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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(CROWN OFFICE LIST)

CO/3697/99

Royal Courts of Justice
Strand
London WC2

Friday, 30th June 2000

B e f o r e:

MR JUSTICE MUNBY

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REGINA

-v-

(1) CRIMINAL INJURIES COMPENSATION APPEALS PANEL
(2) THE CRIMINAL INJURIES COMPENSATION AUTHORITY
EX PARTE LESLEY EMBLING

- - - - - - -

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MS KAREENA MACIEL (instructed by The Royal College of Nursing Legal Services, London, W1M OAB) appeared on behalf of the Applicant.

MS ALICE ROBINSON (instructed by the Treasury Solicitors) appeared on behalf of the Respondents.

J U D G M E N T
(As Approved)

Friday, 30th June 2000

JUDGMENT

1. MR JUSTICE MUNBY: Ms Kareena Maciel moves on behalf of Lesley Diane Embling ("the Applicant") for judicial review of the decision of the Criminal Injuries Compensation Appeals Panel ("the Panel"), dated 1st July 1999, awarding the Applicant the sum of £1,500 in respect of an injury -- a fracture to the index finger on her right hand -- suffered during an assault at work on 3rd January 1997.

2. The Respondent is represented by Ms Alice Robinson.

Background

3. Compensation for criminal injuries is now regulated by the Criminal Injuries Compensation Act 1995. The background to and philosophy of the thinking underlying the Act is explained in the speech of Lord Mustill in R v Secretary of State for the Home Department ex parte Fire Brigades Union [1995] 2 AC 513, 556G-558D. Section 2 of the Act provides that the amount of compensation payable shall be determined in accordance with the provisions of the Scheme made by the Secretary of State in exercise of powers conferred on him by the Act, and that provision shall be made in the Scheme (i) for what is called "a standard amount of compensation" to be determined by reference to the nature of the injury, and (ii) for the standard amount to be determined in accordance with the Tariff prepared by the Secretary of State as part of the Scheme.

4. Paragraph 25 of the Scheme, reflecting the language of section 2 of the Act, provides that:

> "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."

5. It is common ground that the Tariff contains two, and only two, relevant descriptions of injury, namely:

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

6. It is also common ground that the words "full recovery" and"continuing disability" (which are similarly used in the Tariff in relation to numerous descriptions of injury to other limbs) are not defined in the Act, the Scheme or the Tariff.

7. The Panel, upholding earlier decisions of the Criminal Injuries Compensation Authority ("the Authority") at first decision and on review, held that the Applicant was entitled to payment of the sum of £1,500 only. Her case is that she is entitled to £3,500.

The issues.

8. Accordingly, the dispute in essence is whether there is "continuing disability" or "full recovery". Put more precisely, the issues I have to determine are:

(i) What is meant by the words "full recovery" and "continuing disability"?

(ii) Whether the Panel correctly directed itself as to the meaning of the words "full recovery" and "continuing disability" and whether there was evidence upon which the Panel was entitled to conclude that the case was not one of "continuing disability"?

The facts.

9. The Panel had before it the written evidence of three medical experts: Dr Gwilliam, Mr JPR Williams, a Consultant Orthopaedic Surgeon, and Mr PD Evans,

another Consultant Orthopaedic Surgeon. Both Dr Gwilliam and Mr Williams completed the Authority's standard form of medical questionnaire.

10. In answer to the question:

> "Do you expect the Applicant to make a full recovery? If not, please give details of any likely continuing disability or residual scarring,"

11. Mr Williams said, on 19th August 1997:

> "May have residual stiffness in finger."

12. Dr. Gwilliam's answer, on 24th October 1997, was "Yes", but in answer to the further question:

> "How long did the main effects of the injury last?"

13. he said:

> "... movements of finger joints improved after physiotherapy."

14. In a report dated 24th April 1998, Mr Williams said:

> "She is likely to be left with some residual stiffness in the finger, but this should not prevent her from carrying out her occupation as a nurse."

