

IN THE HIGH COURT OF JUSTICE

CO 3276/99

QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

Royal Courts of Justice
Strand
London WC2

Monday, 10th July 2000

B e f o r e:

MR JUSTICE JACKSON

REGINA

-v-

CRIMINAL INJURIES COMPENSATION APPEALS Panel
EX PARTE BENNETT

(Computer-aided Transcript of the Stenograph Notes of
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Official Shorthand Writers to the Court)

MR ANDREW MCNAMARA (instructed by Thompsons, Arundel House, Sheffield S1
4QL Oxford Housing Rights Centre, Oxford, OX1 1LT) appeared on behalf of the
Applicant.

MR HUGO KEITH and MR S NAOSHBANDI (for Judgment) (instructed by The
Treasury Solicitor, London) appeared on behalf of the Respondent.

J U D G M E N T
(APPROVED)

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Monday, 10th July 2000

JUDGMENT

1. **MR JUSTICE JACKSON:** This judgment is in five parts:

Part 1. Introduction.

Part 2. The facts.

Part 3. The present proceedings.

Part 4. What is the meaning of "disabling" in the section of the tariff relating to shock?

Part 5. Decision.

2. Part 1. Introduction.

3. This is an application for judicial review of a decision made by the Criminal Injuries Compensation Panel (the "Panel") when sitting at Leeds on 18th May 1999.

4. The statutory context in which the Panel operates is as follows. Section 1 of the Criminal Injuries Compensation Act 1995 empowers and requires the Secretary of State to establish the Criminal Injuries Compensation Scheme. The basis upon which compensation for injuries is to be calculated is set out in section 2 of the Act. Each injury suffered by an applicant is to attract a fixed award of compensation derived by reference to a "tariff" prepared by the Secretary of State.

5. On 12th December 1995 the Secretary of State established the Criminal Injuries Compensation Scheme which is now in force. I shall refer to this as "the Scheme". Paragraph 2 of the Scheme provides that claims officers will determine claims for compensation. Paragraph 58 provides that an applicant may seek a review of any decision made by a claims officer. Such a review must be carried out by a second claims officer who is more senior than the first one. Paragraph 60 of the Scheme enables an applicant to

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appeal to the Panel against a decision taken on review. The Panel consists of adjudicators appointed by the Secretary of State. Any oral hearing of an appeal to the Panel must be heard by two or more of those adjudicators.

6. Paragraph 75 of the Scheme provides:

"The procedure at hearings will be as informal as is consistent with the proper determination of appeals. The adjudicators will not be bound by any rules of evidence which may prevent a court from admitting any document or other matter or statement in evidence. The appellant, the claims officer presenting the appeal and the adjudicators may call witnesses to give evidence and may cross-examine them."

7. The body which has overall responsibility for the administration of the Scheme is the Criminal Injuries Compensation Authority. That Authority employs the claims officers who assess individual claims.

8. I turn now to the provisions of the Scheme which govern the amount of compensation to be awarded for injuries. Paragraphs 25 and 26 of the Scheme provide:

"25. The standard amount of compensation will be the amount shown in respect of the relevant description of injury in the Tariff appended to this Scheme, which sets out:

(a) a scale of fixed levels of compensation; and

(b) the level and corresponding amount of compensation for each description of injury.

Level 1 represents the minimum amount payable under this Scheme, and Level 25 represents the maximum amount payable for any single description of injury. Where the injury has the effect of accelerating or exacerbating a pre-existing condition, the compensation awarded will reflect only the degree of acceleration or exacerbation.

26.... The standard amount of compensation for more serious but separate multiple injuries will be calculated as:

(a) the Tariff amount for the highest-rated

description of injury; plus

(b) 10 percent of the Tariff amount for the second highest-rated description of injury; plus, whether there are three or more injuries,

(c) 5 percent of the Tariff amount for the third highest-rated description of injury."

