upon the hypothetical actions of a third party but rather upon her future state of health and he thus seeks to rely upon what Stuart-Smith LJ said at pp 1609G and 1611B-C. That may be so, but it does not, as it seems to me get him anywhere. See what Stuart-Smith LJ said at p 1610C as to it being "trite law" that future uncertain events, such as the question of whether and to what extent someone will suffer osteoarthritis,

> "are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating".

33. To that extent Ms Gumbel is, in my judgment, right and Mr Johnson is wrong. But that does not, in the final analysis, as it seems to me, assist Ms Gumbel. As Stuart-Smith LJ made clear at p 1614D, the fact-finding tribunal when conducting this kind of exercise is concerned with possibilities which are real or substantial and not with those which are merely speculative. If the fact-finding tribunal finds that the chance of something not happening is merely speculative – or as Mr Johnson puts it merely fanciful – then it is open to it to assess the claim (in this case the deduction) at 100%. As Stuart-Smith LJ said, it is not helpful to seek to lay down in percentage terms what the upper end of the bracket should be.

34. In the present case Ms Gumbel identifies two different areas of possible uncertainty surrounding the claimant's right to go on receiving disability living allowance: (i) possible changes in the claimant's circumstances and (ii) possible changes in the legislation. As to the first, the defendant was, as I have already said, entitled to conclude, on the totality of the evidence before it, that the claimant would remain in receipt of benefit for the rest of her life and that the very modest adjustment made in the claimant's favour to the multiplier sufficiently reflected the overwhelming realities. As to the second, this is, as Mr Johnson says, entirely speculative. And as he points out, if one is to factor into the calculation the possibility that the government will withdraw or adversely modify disability living allowance so too one has to factor in the possibility that the amounts paid will be increased in real terms.

35. Overall I conclude that the defendant was entitled to find, as it did, that the disability living allowance "would continue in payment". That being so the outcome is the same whichever legal approach one adopts.

36. Ms Gumbel has, in my judgment, failed to demonstrate any judicially reviewable error on the part of the defendant. It was open to the defendant to make the findings it did, as set out and explained in Miss Dorrian's statement.

37. It follows that this claim must be dismissed.

MR JUSTICE MUNBY: For the reasons set out in a judgment which has already been sent to the parties in draft, and which I now hand down in open court, this application must be dismissed.

MR JOHNSON: My Lord, in those circumstances I ask for a paper judgment on costs. The claimant is in receipt of public funding. We do not have a schedule, but I would invite you to make an order that the claimant pay the defendant's costs not to be enforced save pursuant to the Access to Justice Act.

MR JUSTICE MUNBY: That is the appropriate form of words were I to make such an order, is it?

MR JOHNSON: My Lord, yes.

MS GUMBEL: My Lord, I am publicly funded, I cannot really say anything further. I will be asking for permission to appeal on the basis that this is a point of general importance, and that is perhaps also a point I should make in relation to costs. It is testing a point, and your Lordship's judgment does give a variation on the test that will now be applied to applications before --

MR JUSTICE MUNBY: Well, can I test, Ms Gumbel, the proposition you are making by inviting you to formulate, as it were, the proposition of law which, were this unreportable case to be reported, would appear in a law reporter's headnote as being my holding. Ms Gumbel, I am not conscious of having decided any point of law or principle at all, although I appreciate that there are occasions when judges do such things without being aware that they are doing them.

MS GUMBEL: My Lord, I would put it like this. The correct test for the Criminal Injuries Compensation Authority, when assessing deduction of benefits from claims, is that that deduction should be made on the basis of the percentage prospects that benefits will be paid and not on a balance of probabilities. This tribunal clearly deducted the benefits on a balance of probabilities, and that was the position, as I understand it, that the defendants took, was the correct position and was defended.

MR JUSTICE MUNBY: Yes, but in effect I have accepted that the correct legal analysis is as you say it was.

MS GUMBEL: My Lord, yes.

MR JUSTICE MUNBY: And not as Mr Johnson said it was, but I said, on the particular facts of this case, it did not do you any good at the end of the day because whether one was approaching this on the loss of the value of the loss of chance or on the basis of balance of probabilities, a point which, so far as I am aware, was never taken before the defendant at all, you actually get to the same result on the figures.

MS GUMBEL: Well, my Lord, that is your Lordship's --

MR JUSTICE MUNBY: The paradox is that on the only point of principle which I think one can divine from my judgment, you were successful.

MS GUMBEL: My Lord, yes. I appreciate the difficulty, something of a boxing in as far as the Court of Appeal is concerned, but it does raise the further point as to whether if your Lordship finds, as a matter of principle, the tribunal has applied the wrong test, it is possible to superimpose the result they might have come to

had they applied the right test, and certainly my argument would be that having found they applied the wrong test, the only option is for the matter --

MR JUSTICE MUNBY: To send it back again.

MS GUMBEL: To be sent back, because having said in terms they applied the balance of probabilities test, what they would have done between 51 and 100 per cent is a factual finding that your Lordship has made from the material before your Lordship as to how your Lordship would have decided that issue on a percentages basis. I would say that is a matter in itself that is of importance for the Court of Appeal to consider whether in those circumstances it is right that your Lordship decides that issue rather than sending it back for the correct test to be applied.

MR JUSTICE MUNBY: Ms Gumbel, you have accepted, without inviting me to correct it as being an error, what I said in paragraph 31 of the judgment, that this point of law was neither taken before the defendant nor indeed in the N461, and I think I am right in saying that it was, as it were, your riposte at a later stage, after the defendant had perhaps somewhat imprudently, in the last two or three lines of the acknowledgment of service, as it were, identified for the first time a legal proposition, as it turns out erroneously in my judgment, and that I think I am right in saying that this point which you then took before me was canvassed for the very first time not before Jackson J, who dealt with this matter on the papers, but before Forbes J on the renewed oral application.