15. In a further report, dated 6th October 1998, he said:

> "She has slight stiffness in the distal interphalangeal joint of the right index finger and the finger aches in the cold weather. She claims that she cannot knit for as long as she used to prior to the injury. She has no particular problems with the finger at work. On examination she has slight stiffness at the distal interphalangeal joint ... She has been left with slight permanent stiffness at the distal interphalangeal joint, but this is not affecting her in her occupation as a nurse. Her long term prognosis is good and she should suffer no serious long term sequelae."

16. Mr Evans's first report is dated 28th May 1999. In it, he says:

> "There is no obvious deformity of her right index finger ... There is no

rotational deformity of the finger. She is able to demonstrate almost a full range of movement of the index finger. Extension was full. Full flexion is not quite full (the finger tip does not reach the palmar crease by one fingers breadth)."

17. Then, a little later on in the same report:

"She has some discomfort in her finger from time to time, but this does not interfere with her employment. There is some residual loss of movement of the finger which is likely to be to be permanent at this stage. It would be useful to have sight of the x-rays of her fracture to know whether there is going to be a risk of onset of premature arthritis as a consequence of this fracture."

18. Having seen the X-rays, he wrote a further report, dated 29th June 1999, in which he said:

"This fracture should not give rise to any onset of premature arthritis, as it does not involve the articular surface. There is no residual instability of the PIP joint of her finger. Beyond the residual stiffness and occasional discomfort, I would not expect there would be any further long term disabilities."

19. The Panel also had before it a decision letter, dated 30th May 1997, from the Benefits Agency relating to the Applicant's claim for industrial injuries disablement benefit. The material part reads:

"The Adjudicating Medical Authority decided that

- the industrial accident on 3.1.97 has caused you a loss of faculty

- the loss the faculty is - restricted movements right index finger

- you are 6% disabled from 18.4.97 to 17.4.98 because of the loss of faculty.

- by **loss of faculty** we mean some loss of power or function to an organ of your body."

20. The formal decision of the Panel, dated 1st July 1999, sets out its decision and reasons as follows:

"Having heard evidence and considered all the papers, the Panel concluded that the applicant was not suffering such residual effect from her injury as to constitute a continuing disability as required by the Tariff."

21. That reasoning is elaborated in the witness statement by the chairman of the Panel, Mr Austin Peter Wilson, dated 14th January 2000. According to Mr Wilson, the Panel found that:

"... the injury to the applicant did still have some residual effects ..."

22. and that:

" ... the injury did sometimes continue to trouble her ..."

23. Mr Wilson described the Applicant's evidence to the Panel as follows:

"The Panel heard evidence from Lesley Embling, who is naturally right handed, that she was still finding her right hand to be weaker than her left (e.g. in performing household tasks like lifting a full saucepan) and that her right index finger could still be painful (e.g. in cold weather when she took Neurofen for relief, or when knitting). Both at home and at work, she now tended to use her left hand rather than her right predominantly. But she also told us that she was able to carry out her full range of normal duties whilst at work. My own manuscript notes of the hearing record her as telling the Panel that 'the stiffness [in the index finger] does not affect me in my job'."

24. It is apparent that the Panel accepted her evidence which, as Mr Wilson observes, was "consistent with the medical evidence".

25. In summary, the Panel's crucial findings of fact were:

(i) The Applicant's injury did still have some residual effects and did sometimes continue to trouble her.

(ii) As described in the medical evidence the residual effects included permanent stiffness and some residual loss of movement in the finger and discomfort from time to time (aches in cold weather). But they were not such as to prevent the

Applicant from continuing her occupation as a nurse. In short, to use the language of the Benefits Agency decision letter, there was some loss of power or function in the finger.

(iii) The residual effects as described by Applicant included pain in the finger (e.g. in cold weather or when knitting) and a general feeling that her right hand was weaker than her left. Although she was able to carry out the full range of duties at work, both at work and at home when performing domestic tasks, she now tended predominantly to use her left hand rather than her right hand.