9. The Tariff appended to the Scheme comprises a list of possible injuries, some ten pages long. Against each injury is listed the level of compensation and the standard amount of compensation. The Tariff includes the following entries:

	"Level	Standard Amount £
Shock (see notes)		
Disabling, but temporary mental anxiety, medically verified –	1	1,000
Disabling mental disorder, confirmed by psychiatric diagnosis:		
lasting up to 28 weeks,	6	2,500
lasting over 28 weeks to one year	9	4,000
lasting over one year, but not permanent	12	7,500
Permanently disabling mental disorder confirmed by psychiatric prognosis	17	20,000...
Upper limbs: fractured finger(s)		

or thumb - one hand (full recovery)	3	1,500
Upper limbs: fractured finger(s)		
or thumb - one hand (with		
continuing disability)	8,	3,500"

10. At the end of the Tariff are some notes. Note 2 reads as follows:

"Shock or 'nervous shock' may be taken to include conditions attributed to post-traumatic stress disorder, depression and similar generic terms covering:

(a) such psychological symptoms as anxiety, tension, insomnia, irritability, loss of confidence, agoraphobia and pre-occupation with thoughts of guilt or self-harm; and

(b) related physical symptoms such as alopecia, asthma, eczema, enuresis and psoriasis. Disability in this context will include impaired work (or school) performance, significant adverse effects on social relationships and sexual dysfunction."

11. It seems to me that there must be a printing error in note 2. The last sentence of subparagraph (b) should begin on a new line. This sentence has nothing specifically to do with subparagraph (b). Its function must be to illuminate the meaning of the word "disabling", which occurs three times in the section of the Tariff headed "shock".

12. Finally, it should be noted that the approach to assessing damages laid down in the Scheme is quite different from the approach adopted by the courts in a personal injuries action. Furthermore, the level of awards under the Scheme is distinctly lower than the level of damages which the courts would award for comparable injuries. Under the Scheme, of course, the paying party is not the wrongdoer or his insurers but the state.

13. Part 2. The facts.

14. On 18th August 1996 the applicant (who was then aged 48) was the victim of a violent and unprovoked attack. It occurred while the applicant was walking to work. The

description of the attack in the applicant's own words is as follows:

"I was approached by a young man who asked me what time it was. While I was looking at my watch he stepped behind me, grabbed hold of me around the neck, took a metal bar from inside his coat and began striking me on the head with the metal bar causing me to fall to the ground. He continued to strike me making it impossible for me to get up. He then struck me on the mouth, left arm, left leg and both hands before being disturbed by a neighbour and running off."

15. The applicant was taken to Doncaster Royal Infirmary for treatment. On 27th August 1996 (some nine days after the incident) she visited her general practitioner,

16. Dr Sheikh. Dr Sheikh describes her physical injuries as follows:

"- Multiple bruises, abrasions, and lacerations

- Hospital admission, investigations including skull x-ray, neurological observations for head injury and tissue superglue to close skin breaches."

17. As a result of the injuries and shock which the applicant suffered, she was off work for a period of three months. In addition to the applicant's physical injuries, she suffered from post-traumatic stress disorder. She received some counselling during the period following the incident.

18. Mrs Burgess, who provided the counselling, describes the applicant's condition in the following terms:

"My first meeting with Ms Bennett took place at her daughter's home, where she moved soon after the assault as she did not feel safe at her own home. She was suffering from head pains, sleep difficulties, and had a high degree of anxiety. Ms Bennett was then effectively housebound as she was extremely anxious about leaving her home in case she encountered the assailant. She was not able to go to work.

Ms Bennett was at this time suffering from shock and was extremely emotionally distressed. She was very concerned to make sense of the assault, which appeared random, and felt very vulnerable, often finding herself tearful and depressed.

After a time, Ms Bennett was able to return to her own home and to begin to contemplate a return to work. However, she was still apprehensive and feeling vulnerable, and felt it would be some time before she felt safe in her own home once more."

19. Three months after the incident the applicant returned to her work as a care assistant. Four months after the incident the applicant ceased to receive counselling.

20. On 17th October 1996 the applicant applied for compensation to the Criminal Injuries Compensation Authority. On 9th May 1997 a claims officer refused the application. The applicant applied for a review of that decision. For the purposes of the review the Criminal Injuries Compensation Authority contacted Dr Sheikh and obtained a report from him dated 27th May 1998. After describing the physical injuries, that report continued as follows:

"Post-traumatic stress with persistent anxiety, nightmares and insomnia
6.5.98 - continuing."

21. Then a little lower down the page:

"6.5.98 Behaviour indicates continuing effects of post-traumatic stress on lifestyle. For example continuing fear when alone outdoors, looking back expecting to be attacked, and using a taxi to travel to work for journeys previously undertaken by foot."