MS GUMBEL: My Lord, yes. The reason for that --

MR JUSTICE MUNBY: I am not so much interested in the reasons, but if that is the fact and you have not dissented from what I said in the judgment, is it not a relevant consideration that I should determine the matter, if I properly can on the materials before me, rather than sending back for determination by the defendant a point which was never taken before them.

MS GUMBEL: It raises the further point, which I had not raised, as to whether it is right that the tribunal gives such sparse reasons at the stage of giving their reasons on the determination that it is impossible to ascertain the test they applied until this application was made, when they said in the reply what test they had applied.

MR JUSTICE MUNBY: Well, I have to say that thought had occurred to me.

MS GUMBEL: That is the difficulty.

MR JUSTICE MUNBY: But you are only able to hoist yourself onto this point at all, I think, not because of anything said by the defendant at the time, not by anything said by Miss Dorrian in her evidence, but simply and solely because of what was said on the defendant's behalf by the Treasury Solicitor in the acknowledgment of service.

MS GUMBEL: I would not entirely accept that. I would say from Miss Dorrian's evidence she used the term "likely", which is usually used in respect of the balance of probabilities test, it appears from her evidence that she had used that, certainly consistent with the balance of probabilities test, and the form certainly specified a balance of probabilities test. The other difficulty, and the case was not put in the way that it was put before Forbes J in the written application before Jackson J on the multipliers either, because it was impossible to ascertain how the multipliers would be worked out until we got the response, and I appreciate it looks unsatisfactory, but that is the explanation.

MR JUSTICE MUNBY: Ms Gumbel, contrary to my original suggestion, you have identified a point. I am not sure it is a point of law, but you have identified a point which I can see you might wish to argue in the Court of Appeal. I have to say it does not seem to me to be the kind of point which satisfies either of the criteria which have to be satisfied if I am to give permission.

MS GUMBEL: My Lord, I would say that it does give rise to reasonable prospects of success that a tribunal should reconsider with the correct test the deduction of benefits, and that the way in which the benefits are deducted and the application of the correct test is a point of far reaching importance in applications to those tribunals, because, from the facts of this case, it is apparent it makes a huge difference to the size of the awards, and if the correct approach is to hear detailed evidence as to the percentage prospects of the benefit continuing to be paid, then that may make a large difference for awards and some guidance in how that is to be done would also be of assistance.

MR JUSTICE MUNBY: The point arises in this case because of the fact that, as a result of some preexisting condition, in relation to the relevant period your client is suffering disability from two independent concurrent causes. Now, I am not at all sure that the problem which you identify as being one of general importance is likely to arise in any criminal injuries compensation context unless both disability living allowance is in issue and you have, as in the present rather unusual case, two concurrent injuries overlapping.

MS GUMBEL: My Lord, I would say quite to the contrary. In any case in which benefits are deducted, and they are deducted in every case, the tribunal should be carrying out the exercise as to whether on reassessment that particular claimant will be continuing to obtain that benefit, because benefits are deducted in total from the award as a whole, and the assessment of the benefit is a huge part of the calculation, and that calculation has to be done in every case. It includes income support and other benefits that a claimant may be receiving, that made this particular case more complicated, but it does not alter the fact that the practice at the moment is to deduct the totality of the benefit, I would say because the test being applied is wrong, and in every case the totality is

deducted without the exercise being carried out as to what the percentage prospects of continuing to receive the benefit are. Tribunals should be --

MR JUSTICE MUNBY: You say the matter is of general importance which applies, you say, across the board, as how is the Criminal Injuries Compensation Authority to go about the assessment of the value of future benefits when you say nobody knows what may be in the Secretary of State's mind in six months' time, some form of benefit may be removed by statute, and, furthermore, there may be the problem of knowing whether the particular claimant will continue to receive the benefit for 5, 10, 15 or 20 years. That is the general point, is it?

MS GUMBEL: That is the general point. The second point may be more significant in most cases as to the future prognosis and the future plans of the claimant for having carers and the changes in equipment provided will make a huge difference, the example is the walk-in shower, something of that sort. Evidence at the moment is not given as to the likelihood of that and what difference that will make to the entitlement of benefit. If that does happen then some guidance would certainly be helpful. The result of your Lordship's judgment is to replace the test with the percentage test but then to apply an assessment without factual evidence on the point being before your Lordship. That is the difficulty.

MR JUSTICE MUNBY: Yes, I see.

MS GUMBEL: It will be difficult for the tribunals to apply your Lordship's judgment not having seen how factual evidence on that point should be treated and tested.

I would also deal with the first point in the misfit between the care and benefits. Again, the point there is where disability living allowance is assessed for the care as a whole that somebody is in need of, whether one can take a part of that out because of a preexisting disability there. I accept it is particular to the circumstances of this case, and that is much more sensitive to this particular case than the second point.

MR JUSTICE MUNBY: Yes. Thank you. Mr Johnson, what do you have to say about this?

MR JOHNSON: My Lord, I can see that there is a point of importance as to the correct approach in calculating future losses --

MR JUSTICE MUNBY: Is that, as Ms Gumbel suggests, going to have some impact upon the practical way either in which people have to conduct hearings before the appeals panel, or practical implications in terms of changing the way in which the appeals panel in the future is going to go about evaluating and deciding cases of this sort?