26. In her notice of appeal to the Panel, dated 13th November 1998, the Applicant had said:

> "I am unable to clench a complete fist, and ... the grip in my right hand is not as good as it was."

27. In a witness statement, submitted without objection from Ms Robinson for the purposes of the hearing before me, the Applicant said:

> "At the hearing, I gave evidence to the Panel as follows. I did have difficulties with the use of my finger. At first this was to do with general care and chores such as applying make up, personal hygiene, drying hair, washing-up, preparing vegetables, turning the cooker on, pressing buttons on the microwave, etc. At work, my difficulties were putting patients buttons on whilst dressing them and writing. My hobbies of knitting and playing darts were initially curtailed. By the time of the hearing, I was still suffering with a weakness in grip, inability to clench my fist, stiffness and pain, especially in the cold weather. However, due to the fact that the injury had occurred some two and a half years prior to the hearing, I had since learnt to adapt, by using other fingers to assist. I do not use my right index finger much, as I essentially started to use other fingers and do things in different ways to compensate for the injured finger."

Issue (i).

28. The starting point, as it seems to me, is that since the Tariff contains only two descriptions of injury in relation to a fractured finger, there must necessarily be, in

relation to every fractured finger which otherwise qualifies for compensation under the Scheme, either "full recovery" or "continuing disability". Put another way, if the case is not one of "full recovery", it is necessarily one of "continuing disability"; conversely, if it is not one of "continuing disability", it is necessarily one of "full recovery".

29. Two things, in my judgment, follow from this. First, as Ms Robinson puts it, the phrase "full recovery" is to be construed by reference to the alternative "continuing disability" and, I would add, vice versa. So, "full recovery" means full recovery from what would otherwise be "continuing disability". Conversely, "continuing disability" means a continuing disability which precludes "full recovery".

30. Second, if at all possible one must give both to the phrase "full recovery" and to the phrase "continuing disability" such meaning as will have the effect that (a) if a particular state of affairs "X" falls outside the meaning of the words "full recovery", it can nevertheless sensibly be described as falling within the words "continuing disability"; (b) conversely, if a particular state of affairs "Y" falls outside the meaning of the words "continuing disability", it can nevertheless sensibly be described as falling within the words "full recovery", and so on for all possible conditions "X", "Y", "Z" et cetera.

31. The next point to be noted is that "continuing disability" has to be contrasted not with "recovery", but with "full recovery". That, in my judgment, carries with it the corollary that to the extent that something more has to be shown if the case is properly to be described as one of "full recovery" rather than "recovery", so, correspondingly, the alternative category of "continuing disability" has a wider ambit when contrasted with "full recovery" than would be the case if it were merely contrasted with "recovery".

32. As against that, the phrase "full recovery" has to be contrasted not with "disability", but with "continuing disability". That carries with it the corollary that for this purpose the case can properly be treated as one of "full recovery" if the "disability" is merely temporary or short-term.

33. Subject to this, the words "full recovery" and "continuing disability" are ordinary English words which, other things being equal, one would expect to find being used in the Tariff with their ordinary and usual meanings. "Disability" is defined in the New Shorter Oxford English Dictionary as:

> "A physical or mental condition (usually permanent) that limits a person's activities or senses, especially the ability to work."

34. It is defined in the New Oxford Dictionary of English as:

> "A physical or mental condition that limits a person's movements, senses, or activities."

35. In Black's Medical Dictionary, it is defined as:

> "An observable mental or physical loss or impairment which is measurable and which may be permanent or temporary."

36. "Recovery" is defined in the New Shorter Oxford English Dictionary as:

> "Restoration or return to a former, usual, or correct state or condition, as health, etc."

37. In the New Oxford Dictionary of English as:

> "A return to a normal state of health, mind, or strength."

