



**OUTER HOUSE, COURT OF SESSION**

P1168/03

**OPINION OF LORD CARLOWAY**

in the petition of

**AVIS BENNETT (JAMES BENNETT'S  
REPRESENTATIVE)**

Petitioner

against

**THE CRIMINAL INJURIES  
COMPENSATION APPEAL PANEL**

Respondents

for

Judicial Review of a decision of the  
respondents dated 22 November 2001 to  
refuse compensation

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**Petitioner: Sutherland; Anderson Strathern WS for Naftalin Duncan & Co, Glasgow  
Respondents: Lindsay; H.F. Macdiarmid (Solicitor to the Advocate General for Scotland)**

9 December 2003

**1. Background**

[1] On 9 May 1999 at about 12.45am, James Bennett was standing in Broomknoll Street, Airdrie, outside the Airdrie Working Men's Social Club. He was drunk and anxious to obtain a taxi. A taxi driven by Gerard Morrissey and containing Yvonne and

Charles Lafferty chanced to be coming along the street. Mr Bennett stood in its path, possibly thinking it to be unoccupied. He sat on the bonnet of the taxi, thus halting its progress. Mrs Lafferty got out of the taxi to remonstrate with Mr Bennett and some form of altercation followed. Mr Lafferty then emerged from the taxi and pushed Mr Bennett. He fell backwards, striking his head on the kerb and sustaining very serious injuries. The police were called and Mr Lafferty was charged with assault and attempted murder. However, he was not detained in custody but released on an undertaking to appear in court, if requested to do so. The matter was apparently reported to the Procurator Fiscal but no proceedings followed.

[2] On 12 July 1999 an application was made for criminal injuries compensation. By letter dated 24 May 2000, the Criminal Injuries Compensation Authority declined to make an award. The reason for this was that:

“Under Paragraph 13(d) of the [Criminal Injuries Compensation] Scheme, the Authority is required to take into consideration your conduct before, during and after the incident giving rise to the application. In this case it is considered that your own conduct provoked the incident. In these circumstances it is inappropriate that you should receive a full award or any award of compensation from public funds.”

[3] An application for a review of this decision was made to the Authority. On 22 December 2000, this was also refused under paragraph 13(d) for the following expanded reasons:

“You were wandering about the middle of the road and repeatedly blocking the passage of a taxi, before eventually sitting on it’s bonnet. It was at this point that the female passenger got out and attempted to persuade you to get off the road. She then describes how you grabbed her around the throat and her husband on seeing this then gets out of the taxi and pushes you away. Regrettably you fall and strike your head causing injury. The alleged offender was originally charged with attempted murder, however the CPS (*sic* !) took the decision not to proceed with any charges against him. Having carefully considered all the evidence available, I am satisfied, on the balance of probabilities, that had you not

prevented the passage of the taxi and then laid hands upon the female passenger you would not have sustained injury, and that your own conduct therefore provoked the incident. In these circumstances it would be inappropriate to make a reduced or full award of compensation from public funds.”

[4] This decision was appealed to the respondents and a hearing was held on 22 November 2001. At the hearing, the taxi driver appeared and gave oral evidence as did Detective Sergeant Blackburn, the reporting officer. Mr Bennett was unable to give evidence in any form because of the neurological effects of his injuries. The Laffertys did not attend the hearing. However, there were a number of statements from the Laffertys and others available for consideration. By a written “Judgement” of 26 November 2001, the respondents refused the appeal but this time not in terms of paragraph 13(d) but under paragraph 8(a); on the basis that Mr Bennett had not sustained a criminal injury as defined in that latter paragraph, namely a “crime of violence”. Since the petitioner’s criticisms of the respondents’ judgment challenged that conclusion as both unreasonable and an error in law, it is necessary to consider the evidence before the respondents and their analysis of it.