MR JOHNSON: My Lord, in my submission, no.

MR JUSTICE MUNBY: You do not accept that?

MR JOHNSON: No. In this case the panel considered -- paragraph 13 of Miss Dorrian's statement she says: "The Panel considered Disability Living Allowance would continue in payment...", and that was a finding made.

MR JUSTICE MUNBY: Indeed, those were the crucial words which I have picked up towards the end of the judgment.

MR JOHNSON: My Lord, precisely so. Neither before the panel nor before your Lordship was there any evidence placed to suggest otherwise. Had evidence been placed to suggest otherwise, then it could have been that what your Lordship termed as merely speculative chances or merely fanciful chances could have been assessed and given a percentage prospect, but in the absence of any evidential basis for that, really neither the panel nor your Lordship, nor the Court of Appeal, would be in any position to make any significant discount --

MR JUSTICE MUNBY: Yes, I see.

MR JOHNSON: My Lord, in terms of sending it back, given the evidential basis, the panel would be in no better position than my Lord in assessing that.

MR JUSTICE MUNBY: Thank you. Is there anything you want to say, Ms Gumbel, in response to that?

MS GUMBEL: I would say if it were sent back, if that were the decision of the Court of Appeal, the panel would be hearing it afresh, and they may well be in a better position because evidence would be called on that point as to the percentage chances and as to particular improvements in, for example, the claimant's facilities at home, which might reduce the care needs. So they would hear new evidence that was not before your Lordship or before the original panel, I entirely accept, because the point was not argued in that way then.

MR JUSTICE MUNBY: I am not going to give permission to appeal. There are two alternative bases upon which permission to appeal can be granted. One goes to the merits of the proposed appeal. The other, which, in a sense, is independent of the merits, is if there is some other compelling reason why the matter should be considered by the Court of Appeal.

So far as concerns the merits, despite everything said by Ms Gumbel, I remain wholly unpersuaded that there is any point of principle here, or indeed any point which is of that degree of merit which would have to be shown were I to be entitled to grant permission. I do not believe that an appeal stands any realistic prospect of success.

So far as concerns the second matter, Ms Gumbel has suggested that the effect, the practical forensic effect, of my judgment is going to be a significant alteration in the way in which litigants before the Criminal Injuries Compensation Appeals Panel prepare and present their cases - a significant change in the type of evidence which will be required to be adduced before the appeals panel, and a significant difference in the way in which the appeals panel will have to go about evaluating and deciding such cases.

Mr Johnson disputes those propositions. I am unpersuaded that there is any real substance in them. Had I been persuaded that there was some real reason to believe that my decision would very significantly alter the way in which the appeals panel for the future conducted business, I might have been persuaded that that would be a sufficient and compelling reason as to justify the grant of appeal on that basis, but I am not. In the circumstances, Ms Gumbel, despite her elegant arguments, has failed to persuade me that permission to appeal should be granted on either basis.

The order, I think, simply comes to this. The application will be dismissed. There will be an order for costs in the appropriate form, bearing in mind that the claimant is publicly funded. Permission to appeal will be refused.

MS GUMBEL: I think I need public funding assessment.

MR JUSTICE MUNBY: There will also be, in whatever is the technically appropriate form, an order for the detailed assessment of the claimant's publicly funding costs.

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Neutral Citation Number: [2002] EWHC 815 (Admin)

Case No: CO/2239/2001

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

2 May 2002

Before:

THE HONOURABLE MR JUSTICE MUNBY

Between:

R (LINDA ANNE SOPER) **Claimant**

- and -

CRIMINAL INJURIES COMPENSATION APPEALS PANEL **Defendant**

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7421 4040, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Ms E A Gumbel QC (instructed by T V Edwards) for the Claimant
Mr Jeremy Johnson (instructed by the Treasury Solicitor) for the Defendant

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HTML VERSION OF JUDGMENT
AS APPROVED BY THE COURT

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Mr Justice Munby:

1. Pursuant to permission granted by Forbes J on a renewed oral application on 21 September 2001 (permission having previously been refused on the papers by Jackson J on 20 July 2001) Ms Gumbel QC moves on behalf of Linda Anne Soper for judicial review of a decision of the Criminal Injuries Compensation Appeals Panel (Miss Leeona Dorrian QC, chairman, Mr Peter Weitzman QC and Mr Michael Park CBE, solicitor) dated 6 March 2001.

2. It is common ground that the claimant, who was born on 24 November 1947, was entitled to compensation in relation to an injury she suffered on 26 November 1992. It is also common ground that at the time of the injury the claimant had a pre-existing spondylosis which was liable to become symptomatic in the future and that as a result of the injury the claimant went on to develop symptoms of fibromyalgia.

3. It is likewise common ground that in accordance with paragraph 12 of the Criminal Injuries Compensation Board's 1990 Scheme the claimant's award was to

> "be assessed on the basis of common law damages".

4. Paragraph 19(a) provided, however, that

> "Compensation will be reduced by the full value of any present or future entitlement to ... United Kingdom social security benefits".

5. It is accepted by the defendant that the only benefits to be brought into account for this purpose are those attributable to the injury; there is no deduction for benefits which the claimant would have been entitled to in any event in the absence of the injury. That is made clear in paragraph 9 of the February 1990 Guide to the Scheme.

6. The defendant assessed the gross amount of the award in the sum of £195,968. Included in this was the sum of £32,120 for future loss of earnings to age 60 (£5,538 per annum x multiplier of 5.8) and the sum of £72,720 for future costs of care for the remainder of the claimant's life (£4,848 x multiplier of 15). None of this is directly challenged by Ms Gumbel. Indeed, as Mr Johnson on behalf of the defendant points out, the care multiplier of 15 was that put forward by the claimant.