22. A second claims officer duly considered this evidence and reviewed the decision of his colleague. By a decision dated 1st July 1998 he made an award to the applicant of £1,000 for temporary mental anxiety.

23. The applicant considered that her injury had been incorrectly classified and exercised her right of appeal to the Panel. In support of her appeal the applicant obtained and submitted to the Panel two reports by Dr Goodhead, who is a consultant psychiatrist at the Doncaster Royal Infirmary. In his first report, dated 15th September 1998, Dr Goodhead set out in some detail the applicant's description of the attack which she had suffered. He then set out the applicant's symptoms. These included fearfulness,

moodiness and nightmares. On page 4 of the report he said this:

"Her emotional problems have therefore continued throughout this 2 year period although some aspects are now better although not all by far. She said that she had been seeing her GP at first and he had offered to arrange counselling but her employers had organised for her to see a counsellor at her daughter's house on some 3 or 4 occasions. She said that she also had some sleeping tablets from her general practitioner which was perhaps some 4 months after the assault, but this also coincided with the additional strain of her mother's death. However, she didn't consistently take these tablets as they tended to leave her feeling too tired in the day."

24. On page 5, Dr Goodhead set out his conclusions as follows:

"Therefore in summary she is a 50 year old lady who has generally been in good health over the years, but who was the victim of a very frightening assault 2 years ago in which she sustained physical injuries, and following which, although the injuries have largely healed, she has been left with significant emotional problems which I felt were typical of post-traumatic stress disorder as often occurring after very frightening and potentially life threatening situations. This has been characterised by her change in energy and weight, reduced concentration and memory, an exaggerated startle response to noise, general reductions in interests and self-confidence, with depressed mood, sleep disturbance, and recurring nightmares and flashback memories of the assault, and a fear that this is going to recur.

She is now most reluctant to leave the house at all on her own or allow men into the house, and becomes very fearful in situations that remind her of the original assault, eg footsteps behind her or someone asking her the time, and avoids a lot of trips out and is even cautious now at what time she will catch a bus or use a taxi. She has already received some counselling help and some sleeping tablet medication, with the situation being aggravated further by the deaths of both of her parents in the intervening period. However, I am sure the majority of the emotional reaction is related to this rather horrific assault, and that some of her symptoms are likely to continue for some time, only slowly settling over the next few years, in which she will need a lot of support both from family, friends and possible psychological help organised by her general practitioner."

25. In his second report, dated 10th May 1999, Dr Goodhead stated that he had now examined the general practitioner's notes relating to the applicant. He noted a number of

references to the attack and its effects in these notes. He also observed that in June of 1996, two months before the attack, the applicant's father had died and she needed a period of sick leave following that bereavement.

26. Dr Goodhead's second report included the following passages relating to prognosis:

"I think it is always difficult to judge to what extent such situations remain, but in the light of her age and the assault being almost 3 years ago, I am sure that some of her symptoms are going to be permanent and I do not think that she is in practice going to make a full recovery and that she will remain emotionally damaged following such a traumatic experience.

... I think overall these records are helpful in clarifying that the main problem for her was the assault and the continuing emotional problems thereafter and confirming my own assessment of post-traumatic stress disorder and the need for counselling.

I think this further emphasises to me that this is a lady who is likely to have continuing emotional symptoms from this point on and although they may improve to some degree with time I think some symptoms are going to permanently remain for her."

27. On 18th May 1999 three members of the Panel heard the applicant's appeal. They were Mr Charles Norris, a solicitor who acted as chairman, Dr Ann Fingret, a consultant physician in occupational medicine, and Mr Keith Beattie. The applicant gave oral evidence at the hearing. The gist of the applicant's evidence, as recorded in Mr Norris's recent witness statement, was as follows:

"Counsel took evidence from the applicant. She said she had been off work for 3 months after the incident but had been working full time since. However she said she occasionally burst into tears at work, and had done so regularly for the first 12 months. She was alright with the patients with whom she worked as a care assistant, some of whom had Alzheimer's disease or mental health problems. She stopped counselling soon after the incident, and had agreed with that, and had not asked to go back to it. She said she was managing reasonably well, and was occasionally reminded of the incident. She said she did not go to her doctor, and she did not want to take anti-depressants or sleeping tablets and was coping without them. She

had been living on her own for a year before the incident, when her son had left home. She had been divorced for 12 years."