## **2. Evidence and the Respondents’ Analysis**

### **(a) EVIDENCE**

[5] The respondents had before them a number of statements taken by the police shortly after the incident or during the course of the following day. One of these was from Mr Morrissey, timed at about 11.00 a.m. He was noted as saying:

“When I got to Broomknoll Street [Mr Bennett] was walking down the middle of the road...I stopped as he was blocking the road and he had his back to me. He turned round and seemed to see that I had a taxi and walked towards me. He stood there and I went to drive round him but he moved again to block me and then he sat down on the bonnet of my taxi...The woman passenger seemed to get annoyed and got out of the taxi. She opened the door and at that point he walked

towards her as if he realised the door had opened. She was shouting at him to get off the road but I was still not bothered having known the guy and did not expect any more than that. She would give him a cuddle and walk him off the road. I was looking round and saw the old guy approach her but could not see if there was any contact between them. The guy then got out of the taxi and when he was getting out I wondered why he was getting out. He never said anything. He went out...and I turned round and saw the guy put his two hands on the old guy's chest and push him back....He did not make any attempt to talk to the old guy he just shoved him. I thought it was over the top. The old guy went down, straight back. I heard a thud. The guy got back into the taxi..."

Another statement was from Mrs Lafferty, taken at the locus at about 1.05 a.m., very soon after the incident. She was recorded as then stating:

"...I was in a taxi with my husband...when I saw a drunk man...on the road. We saw a drunk man knocked down once before and I wanted to get him off the road. I took his arm to guide him off the road and he grabbed me by the neck. At this point my husband...got out and he tried to get him off me. He was still holding onto my neck and Tommy pushed him. However the man was so drunk he fell straight back and struck his head on the pavement..."

Subsequently, at about 8.45pm the next day, her account was:

"The taxi driver began to get ratty and contacted the police. After the taxi driver contacted the police he still tried to get by the guy but he continued to block his path. I then thought I would go out and help him onto the kerb, then the taxi driver could get by. I was worried in case he wandered onto oncoming traffic. I got out of the taxi and took his right arm to walk him back to the kerb. As I took his arm the guy...suddenly grabbed me by the throat with both his hands. He was grabbing me but was still quite stumbly. He was mumbling but I couldn't make out anything. He was hurting my neck and I tried to grab his hands. The next thing I was aware of [was] Thomas beside me and he pushed the guy on the shoulders with both his hands. The guy just fell back hitting his head off the pavement."

DS Blackburn interviewed Mr Lafferty under tape recorded conditions, probably at about the same time as Mrs Lafferty was re-interviewed. Mr Lafferty said:

"There was a chap standing on the middle of the road. Yvonne panicked. Maybe she was naïve to get out the taxi to help the guy. I should never have let her go out the car as you never know what might happen. She got out the left hand door and the guy just grabbed her. I panicked and jumped across and got out and shoved him off Yvonne. He just went back and hit his head off the kerb..."

He had a hold of her. He wasn't punching her, choking her or anything like that. ...it was probably on the chest [that I pushed him]. I certainly wasn't trying to hurt the guy. His hands were on my wife. I panicked and pushed him. He just went straight back and down."

[6] At the hearing before the respondents, a precognition of Mr Morrisey, taken by Mr Bennett's agent on 1 November 2001 (i.e. only a few weeks before the hearing), was available. The relevant parts read:

"As I was now stopped he sat on my bonnet. He looked to be in very good form and was laughing or appeared to be laughing as he sat on my bonnet. I radioed through to the controller to let the police know. This was only because I was concerned that he would be involved in some kind of accident and I was anxious that he should be taken home safely... Within seconds of stopping... the woman passenger in the car opened her door... and stepped out of the car. When the man on the bonnet... saw her he got off the car... As [the man] approached her he was smiling and he had his arms outstretched. He seemed cheerful... The woman was not so happy and was complaining a bit to him... she wasn't being extremely friendly with him.

My attention was distracted from them... However within a minute my attention was refocused as I became aware that the man in the car... was getting out of the car... I didn't feel there was any need for him to become involved. The man... extended his arms full length and with full force pushed Mr Bennett over. I was taken aback with the force that he used. Mr Bennett didn't stumble or stagger but fell cleanly over... I was shocked at the action of the male passenger. He clearly got out of the car with the intention of pushing Mr Bennett. He made no effort to speak to Mr Bennett or to try and deal with the situation in any other way than by a push...

At no time did I see Mr Bennett behave in any aggressive way or have his hands up around anybody in any way which could be construed as threatening. Granted my attention was diverted for a period as I was watching the road but that would only have been a matter of seconds also."

There was also a precognition from DS Blackburn, dated 2<sup>nd</sup> October 2001, which included the following:

"It was initially thought that this may have been simply an accident but upon investigation it became clear that Mr Lafferty's response to Mr Bennett was disproportionate and as such constituted a criminal act...