7. From the gross award of £195,968 the defendant deducted a total of £187,955, leaving the claimant with a net award of £8,013. Included in the deductions was the sum of £84,749 in relation to benefits – including disability living allowance – receivable by the claimant until age of 65 (£8,921 per annum x multiplier of 9.5) and the sum of £49,420 in relation to benefits receivable by the claimant after age 65 (£4,942 per annum x multiplier of 10). The claimant challenges these two deductions.

8. In essence Ms Gumbel's complaint is that the defendant erred in law and/or that it was irrational for the defendant to adopt different multipliers for the future cost of lifetime care – 15 – and the future receipt of care-related benefits – 9.5 + 10 = 19.5.

9. It is a fact, as Mr Johnson points out, that Ms Gumbel declines to be drawn both on the question of whether the multiplier for future care costs should be increased to the multiplier for deduction of future benefits or whether the multiplier for deduction of future benefits should be decreased to the multiplier for future care costs and also on the ultimate question of what the final award should have been. Ms Gumbel is entitled to adopt that stance but it means that if this challenge succeeds the case will have to go back to the defendant for a re-determination whose outcome is uncertain.

10. The award of disability living allowance is regulated by sections 71-76 of the Social Security Contributions and Benefits Act 1992. It cannot be paid to a person who has reached the age of 65 except by virtue of an award made before that age: section 75. It consists of a "care component" and a "mobility component": section 71(1). Entitlement to the care component is governed by section 72(1) and to the mobility component by section 73(1). The care component can be paid at three different rates (sections 72(3) and (4)) and the mobility component at two different rates (sections 73(10) and (11)). In the present case the deductions calculated by the defendant assumed that the claimant would receive the care component at the middle rate and the mobility component at the higher rate.

11. The defendant's decision is explained in a statement by the chairman, Miss Dorrian, dated 25 October 2001. I think it best if I set out the key paragraphs in full:

> "9 ... The discount rate applied by the Panel throughout the calculation of the Claimant's award was 3%. The multiplier applied for future loss of earnings was taken from Table 24 (multipliers for loss of earnings to pension age 60 (females)) of the Ogden tables for a woman aged 53 at a discount rate of 3% which produced a multiplier of 6.24. This multiplier was reduced to reflect economic factors by using Table C on page 15 (loss of earnings to pension age 60) by 0.94, producing a multiplier of 5.8.
>
> 10 Counsel for the Claimant suggested a multiplier of 15 to be applied to future care costs. This was considered by the panel to be a reasonable and fair figure having regard to the terms of table 20 where the 3% discount rate showed a life multiplier of 19.75 for a woman of 53. The reduction to 15 in our view properly reflected the fact that in any event the claimant would have had an increased requirement for care as she grew older and as the effect of the degenerative changes in her spine were felt with age.

> 11 The multiplier applied to future benefits was taken from Table 20 for a woman aged 53 at a discount rate of 3% which produced a multiplier of 19.75. The Panel noted the rate of benefits paid to the Claimant would change when she reached the age of 65, and adjusted and apportioned the multiplier to reflect this and for other contingencies. Table 26, (multipliers for loss of earnings to pension age 65 (females)), for a woman aged 53 at a discount rate of 3%, produced a multiplier of 9.84 which was adjusted in the Claimant's favour for other contingencies to 9.5 and applied to the benefits up to the age of 65. A multiplier of 10, rather than 10.25 (19.75 less 9.5), again in the Claimant's favour, was applied to the balance of benefits for life.
>
> 12 The challenge on behalf of the Defendant states "only those benefits that are attributable to the injury ought to be deducted". This principle is in accordance with the approach taken by the Panel in all cases in accordance with the terms of the scheme set out at Paragraph 19. In the Claimant's case the benefits deducted were the benefits that were paid as a result of the injury. In regard to future benefits the Panel deducted the benefits which they considered would have remained in payment to the Claimant which she would receive as a result of the incident.
>
> 13 The Panel considered that Disability Living Allowance would continue in payment as the effects of the injuries on the Claimant were unlikely to diminish with time; and deducted the future entitlement to Disability Living Allowance after applying an appropriately adjusted multiplier. The Panel had a number of reports from Dr Chikanza which made it clear (a) that the pursuer's symptoms arose from her fibromyalgia, which was precipitated by trauma; and (b) that she would continue to have pain from the fibromyalgia and to require treatment for this for the foreseeable future. ... In the circumstances we felt (i) that the claimant was likely to continue to have problems from fibromyalgia for the rest of her life and to receive disability living allowance accordingly; and (ii) that had it not been for her fibromylyagia her other conditions were not of such a degree that she would have been likely otherwise to qualify for disability living allowance. Further, although we considered that she would in any event have required increased care with the effects of ageing, the evidence did not suggest to us that her condition would have led to an entitlement for disability living allowance had it not been for the accident. The continuation of disability living allowance would thus be wholly attributable to the accident and as such required to be deducted."

12. There is no challenge as I understand Ms Gumbel's submissions to the defendant's evaluation of the medical evidence as summarised in paragraph 13 of Miss Dorrian's statement nor to the defendant's finding that but for the injury the claimant would never have become entitled to benefit.