28. The applicant's counsel made submissions. The presenting officer for the Criminal Injuries Compensation Authority made submissions. Having considered the applicant's oral evidence, the three medical reports, the other documents submitted and the advocate's submissions, the three members of the Panel came to the following conclusion: the appeal should be allowed, and the award should be increased to £2,650 made up as described below:

"1. Disabling Mental Disorder confirmed by psychiatric diagnosis lasting up to 28 weeks - level 6 - 100% = £2,500

2. Chipped tooth - level 1 - 10% of £1,000 = £100;

3. Minor multiple injuries - level 1 - 5% of £1,000 = £50."

29. The applicant was aggrieved by that decision. Accordingly, she seeks to challenge it by way of judicial review.

30. Part 3. The present proceedings.

31. By an undated notice of application the applicant sought an order of *Certiorari* to quash the Panel's decision, together with certain related remedies. She contends that the award for post-traumatic stress disorder is too low. The award under that head ought to have been either £7,500 or £20,000.

32. On 22nd February 2000 Moses J granted permission to the applicant to apply for judicial review. Following that grant of permission, the respondent served a witness statement by Mr Norris, a section of which has been quoted in part 2 above. Mr Norris set out the reasoning of the three members of the Panel in paragraphs 10 to 13 of his witness statement:

"10. Although there were some inconsistencies in the descriptions of her symptoms in the papers, and the psychiatrist who had seen her had not seen her until over 2 years after the incident, and then only on one

occasion for compensation purposes and not on referral or for therapy, we were satisfied that the applicant's condition after the incident had amounted to a mental disorder, which was confirmed by his diagnosis.

11. We were also satisfied that initially she had been disabled by her mental condition. She had stayed with her daughter, had not gone out, had initially not been able to work, and had been referred at work for counselling.

12. We then had to consider how long she had suffered from a disabling mental condition. There were a number of matters which we noted and considered relevant. The applicant had not received any counselling after the first 4 months, and had never been referred for psychiatric treatment or assessment (save later for the purpose of recovering compensation); she had not sought any medication, and felt that she could cope on her own; she had been able to return to work full time after 3 months and had not had time off work since on account of this incident. There was no suggestion she required treatment or therapy now. We also bore in mind the paragraph in the Notes to the Tariff, which includes a sentence on what disability in the context of 'nervous shock' includes. ...

In our view, using the word 'disabling' in its ordinary, common-sense context, and even though she still described some psychological symptoms which she had, we did not consider that this applicant was disabled for longer than 7 months. Indeed in this case we consider any disability probably ceased once she had been able to return to work full time. The effect of this was that she was entitled to a level 6 tariff award of £2,500 for 'Disabling mental disorder confirmed by psychiatric diagnosis lasting up to 28 weeks'.

13. The grounds [of application for judicial review] make the point that the Panel's assessment of whether the applicant's injury was disabling was restricted to assessing whether she could work. First that is not so. We considered, and noted at the time that we had considered, the other matters in paragraph 12 above which in our view were all relevant to the issue. Secondly, we would all have accepted that a person can be disabled, emotionally as well as physically, when he or she is able to work. We did not consider this was such a case."

33. At the hearing of the present application Mr Andrew McNamara, counsel for the applicant, submitted that the applicant's mental disorder was permanently disabling. Accordingly, she should receive a standard amount of £20,000 in respect of this head of claim. Alternatively, the applicant's mental disorder was disabling for more than a year.

Accordingly, she should receive £7,500 under this head of claim. Mr McNamara submitted that the Panel attached undue significance to the applicant's return to work three months after the incident. He submitted that in the absence of any contradictory evidence, the Panel should have accepted in full the evidence of Dr Goodhead and

34. Dr Sheikh. Mr McNamara submitted that this evidence leads inexorably to one or other of the two conclusions for which he contends.

35. Part 4. What is the meaning of "disabling" in the section of the Tariff relating to shock?

36. Mr Justice Munby has recently considered a related problem in **R v Criminal Injuries Compensation Appeals Panel, ex parte Embling** (30th June 2000). The applicant in that case suffered a fractured finger as a result of an assault. After the fracture had united, the applicant continued to suffer some residual effects. There was permanent stiffness, some loss of function and periodic discomfort. These residual effects did not prevent the applicant from continuing her occupation as a nurse. The Panel considered the two categories of finger injury, which I have quoted in part 1 of this judgment. It concluded that the injury fell into the first category, namely "Upper limbs, fractured fingers or thumb - one hand (full recovery)". Mr Justice Munby held that the Panel had erred. The Panel ought to have held that Ms Embling's injury fell into the second category, namely "upper limbs, fractured fingers or thumb - one hand (with continuing disability)". He accordingly quashed the Panel's decision.