I am very surprised that the case against Mr Lafferty was dropped by the PF Department. I assume that this occurred because of the delay involved..."

## (b) ANALYSIS

[7] The respondents quoted from the statements of the Laffertys. They also remarked upon both Mr Morrissey's statement and his precognition, stating that:

"His precognition paints a wholly different picture...but we have to say that we treat that precognition, taken as it was by the applicant's solicitor, with caution. We prefer his statement to the police made at the time."

On the facts, the respondents concluded:

"We find on the balance of probabilities that what happened when Mrs Lafferty got out of the cab is this.

Bennett in his drunken state walked towards her, stumbling and with his arms out. While we do not think he had any hostile or aggressive intent towards her nor do we accept that he put his hands around her neck to throttle her, we do believe that his hands did come into contact with her upper body in a moving and drunken and stumbling way. Morrissey himself describes in his precognition and repeated to us today that Bennett's arms were outstretched – "apologetically almost". The girl Lafferty almost certainly took hold of Bennett somehow to move him off the road. Thus there was physical contact between the two of them.

Mr Lafferty, we have no doubt, saw simply a drunken man arms outstretched come up to and lay hands on his young bride...

He was clearly cross. He got out of the taxi. He pushed Bennett away from his wife with both hands."

[8] The respondents went on to consider the legal implications of their findings in fact in relation to whether a "crime of violence" had been committed. They determined:

"A simple push would clearly be a crime of violence. A push by a husband who reasonably believes that a drunken man is molesting his wife would not necessarily be so unless excessive force was used.

Lafferty was charged with attempted murder. The Procurator Fiscal, after full consideration declined to prosecute, not even on some lesser charge.

Although we have anxiously considered whether the force used by Lafferty was excessive to the point of being unjustified and criminal, we can see no good reason to differ from the Procurator Fiscal. He, no doubt as we do, took a commonsense view of the incident. It was a late Saturday night. A drunken man makes himself a public nuisance. Physical contact clearly comes about between the drunken man and the young wife. It seems to us that the husband's actions were understandable and do not amount to a crime of violence. We say this conscious of the different standard of proof which we have to apply.

Consequently the application fails in terms of paragraph 8(a) of the Scheme."

In refusing the appeal, the respondents added that, in any event, Mr Bennett would have had serious problems to overcome in showing that his conduct did not make an award inappropriate in terms of paragraph 13(d).

### **3. Submissions**

#### **(a) PETITIONER**

[9] Although one of the complaints in the petition was that the respondents had acted unfairly in introducing paragraph 8(a) in circumstances where the prior decisions had been based on paragraph 13(d), this line was not insisted upon at the hearing. This was no doubt because it was accepted that the procedure before the respondents involved a re-hearing and the respondents had requested to be, and had been, addressed on paragraph 8 by the petitioner's agent. The submission made was in three parts. First, it was argued that the respondents' findings in fact about what had happened between Mr Bennett and the Laffertys were unreasonable and not supported by the evidence. Mrs Lafferty's account was of Mr Bennett attempting to strangle her and this had been rejected by the respondents. She was the only source of such an allegation. Mr Lafferty's account was not consistent with that of his wife. On the other hand, Mr Morrissey had given an oral account before the respondents and had not spoken to there being contact between Mr Bennett and Mrs Lafferty, such contact being essential to the respondents' findings. His testimony appears to have been rejected but no reason for this had been given, although the respondents did say that they had preferred Mr Morrissey's statement to his precognition. In the absence of such a reason, it was unreasonable for the respondents to conclude that there had been any contact between Mr Bennett and Mrs Lafferty at the

point when Mr Lafferty intervened. The respondents' finding that Mrs Lafferty had taken hold of Mr Bennett was important since it was that action which led to Mr Bennett supposedly assaulting her. Yet the basis for that finding was Mrs Lafferty's evidence, which the respondents otherwise rejected.

[10] Secondly, the petitioner argued that the respondents' conclusion concerning the reasoning of the procurator fiscal in not prosecuting Mr Lafferty was not based upon any evidence. Indeed, such evidence as the respondents had (i.e. DS Blackburn) pointed to the decision having been made because of delays in the system rather than a consideration of the evidence. The respondents had speculated upon the reasoning of the procurator fiscal when they concluded that he had taken a common sense view. They had then used that speculation as a basis for their own decision. There were many reasons why the procurator fiscal might have decided not to prosecute, such as lack of corroboration or a public interest factor.