13. Ms Gumbel and Mr Johnson are, in effect, agreed that the defendant's selection of a multiplier of 15 for the claimant's care costs to reflect the increased care which the claimant would in any event have needed as she got older for her spondylosis means that after the expiry of the appropriate period represented by that multiplier – according to Mr Johnson at about the age of 72 – there will be a need for care unrelated to the injury. In other words, until she is about 72 the claimant will need care solely as a result of the injury; from about the age of 72 the claimant would have needed care in any event as a result of her pre-existing condition.

14. The claimant's challenge is two-fold:

    i) First, as I have said, that the defendant erred in law and/or that it was irrational for the defendant to adopt different multipliers for the future cost of lifetime care and the future receipt of care-related benefits.

    ii) Secondly, and in any event, that the defendant's assessment of the claimant's likelihood of receiving benefits in future was flawed.

15. I shall consider these in turn.

16. Ms Gumbel submits that the effect of assuming that the claimant would have required care in any event and making a reduction of 4.75 in the multiplier for this contingency was to deduct benefits for a period when the defendant had assumed that the claimant would have required care even without the injury – so the defendant did not in practice deduct like from like. The defendant, in other words, deducted benefits for a longer period than that for which it calculated care was required as a result of the injury. It is, says Ms Gumbel, difficult to see how the defendant can have assumed that disability living allowance would become payable *only* because of the injury if the claimant was going to require care in any event. Furthermore, she says, the logic of the defendant's approach as summarised in paragraph [13] above requires that the deduction of benefits paid as a result of the claimant's need for care deriving from the injury should also have been capped at a multiplier of 15.

17. As Mr Johnson points out, Ms Gumbel's entire case on this point assumes that a need for care as a result of a particular injury and an entitlement to future disability living allowance as a result of the same injury are logically and legally equivalent, in other words that an entitlement to disability living allowance is a logical and legal consequence of the need for care.

18. Mr Johnson submits that there is no such logical or legal equivalence. He points to two matters:

    i) Not every person who needs care is entitled to disability living allowance: the specific statutory criteria have to be fulfilled.

    ii) The effect of section 75, which prevents a person over 65 from making a fresh claim.

19. The effect of these two factors in a case such as this, he submits, is that inevitably the multiplier for deduction of future benefits will be higher than the multiplier for future care costs.

20. So far as concerns the multiplier of 15 for future care costs Mr Johnson submits – and I can see no answer to this – that it was entirely correct to reduce the multiplier of 19.75 to reflect the fact that, even if the claimant had not suffered the injury, she would have needed care at some time in the future in any event. As he points out, the claimant's own case was presented to the defendant on that basis and it was the claimant's own counsel – not, I should make clear, Ms Gumbel – who proposed the multiplier of 15 which in the event was accepted by the defendant. He says, and I agree, that the multiplier of 15 was consistent with both the claimant's own submission and the medical evidence and that there is simply no basis for a finding that it was irrational.

21. So far as concerns the multiplier of 19.75 for future benefits that was, says Mr Johnson, plainly the correct starting point if the defendant was justified – as he says it was – in finding that the claimant would continue to receive benefits for the rest of her life. Subject only to Ms Gumbel's alternative argument which I address below that was, he says, and I agree, a finding of fact that the defendant was entitled to make.

22. So far so good. But it is the next part of Mr Johnson's argument which is crucial. Given that 19.75 was the correct starting point, why not reduce the multiplier to 15 in just the same way as the other multiplier? Mr Johnson gives two answers:

    i) Given that the claimant's pre-existing condition was such that she would have needed care from her earlier 70s – see paragraph [13] above – this does not mean that there should be a commensurate reduction in the multiplier for future benefits. This, says Mr Johnson, is because if the claimant had never suffered the injury but become disabled in her late 60s or 70s section 75 would have precluded any award of disability living allowance.

    ii) Even if the claimant's pre-existing condition would have become symptomatic before the age of 65 it does not follow that she would have become entitled to disability living allowance. The defendant, he submits, was entitled to find that although she would have required care, she would not have qualified for disability living allowance.

23. Mr Johnson suggests that although the effect of the defendant's decision is that the claimant receives from public funds – the defendant's funds – an amount less even than the award of general damages, there is no injustice because, he says, the difference is made up by her entitlement to future benefits from other public funds.

24. Ms Gumbel's riposte is that part at least of this involves reading into the defendant's decision reasoning which is not to be found explicitly set out. That may be so, but since her entire challenge is based on the assertion that the defendant's decision is irrational it is legitimate for Mr Johnson to point out, if he can, that there is a rational basis for it.

25. At the end of the day the point, as it seems to me, really comes down to this. Is Ms Gumbel correct in asserting that the defendant's reasoning as explained in paragraph 10 of Miss Dorrian's statement is simply logically inconsistent with its reasoning as explained in paragraph 13 of that statement?

26. Put rather differently, is there, as Ms Gumbel would have it, some necessary inconsistency between:

    i) the finding in paragraph 10 that the claimant would have required care in any event as she grew older as a result of her pre-existing spondylosis – and, consequentially, the finding that the correct multiplier is 15, and

    ii) the findings in paragraph 13 (a) that the claimant's pre-existing spondylosis would *not* have led to any entitlement

to disability living allowance and (b) that the fibromyalgia would entitle her to disability living allowance for the rest of her life – and, consequentially, the finding that the correct multiplier is 19.75 (rounded down in favour of the claimant to 19.5)?

27. In my judgment the answer to this question, however it is put, has to be in the negative. Each of the defendant's findings as set out in paragraphs 10 and 13 of Miss Dorrian's statement was, in my judgment, one that was open to it given the evidence before it. There is, in my judgment, nothing irrational, illogical, or unlawful in the defendant's reasoning and decision.