38. Ms Robinson submits that there will be few injuries which do not have some residual effect at one time or another, but that does not mean there has not been a "full recovery" for this purpose. She says that the case cannot be one of "continuing disability" if there is merely intermittent pain without loss of function. Furthermore, as a matter of language, she says, "disability" is concerned with lack of ability or inability to perform a task or activity. Thus there is not, she says, "disability" merely because there has been some impairment or loss of function or faculty. If the function of a limb is impaired, but not to the extent that it prevents a person carrying out a reasonable range of tasks and activities in the course of daily life, whether in the workplace or at home, the injury

cannot sensibly be described, she says, as giving rise to a continuing disability.

39. She seeks to derive support for this submission from Note 2(b) to the Tariff, which provides that:

> "... Disability in this context [the context is that of shock or nervous shock] will include impaired work (or school) performance, significant adverse effects on social relationships and sexual dysfunction."

40. This, she says, shows the focus of the Tariff on the inability to do things, in the case of shock or nervous shock, on the effect on the claimant's ability to perform or function in the work or school environment, or in the context of social or sexual relationships.

41. I cannot agree with Ms Robinson's approach. I say this essentially for four reasons.

(1) In the first place, it seems to me that the reference in the Tariff to "full recovery" or "continuing disability" is in each case a reference not to the condition of the claimant as a person, or as a worker, housewife, or whatever, but rather to the condition of the relevant limb or organ -- in the present case, the Applicant's index finger.

(2) Secondly, 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".

(3) Thirdly, if the test of "continuing disability" is, as Ms Robinson would have it, referable to the claimant's ability or inability to carry out a reasonable range of

tasks and activities in the course of daily life, there will be many cases which, on her approach will not be cases of "continuing disability", and which will therefore necessarily have to be classified as cases of "full recovery", but which the man on the Clapham omnibus -- or his modern successor, the woman on the underground -- would, in my judgment with every justification, find it very hard to treat as cases 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.

(4) Finally, I do not find the reference to Note 2(b) to the Tariff of any very great assistance. That provides what is, it ought to be noted, only a partial definition (that is, a definition which is inclusive and not exhaustive) of disability in cases where the injury, as elsewhere described in the Tariff, takes the form of mental disorder or mental anxiety. I am concerned with disability in the context not of injury to the mind, but of physical injury to a limb.

42. 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 has been "full recovery", the case will properly be one of "continuing disability".

43. I should add that it may be helpful for the decision-maker who has provisionally arrived at the conclusion that a case is not one of "continuing disability" to ask himself whether the case can sensibly be described as one of "full recovery". If it can, then his provisional decision is almost certainly correct; if it cannot, that may be a very powerful

indicator that his provisional decision is wrong.

Issue (ii).

44. I turn to consider whether the Panel correctly directed itself as to the meaning of the words "full recovery" and "continuing disability", and whether there was evidence upon which the Panel was entitled to conclude that the case was not one of "continuing disability".

45. As explained by Mr Wilson, the Panel's conclusion was that:

> "Although the injury to the applicant did still have some residual effects, it had not been shown to us that these were sufficient to constitute a continuing disability. In reaching that conclusion, we were aware that the term 'disability' is not defined in the Scheme but we had regard to the fact that, in the Notes to the Tariff (on page 28 of the Scheme) disability in the context of the physical symptoms of 'shock' is said to include 'impaired work (or school) performance, significant adverse effects on social relationships and sexual dysfunction.'. In considering the matter, the Panel decided to adopt a common sense approach and to pay particular attention to the applicant's own evidence."

46. Further insight into the Panel's reasoning is afforded by Mr Wilson's comment, which I have already read but which I will repeat:

> "But she also told us that she was able to carry out her full range of normal duties whilst at work. My own manuscript notes of the hearing record her as telling the Panel that 'the stiffness [in the index finger] does not affect me in my job'."

47. In my judgment, this process of reasoning involves at least two detectable errors: in the first place, it would seem that the Panel, in my judgment wrongly, focused on the issue of whether the Applicant was still able to carry out her full range of normal duties at work; secondly, undue reliance was placed on Note 2(b) to the Tariff.