[11] Thirdly, the respondents had failed to answer the question which they had posed for themselves, namely whether a crime of violence had been committed. They had made a distinction between a push as an assault and a push designed to stop a person being molested. However, they did not go on to consider the question of whether excessive force had been used. They reached the view that Mr Lafferty's actions were understandable, but that did not address the issue of excessive force. In all these circumstances, the respondents' decision ought to be reduced and the matter remitted for reconsideration before a differently constituted panel.



(b) RESPONDENTS

[12] The respondents moved that their second plea-in-law be sustained. This was that the decision had been both lawful and reasonable and therefore the orders sought by the petitioner should be refused. On the first point, there was a basis in the evidence for the conclusion reached on the facts. Matters concerning the weight of evidence had been for the respondents to resolve and they had done this satisfactorily. The procedure adopted at hearings was derived from English practice. It was that a witness' precognition was effectively treated as his evidence-in-chief and the witness was simply asked to confirm its accuracy. The witnesses were not sworn. That procedure had been followed here. In rejecting Mr Morrissey's precognition in favour of his statement, the respondents were also giving a reason for rejecting his oral account. Mrs Lafferty's statement about the stumbling, mumbling actions of Mr Bennett formed the basis for the respondents' conclusions on the facts. Mr Morrissey had not said that there had been no contact between Mr Bennett and Mrs Lafferty, since he acknowledged that he had been distracted for part of the time. His evidence did not contradict Mrs Lafferty's statement.

[13] On the second point, the respondents' views on the procurator fiscal's conclusion were *obiter*, in the sense that they did not form part of the respondents' decision albeit that his conclusion was used as confirmation. The respondents had reached their own conclusion. Finally, on the third point, and under reference to *Gray v Criminal Injuries Compensation Board* 1999 SLT 425, the respondents had answered the question of whether excessive force had been used in concluding that no crime of violence had occurred. They had thus concluded that excessive force had not been used.

#### 4. Decision

[14] There is no unreasonableness or unlawfulness apparent from the respondents' decision. First, the respondents reached a conclusion on the facts which was open to them upon the evidence. That evidence took a variety of forms, being the contents of police statements, precognitions and unsworn oral accounts. The respondents analysed this evidence and, in large measure, felt able to reconcile the versions given by the protagonists. It must be borne in mind that when persons are describing a fast moving event such as occurred on the night in question, there may well be differences in the accounts given as a result, for example, of each witness viewing matters from a different angle, at slightly different times and from his or her particular perspective having regard to what might tend to effect the witness directly at a given moment. Equally, there can be vague elements, and sometimes inaccuracies, in police statements and such material cannot be scrutinised in the same way as testimony given under oath and subject to competent cross-examination.

[15] Looking at the statements given to the police at the time, there were differences in the three basic accounts given. But that is not to say that the statements were inconsistent with each other in the sense of these being contradictions between them. On the contrary, the statements are tolerably capable of reconciliation, one with the other, and this is what the respondents concluded. Thus, the critical element in Mr Morrissey's statement is that he saw Mr Bennett approaching Mrs Lafferty, albeit that he could not see if there was any contact between them. Mrs Lafferty went as far as to say that she took Mr Bennett by the arm and he grabbed her around the neck or throat, acting in a stumbling, mumbling sort of way, but she did not say at any point that Mr Bennett had

attempted to throttle or strangle her. Mr Lafferty spoke to Mr Bennett grabbing and having a hold of his wife, albeit that he did not specify precisely what part of her he did grab or hold. From all of this, the respondents were well entitled to conclude, as they did, that what had happened was that the drunk Mr Bennett approached Mrs Lafferty and came into contact with her upper body in a moving and drunken and stumbling way. For the purposes of the application before them; the respondents did not need to determine matters with any greater precision. Equally, and using the same approach, they were entitled to conclude that, from Mr Lafferty's perspective, this was a drunk man laying hands on his wife. There is no inconsistency between that conclusion and the various statements taken by the police to which the respondents had regard. Quite the contrary, these statements provided an adequate foundation for the findings in fact made. The fact that the respondents did not consider that Mr Bennett had a hostile or aggressive intent and did not grab Mrs Lafferty's neck with a view to throttling her is not inconsistent with the content of any of the statements and does not amount to a rejection of Mrs Lafferty's account. In short, there was evidence before the respondents to enable them to conclude as they did so far as the facts of the incident were concerned.