37. At pages 10 to 16 of the transcript, Mr Justice Munby discussed the meaning of the phrase "continuing disability". In the section of the Tariff relating to fractured fingers, every such injury has to be classified as either "full recovery" or "with continuing disability". The phrase "continuing disability" had to be construed against this background.

38. At pages 14 to 15 of the transcript, Mr Justice Munby said this:

"...whilst I accept that intermittent pain may not itself involve 'continuing disability' in the absence of any loss of function or faculty, it seems to me that where there is observable and measurable loss of function or faculty, the state of affairs -- assuming it is not merely temporary or short-term -- is, on the one hand, properly and sensibly described as one of 'continuing disability', but is not, on the other hand, properly or sensibly described as one of 'full recovery'. ...

'Disability' is not limited to inability to perform a task or activity; as the dictionary shows, it extends also to conditions that limit movements and senses. ...

In my judgment, the phrases 'full recovery' and 'continuing disability' relate to the relevant limb or organ and not to the claimant. They are to be understood as carrying their ordinary dictionary meanings. Proper emphasis is to be given to the word 'full' in the phrase 'full recovery', and to the word 'continuing' in the phrase 'continuing disability'. Where there is observable and measurable loss of function or faculty which can sensibly be described as continuing, rather than merely temporary or short-term, and such that the ordinary person adopting a sensible view of life would not be prepared to agree that there had been

'full recovery', the case will properly be one of 'continuing disability'."

39. For my part, I agree entirely with this analysis of that section of the Tariff which relates to fractured fingers. However, caution must be exercised when one seeks to apply those comments to the word "disabling" in that section of the Tariff which is headed "shock". I say this for 3 reasons:

1. The word "disabling" is not here used in contrast to "full recovery", as it is in the section about fractured fingers;
2. The word "disabling" is used as an adjective once to qualify "mental anxiety" and twice to qualify "mental disorder". In other words, the Tariff contemplates that some mental anxieties and some mental disorders should be classified as not "disabling".
3. In relation to claims for shock, a partial definition of "disability" is given in note 2(b) at the end of the Tariff. That is quoted in part 1 of this judgment. At

page 15 of the transcript, Mr Justice Munby held (and I agree) that note 2(b) is not relevant to that section of the Tariff covering fractured fingers.

40. Against this background what does "disabling" mean in the section of the Tariff headed "shock"? In my judgment a mental disorder is "disabling" if it significantly impairs a person's functioning in some important aspect of his or her life. The last sentence of note 2 exemplifies this approach but it is not exhaustive. I agree with Mr Justice Munby that the standard to be adopted when applying the test is that of "the ordinary person adopting a sensible view of life."

41. Part 5. Decision.

42. Although Mr Norris's witness statement has been challenged by reference to certain incomplete notes of what was said at the hearing, I accept that witness statement as accurate.

43. In my judgment the three members of the Panel correctly interpreted the meaning of the phrase "disabling mental disorder". They quite properly attached some significance, but not excessive significance, to the fact that the applicant returned to work after three months.

44. The Panel were obliged to take into account the three medical reports. They were not obliged to agree with everything contained in those reports. To a large extent both Dr Sheikh and Dr Goodhead were recounting what the applicant had said to them. The Panel heard the applicant's account of the events for themselves and made their own assessment. The three Panel members collectively brought to bear considerable expertise. As previously mentioned one of their number was a consultant physician in occupational medicine.

45. In my judgment the Panel members were perfectly entitled on the material before them to conclude that the applicant's mental disorder was disabling for no more than 28 weeks. I am not sure whether I would have come to the same conclusion. That, however,

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is a matter of no consequence. The Panel members asked themselves the correct questions. They considered the relevant evidence and they made their own assessment of it. They came to a decision which lay within the range of possible decisions. There are no conceivable grounds upon which this Court may interfere by judicial review. Therefore, this application is dismissed.

(Application for judicial review refused; Applicant to pay costs to respondent of £3,500 permission to appeal refused)