48. That there was reviewable error in the Panel's process of reasoning, even if it were not possible to identify the error precisely, is also, in my judgment, indicated by the

very decision to which the Panel came. Ms Robinson acknowledges, correctly as it seems to me, that the Panel accepted the Applicant's evidence that she was suffering from a loss of function or impaired movement of her finger, variously described in the medical reports as slight/residual stiffness or loss of movement, and that, in that sense, the Applicant was not able to do certain things, for example, as she put it, "I am unable to clench a complete fist". In the light of those findings, it is, putting it at its lowest, very difficult to see how the Panel, if it had properly directed itself in law, could have come to any view other than that the case was one of "continuing disability".

49. Notwithstanding this misdirection, can it nonetheless be said that there was evidence upon which the Panel was entitled to conclude that the case was not one of "continuing disability"? I am conscious that it is for the Panel, and not for this court, to act as the decision-making body on appeal. It is also fair to say that the Applicant's case is, on any view, probably fairly close to the borderline. Nevertheless, the case is one where the medical evidence was undisputed, where the Panel accepted the Applicant's evidence, and where the Panel has come to and, through the medium of Mr Wilson, expressed clear findings of fact.

50. I have come to the conclusion, albeit not without some initial hesitation, that in this case, given the Panel's findings of fact, there simply was no evidence upon which the Panel could properly conclude that the case was not one of "continuing disability". In the light of its findings of fact, if it had properly directed itself, the Panel would, in my judgment, have been driven to conclude that there was "continuing disability". Putting the same point the other way round, I do not see how the Panel, if it had correctly directed itself, could properly have come to the view that there had been "full recovery".

Conclusion.

51. It follows that the Applicant succeeds. I will make an order of certiorari to quash the decision of the Panel. Ms Maciel has not sought an order of mandamus. No doubt the Authority and the Panel can be relied upon to reconsider the Applicant's claim in the light

of this judgment.

52. MS MACIEL: My Lord, there is the matter of costs in this case. Albeit there has been no service of a schedule of costs, I would seek, however, costs on a detailed assessment.

53. MR JUSTICE MUNBY: Your client, I rather assume, is not legally aided?

54. MS MACIEL: My Lord, no.

55. MR JUSTICE MUNBY: She is financially supported by her --

56. MS MACIEL: The Royal College of Nursing.

57. MR JUSTICE MUNBY: Yes, I see. So you are seeking an order for costs and a detailed assessment. Ms Robinson, what do you have to say about that?

58. MS ROBINSON: I cannot resist that, my Lord.

59. MR JUSTICE MUNBY: Very well. I will make the order of **certiorari** as indicated, and I will order the Respondent to pay the Applicant's costs, those costs -- if not to be agreed -- to be the subject of a detailed assessment.

60. MS ROBINSON: My Lord, may I make an application for permission to appeal?

61. MR JUSTICE MUNBY: Yes.

62. MS ROBINSON: My Lord, the latest amendment to the CPR sets out the test for the grant of permission in Rule 52(3)(6). Namely, that the court considers that the appeal would have a real prospect of success, or there is some other compelling reason why the appeal should be heard.

63. My Lord, as to those two tests, can I make brief submissions?

64. MR JUSTICE MUNBY: Of course.

65. MS ROBINSON: First of all, on the question of real prospect of success. Notwithstanding the view that your Lordship has formed at the end of the day, I respectfully suggest that this is such a case and that, at the end of the hearing, your Lordship was apparently undecided on the issues which have been raised here. I note that during the course of your Lordship's judgment, you made the point that you had reached the conclusion you had "not without some initial hesitation".

66. MR JUSTICE MUNBY: That was only on the question of whether there was actually something which in any sensible way had to go back to be decided by the Panel.