28. I turn now to Ms Gumbel's other point, namely that the defendant's assessment of the claimant's likelihood of receiving benefits in future was flawed.

29. Ms Gumbel makes two separate points:

i) There should have been a reduction in the multiplier applied to future benefits to reflect the possibility that there will at some time in future be a loss or reduction of entitlement to the claimant's disability living allowance. In support of this Ms Gumbel points to the undoubted fact that, as correspondence from the Benefits Agency makes clear, the claimant's benefit is to be reviewed on 24 October 2003.

ii) Quite apart from that, she says, the defendant fell into legal error in failing to apply the proper test. Relying upon the decisions of the Court of Appeal in *Doyle v Wallace* [1998] PIQR Q146 and *Langford v Hebran* [2001] EWCA Civ 361, Ms Gumbel submits that the future benefits ought to be valued not, as she says the defendant did, by applying a balance of probabilities test but rather by assessing the chance of the benefits accruing and calculating the award accordingly.

30. So far as concerns the first of these complaints Mr Johnson submits that, although there may be a theoretical possibility of a loss or reduction of benefit, the practical reality is that it is overwhelmingly likely that the claimant will continue to receive the benefits as found by the defendant. I agree that this was a conclusion to which the defendant was plainly entitled to come. He accepts that there can be cases in which an applicant will cease to be entitled to disability living allowance without any improvement in her condition – one such case being that given in her skeleton argument by Ms Gumbel – but he says, correctly as it seems to me, that there is simply no evidential basis for asserting that such will happen to the claimant in the present case. He submits that the defendant, on the totality of the evidence before it, was entitled to conclude, as it did, that the claimant would remain in receipt of benefit for the rest of her life and that the very modest adjustment made in the claimant's favour to the multiplier sufficiently reflected the overwhelming realities. I agree with Mr Johnson when he asserts that the defendant's approach simply cannot be faulted on judicial review grounds.

31. The second point involves a point of law which, so far as I can see, was not ventilated before the defendant (nor, for that matter, in the claimant's N461).

32. As Mr Johnson points out, both *Doyle* and *Langford* are really nothing more than applications of the principles to be found in Stuart-Smith LJ's judgment in *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602. He says that the claimant's future entitlement does not depend upon the hypothetical actions of a third party but rather upon her future state of health and he thus seeks to rely upon what Stuart-Smith LJ said at pp 1609G and 1611B-C. That may be so, but it does not, as it seems to me get him anywhere. See what Stuart-Smith LJ said at p 1610C as to it being "trite law" that future uncertain events, such as the question of whether and to what extent someone will suffer osteoarthritis,

> "are not decided on a balance of probability, but rather on the court's assessment, often expressed in percentage terms, of the risk eventuating".

33. To that extent Ms Gumbel is, in my judgment, right and Mr Johnson is wrong. But that does not, in the final analysis, as it seems to me, assist Ms Gumbel. As Stuart-Smith LJ made clear at p 1614D, the fact-finding tribunal when conducting this kind of exercise is concerned with possibilities which are real or substantial and not with those which are merely speculative. If the fact-finding tribunal finds that the chance of something not happening is merely speculative – or as Mr Johnson puts it merely fanciful – then it is open to it to assess the claim (in this case the deduction) at 100%. As Stuart-Smith LJ said, it is not helpful to seek to lay down in percentage terms what the upper end of the bracket should be.

34. In the present case Ms Gumbel identifies two different areas of possible uncertainty surrounding the claimant's right to go on receiving disability living allowance: (i) possible changes in the claimant's circumstances and (ii) possible

changes in the legislation. As to the first, the defendant was, as I have already said, entitled to conclude, on the totality of the evidence before it, that the claimant would remain in receipt of benefit for the rest of her life and that the very modest adjustment made in the claimant's favour to the multiplier sufficiently reflected the overwhelming realities. As to the second, this is, as Mr Johnson says, entirely speculative. And as he points out, if one is to factor into the calculation the possibility that the government will withdraw or adversely modify disability living allowance so too one has to factor in the possibility that the amounts paid will be increased in real terms.

35. Overall I conclude that the defendant was entitled to find, as it did, that the disability living allowance "would continue in payment". That being so the outcome is the same whichever legal approach one adopts.

36. Ms Gumbel has, in my judgment, failed to demonstrate any judicially reviewable error on the part of the defendant. It was open to the defendant to make the findings it did, as set out and explained in Miss Dorrian's statement.

37. It follows that this claim must be dismissed.

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MR JUSTICE MUNBY: For the reasons set out in a judgment which has already been sent to the parties in draft, and which I now hand down in open court, this application must be dismissed.

MR JOHNSON: My Lord, in those circumstances I ask for a paper judgment on costs. The claimant is in receipt of public funding. We do not have a schedule, but I would invite you to make an order that the claimant pay the defendant's costs not to be enforced save pursuant to the Access to Justice Act.

MR JUSTICE MUNBY: That is the appropriate form of words were I to make such an order, is it?

MR JOHNSON: My Lord, yes.

MS GUMBEL: My Lord, I am publicly funded, I cannot really say anything further. I will be asking for permission to appeal on the basis that this is a point of general importance, and that is perhaps also a point I should make in relation to costs. It is testing a point, and your Lordship's judgment does give a variation on the test that will now be applied to applications before --

MR JUSTICE MUNBY: Well, can I test, Ms Gumbel, the proposition you are making by inviting you to formulate, as it were, the proposition of law which, were this unreportable case to be reported, would appear in a law reporter's headnote as being my holding. Ms Gumbel, I am not conscious of having decided any point of law or principle at all, although I appreciate that there are occasions when judges do such things without being aware that they are doing them.