[16] Although the respondents' conclusion that Mr Morrissey's precognition painted "a wholly different picture" was perhaps going a little far, the respondents have provided a sound reason for rejecting it in favour of the earlier statement to the police. This was simply that the statement was taken at or about the time of the incident and hence, to the respondents, more likely to be accurate. It was also closer to the Laffertys' account than the later precognition. Although it is correct to say that there is no express rejection of any oral account given at the hearing by Mr Morrissey, it is clear from the context of the

procedure adopted that the respondents equated the precognition with the oral account. There is specific mention by the respondents of both that account and the precognition relative to Mr Bennett's "outstretched" arms. In that context, where the witness is simply asked to confirm a precognition, it is hardly surprising that a more spontaneous statement close to the time of the events in question might fall to be treated as more reliable in content than an oral account simply confirming a precognition. In any event, the reasons given by the respondents adequately explain why the account given orally at the hearing was not preferred, where it conflicted, to the earlier statement. That was a matter for the respondents to determine as one involving the weight to be given to the different pieces of evidence before them. There is no basis for rejecting the respondents' approach in these circumstances.

[17] In relation to the procurator fiscal, it seems to have been accepted that no proceedings were taken by the procurator fiscal. Although the police charged him with attempted murder and, presumably, reported the circumstances to the procurator fiscal, Mr Lafferty never appeared on petition or complaint. It is true to say that there was no material before the respondents which explained expressly why no action was taken. The fact that no criminal proceedings ensued may have been a factor which the respondents could have weighed in the balance in deciding whether a crime of violence had been committed. It is clear, however, that the respondents reached their own decision quite independently of any taken by the procurator fiscal. Their reference to his view was by way of his decision being confirmatory of their own rather than as reason or basis for it. In any event, where a matter of this sort is not prosecuted by the authorities, it is not unreasonable to assume that the authorities have considered the evidence and taken a

reasoned decision based upon that evidence. That is what is supposed to happen and, in the absence of any material suggesting otherwise, it is a legitimate deduction to make. Although there was reference in DS Blackburn's precognition to delay, that reference was not readily explicable in the context of someone who was never even placed on petition. It was simply an assumption stated by DS Blackburn, itself appearing to be without basis in fact and one which ignored the more obvious cause tentatively identified by the respondents. There was a sufficiency of evidence here given Mr Morrissey's statement and Mr Lafferty's admission that he pushed Mr Bennett. Where nevertheless the authorities take no action, the reasonable assumption is that they do so advisedly and have not acted in a careless or negligent fashion.

[18] Although they did not embark upon an essay on the law of assault and self defence, the respondents did identify the critical point which they wished to address. This was whether a "crime of violence" had taken place; such a crime requiring to be an assault on Mr Bennett and not merely an action taken as a result of Mr Bennett appearing to seize hold of Mrs Lafferty, a young woman attempting to deal with a drunk man halting the progress of her taxi. It is well known that it is not assault where a person intervenes to protect someone whom he has reasonable grounds for believing is being attacked and, in so intervening, deals physically with the supposed assailant. In that situation, the necessary evil intent towards the ultimate victim is not present. Such intent may still be inferred, however, where cruel excess is employed to prevent the attack but care has to be taken not to weigh such a matter on too fine a scale. It is clear from their reasoning that the respondents had these matters in mind when they made specific reference to the question of whether the force used by Mr Lafferty was excessive. In

concluding, as they did, that Mr Lafferty's actions were understandable and not criminal, it is also apparent that the respondents held, as a matter of fact, that the force was not excessive. Given that all that was involved was a push, even if it was a forceful one, such a conclusion cannot be regarded as unreasonable and was one readily open to the respondents when weighing up the evidence before them.

[19] For these reasons, I will repel the petitioner's first to third pleas-in-law, sustain the respondents' second plea-in-law and refuse to pronounce the orders sought in the third Statement of Fact in the petition.