67. MS ROBINSON: Indeed, I fully accept that. But, my Lord, in all the circumstances, I respectfully suggest that this is a case where there is a real prospect of success.

68. MR JUSTICE MUNBY: How real is real for this purpose?

69. MS ROBINSON: In a previous practice direction, the same phrase was used and I think it went on to say something like "more than fanciful", but I cannot promise that that is a completely accurate recollection.

70. I would suggest a good arguable case would be sufficient, and that plainly is the position here. Even if your Lordship is not satisfied as to that, I respectfully suggest that there is in any event some other compelling reason.

71. As your Lordship has appreciated, the important construction of the two phrases "full recovery" and "continuing disability" is of fundamental significance to the proper construction of the Tariff. It is a phrase which appears many times in relation to injuries to a great many different limbs and it is, therefore, very important to the day to day application of the Scheme.

72. For those reasons, I would invite your Lordship to consider that this is a case which it is proper for the Court of Appeal to consider. Those are my submissions.

73. MR JUSTICE MUNBY: Thank you, Ms Robinson. Can I just ask you this: having now heard my reasons -- I appreciate you have only heard them and not had time to study them -- just how tangled up is this case with the case which is due to come on next week? It may be you cannot really answer that question, I do not know.

74. MS ROBINSON: I think I am in difficulties in answering that question, because the only material which I had -- on which I was able to explain the basic issue in that case -- was the skeleton argument for the respondent. My Lord, I would be making this application even if that other case was not coming up next week.

75. MR JUSTICE MUNBY: I quite appreciate that.

76. MS ROBINSON: I think, and I am speculating to some extent, but given your Lordship's point that the notes in paragraph 2(b) of the Tariff are conclusive, they would -- if another judge took the same approach as your Lordship -- enable the court to conclude that a mental disorder which gave rise to continuing symptoms was a continuing disability, notwithstanding they did not actually have an impact on the person's ability to carry out day to day tasks.

77. MR JUSTICE MUNBY: What do you have to say on this issue?

78. MS MACIEL: My Lord, I am content to leave this matter entirely in your hands. I take on board what my learned friend says. Admittedly, the two phrases are fundamental for the application of the Scheme, and therefore I leave the matter in your Lordship's hands.

79. MR JUSTICE MUNBY: I am going to adopt what I hope is an appropriately pragmatic solution in relation to your application. I am not going to give permission to appeal. What I will do is extend your time for applying to the Court of Appeal for permission to appeal from my judgment until 14 days after judgment in the case which is due to be heard next week --

80. MS ROBINSON: I am grateful my Lord.

81. MR JUSTICE MUNBY: -- subject to a long stop of 31st August. That is designed to cover the situation if next week's case needs to reserve judgment which is not delivered for some time. Part of my thinking is that that will enable the authority to consider its position in relation to each of these two cases together.

82. I entirely accept your position, Ms Robinson, that you will wish to appeal this in any event, but there does nonetheless seem to be some attraction in the authority being in a position to consider its response to each of the cases together, and also -- and this is perhaps the more important aspect -- it does mean that if the authority ends up in a position where it wishes to challenge both cases in the Court of Appeal, the Court of Appeal can be seised of the matter and decide how the two appeals should be dealt with. Because if there is some relationship between the cases, and since this will be the first occasion when this matter has gone to the Court of Appeal, the Court of Appeal might take the view that it wishes the cases to be dealt with together.

83. So, my approach is somewhat pragmatic but I think, in the circumstances, it is the appropriate approach.

84. MS ROBINSON: That is very helpful my Lord, thank you.

85. MR JUSTICE MUNBY: Is there anything? In that case, I hand down two copies of the text. That, I emphasise, I am handing down on a slightly unorthodox basis. It is simply so that, Miss Robinson, whoever is appearing for the authority in the other case can have the earliest possible access to it and, on the basis that by the time that case actually comes on for hearing on Thursday of next week, I would very much hope that the approved transcript of my judgment would be available.

86. I am very grateful to both of you. Thank you both very much.