MS GUMBEL: My Lord, I would put it like this. The correct test for the Criminal Injuries Compensation Authority, when assessing deduction of benefits from claims, is that that deduction should be made on the basis of the percentage prospects that benefits will be paid and not on a balance of probabilities. This tribunal clearly deducted the benefits on a balance of probabilities, and that was the position, as I understand it, that the defendants took, was the correct position and was defended.

MR JUSTICE MUNBY: Yes, but in effect I have accepted that the correct legal analysis is as you say it was.

MS GUMBEL: My Lord, yes.

MR JUSTICE MUNBY: And not as Mr Johnson said it was, but I said, on the particular facts of this case, it did not do you any good at the end of the day because whether one was approaching this on the loss of the value of the loss of chance or on the basis of balance of probabilities, a point which, so far as I am aware, was never taken before the defendant at all, you actually get to the same result on the figures.

MS GUMBEL: Well, my Lord, that is your Lordship's --

MR JUSTICE MUNBY: The paradox is that on the only point of principle which I think one can divine from my judgment, you were successful.

MS GUMBEL: My Lord, yes. I appreciate the difficulty, something of a boxing in as far as the Court of Appeal is concerned, but it does raise the further point as to whether if your Lordship finds, as a matter of principle, the tribunal

has applied the wrong test, it is possible to superimpose the result they might have come to had they applied the right test, and certainly my argument would be that having found they applied the wrong test, the only option is for the matter --

MR JUSTICE MUNBY: To send it back again.

MS GUMBEL: To be sent back, because having said in terms they applied the balance of probabilities test, what they would have done between 51 and 100 per cent is a factual finding that your Lordship has made from the material before your Lordship as to how your Lordship would have decided that issue on a percentages basis. I would say that is a matter in itself that is of importance for the Court of Appeal to consider whether in those circumstances it is right that your Lordship decides that issue rather than sending it back for the correct test to be applied.

MR JUSTICE MUNBY: Ms Gumbel, you have accepted, without inviting me to correct it as being an error, what I said in paragraph 31 of the judgment, that this point of law was neither taken before the defendant nor indeed in the N461, and I think I am right in saying that it was, as it were, your riposte at a later stage, after the defendant had perhaps somewhat imprudently, in the last two or three lines of the acknowledgment of service, as it were, identified for the first time a legal proposition, as it turns out erroneously in my judgment, and that I think I am right in saying that this point which you then took before me was canvassed for the very first time not before Jackson J, who dealt with this matter on the papers, but before Forbes J on the renewed oral application.

MS GUMBEL: My Lord, yes. The reason for that --

MR JUSTICE MUNBY: I am not so much interested in the reasons, but if that is the fact and you have not dissented from what I said in the judgment, is it not a relevant consideration that I should determine the matter, if I properly can on the materials before me, rather than sending back for determination by the defendant a point which was never taken before them.

MS GUMBEL: It raises the further point, which I had not raised, as to whether it is right that the tribunal gives such sparse reasons at the stage of giving their reasons on the determination that it is impossible to ascertain the test they applied until this application was made, when they said in the reply what test they had applied.

MR JUSTICE MUNBY: Well, I have to say that thought had occurred to me.

MS GUMBEL: That is the difficulty.

MR JUSTICE MUNBY: But you are only able to hoist yourself onto this point at all, I think, not because of anything said by the defendant at the time, not by anything said by Miss Dorrian in her evidence, but simply and solely because of what was said on the defendant's behalf by the Treasury Solicitor in the acknowledgment of service.

MS GUMBEL: I would not entirely accept that. I would say from Miss Dorrian's evidence she used the term "likely", which is usually used in respect of the balance of probabilities test, it appears from her evidence that she had used that, certainly consistent with the balance of probabilities test, and the form certainly specified a balance of probabilities test. The other difficulty, and the case was not put in the way that it was put before Forbes J in the written application before Jackson J on the multipliers either, because it was impossible to ascertain how the multipliers would be worked out until we got the response, and I appreciate it looks unsatisfactory, but that is the explanation.

MR JUSTICE MUNBY: Ms Gumbel, contrary to my original suggestion, you have identified a point. I am not sure it is a point of law, but you have identified a point which I can see you might wish to argue in the Court of Appeal. I have to say it does not seem to me to be the kind of point which satisfies either of the criteria which have to be satisfied if I am to give permission.

MS GUMBEL: My Lord, I would say that it does give rise to reasonable prospects of success that a tribunal should reconsider with the correct test the deduction of benefits, and that the way in which the benefits are deducted and the application of the correct test is a point of far reaching importance in applications to those tribunals, because, from the facts of this case, it is apparent it makes a huge difference to the size of the awards, and if the correct approach is to hear detailed evidence as to the percentage prospects of the benefit continuing to be paid, then that may make a large difference for awards and some guidance in how that is to be done would also be of assistance.

MR JUSTICE MUNBY: The point arises in this case because of the fact that, as a result of some preexisting condition, in relation to the relevant period your client is suffering disability from two independent concurrent causes. Now, I am not at all sure that the problem which you identify as being one of general importance is likely to arise in

any criminal injuries compensation context unless both disability living allowance is in issue and you have, as in the present rather unusual case, two concurrent injuries overlapping.

MS GUMBEL: My Lord, I would say quite to the contrary. In any case in which benefits are deducted, and they are deducted in every case, the tribunal should be carrying out the exercise as to whether on reassessment that particular claimant will be continuing to obtain that benefit, because benefits are deducted in total from the award as a whole, and the assessment of the benefit is a huge part of the calculation, and that calculation has to be done in every case. It includes income support and other benefits that a claimant may be receiving, that made this particular case more complicated, but it does not alter the fact that the practice at the moment is to deduct the totality of the benefit, I would say because the test being applied is wrong, and in every case the totality is deducted without the exercise being carried out as to what the percentage prospects of continuing to receive the benefit are. Tribunals should be --

MR JUSTICE MUNBY: You say the matter is of general importance which applies, you say, across the board, as how is the Criminal Injuries Compensation Authority to go about the assessment of the value of future benefits when you say nobody knows what may be in the Secretary of State's mind in six months' time, some form of benefit may be removed by statute, and, furthermore, there may be the problem of knowing whether the particular claimant will continue to receive the benefit for 5, 10, 15 or 20 years. That is the general point, is it?

MS GUMBEL: That is the general point. The second point may be more significant in most cases as to the future prognosis and the future plans of the claimant for having carers and the changes in equipment provided will make a huge difference, the example is the walk-in shower, something of that sort. Evidence at the moment is not given as to the likelihood of that and what difference that will make to the entitlement of benefit. If that does happen then some guidance would certainly be helpful. The result of your Lordship's judgment is to replace the test with the percentage test but then to apply an assessment without factual evidence on the point being before your Lordship. That is the difficulty.

MR JUSTICE MUNBY: Yes, I see.

MS GUMBEL: It will be difficult for the tribunals to apply your Lordship's judgment not having seen how factual evidence on that point should be treated and tested.

I would also deal with the first point in the misfit between the care and benefits. Again, the point there is where disability living allowance is assessed for the care as a whole that somebody is in need of, whether one can take a part of that out because of a preexisting disability there. I accept it is particular to the circumstances of this case, and that is much more sensitive to this particular case than the second point.

MR JUSTICE MUNBY: Yes. Thank you. Mr Johnson, what do you have to say about this?

MR JOHNSON: My Lord, I can see that there is a point of importance as to the correct approach in calculating future losses --

MR JUSTICE MUNBY: Is that, as Ms Gumbel suggests, going to have some impact upon the practical way either in which people have to conduct hearings before the appeals panel, or practical implications in terms of changing the way in which the appeals panel in the future is going to go about evaluating and deciding cases of this sort?

MR JOHNSON: My Lord, in my submission, no.

MR JUSTICE MUNBY: You do not accept that?

MR JOHNSON: No. In this case the panel considered -- paragraph 13 of Miss Dorrian's statement she says: "The Panel considered Disability Living Allowance would continue in payment...", and that was a finding made.

MR JUSTICE MUNBY: Indeed, those were the crucial words which I have picked up towards the end of the judgment.

MR JOHNSON: My Lord, precisely so. Neither before the panel nor before your Lordship was there any evidence placed to suggest otherwise. Had evidence been placed to suggest otherwise, then it could have been that what your Lordship termed as merely speculative chances or merely fanciful chances could have been assessed and given a percentage prospect, but in the absence of any evidential basis for that, really neither the panel nor your Lordship, nor the Court of Appeal, would be in any position to make any significant discount --

MR JUSTICE MUNBY: Yes, I see.

MR JOHNSON: My Lord, in terms of sending it back, given the evidential basis, the panel would be in no better position than my Lord in assessing that.

MR JUSTICE MUNBY: Thank you. Is there anything you want to say, Ms Gumbel, in response to that?

MS GUMBEL: I would say if it were sent back, if that were the decision of the Court of Appeal, the panel would be hearing it afresh, and they may well be in a better position because evidence would be called on that point as to the percentage chances and as to particular improvements in, for example, the claimant's facilities at home, which might reduce the care needs. So they would hear new evidence that was not before your Lordship or before the original panel, I entirely accept, because the point was not argued in that way then.

MR JUSTICE MUNBY: I am not going to give permission to appeal. There are two alternative bases upon which permission to appeal can be granted. One goes to the merits of the proposed appeal. The other, which, in a sense, is independent of the merits, is if there is some other compelling reason why the matter should be considered by the Court of Appeal.

So far as concerns the merits, despite everything said by Ms Gumbel, I remain wholly unpersuaded that there is any point of principle here, or indeed any point which is of that degree of merit which would have to be shown were I to be entitled to grant permission. I do not believe that an appeal stands any realistic prospect of success.

So far as concerns the second matter, Ms Gumbel has suggested that the effect, the practical forensic effect, of my judgment is going to be a significant alteration in the way in which litigants before the Criminal Injuries Compensation Appeals Panel prepare and present their cases - a significant change in the type of evidence which will be required to be adduced before the appeals panel, and a significant difference in the way in which the appeals panel will have to go about evaluating and deciding such cases.

Mr Johnson disputes those propositions. I am unpersuaded that there is any real substance in them. Had I been persuaded that there was some real reason to believe that my decision would very significantly alter the way in which the appeals panel for the future conducted business, I might have been persuaded that that would be a sufficient and compelling reason as to justify the grant of appeal on that basis, but I am not. In the circumstances, Ms Gumbel, despite her elegant arguments, has failed to persuade me that permission to appeal should be granted on either basis.

The order, I think, simply comes to this. The application will be dismissed. There will be an order for costs in the appropriate form, bearing in mind that the claimant is publicly funded. Permission to appeal will be refused.

MS GUMBEL: I think I need public funding assessment.

MR JUSTICE MUNBY: There will also be, in whatever is the technically appropriate form, an order for the detailed assessment of the claimant's publicly funding costs.