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Judgment: approved by the Court for handing down | *Delivered:* **04/05/2007**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY LARA CHRISTINE WAIDE FOR JUDICIAL REVIEW

WEATHERUP J

The application

[1] This is an application for judicial review of the decision of the Criminal Injuries Compensation Appeals Panel that the applicant was not entitled to criminal injuries compensation. The decision concerns the exclusion from the criminal injuries compensation scheme of those injured as a result of the use of a motor vehicle. Ms Higgins QC appeared for the applicant and Mr Schofield appeared for the respondent.

[2] On 11th August 2003 the applicant was playing with friends in Woodvale Park, Belfast. She was standing in an open grass area with unobstructed views for 50 yards in all directions. A scrambler motor cycle drove across the grass area and collided with the applicant causing her serious injuries. The motor cyclist drove away and was untraced.

[3] On 22nd October 2003 the applicant applied for compensation under the Criminal Injuries Compensation Scheme 2002. The claim was rejected by the Compensation Agency on 3rd August 2005 and a review of the decision was unsuccessful. The applicant appealed to the Criminal Injuries Compensation Appeals Panel and on 4th May 2006 the applicant's appeal was rejected.

The Criminal Injuries Compensation Scheme 2002.

[4] The Criminal Injuries Compensation Scheme 2002 was made under the Criminal Injuries Compensation (Northern Ireland) Order 2002. Under paragraph 8 of the Scheme "criminal injury" means a personal injury "…. sustained in Northern Ireland and directly attributable to …. a crime of violence ….".

[5] Paragraph 12 of the Scheme sets out an exclusion and provides - "A personal injury is not a criminal injury for the purpose of this Scheme where the injury is attributable to the use of a vehicle, except where the vehicle was used so as deliberately to inflict, or attempt to inflict, injury on any person."

[6] The Guide to the Northern Ireland Criminal Injuries Compensation Scheme 2002 issued by the Compensation Agency for Northern Ireland, states at paragraph 7.20, deals with injuries caused by motor vehicles as follows –

> "If your injuries were caused by a motor vehicle, we can award compensation only if the vehicle was, in effect, used as a weapon. We have to be satisfied that the driver of the vehicle deliberately drove it at you in an attempt to cause you injury. The general rule is that compensation is not payable under the Scheme for injuries caused as a result of traffic offences on a public highway. In such cases, your remedy is through the driver's insurance company or if the driver was uninsured or unidentified, through the Motor Insurers Bureau (MIB)."

[7] The exclusion has appeared in previous criminal injury compensation schemes. The Criminal Injuries (Compensation) (Northern Ireland) Order 1988 provided that "criminal injury" means an injury directly attributable to a violent offence. "Violent offence" was defined as –

> "(a) any offence which was intended to cause death, personal injury or damage to property;
>
> (b) any offence committed by causing the death or injury of any person, or damage to property, where the state of mind of the person committing the offence consisted of recklessness as to whether he caused death, personal injury or damage to property;
>
> …. but does not include a traffic offence."

" 'Traffic offence' means an offence arising from the driving or use of a motor vehicle . . . unless the vehicle was at the time of the commission of the offence being primarily used for the purpose of –

(a) causing injury;
(b) committing or facilitating the commission of a violent offence; or
(c) avoiding arrest, or escaping detection, in connection with a violent offence."

The applicant's grounds for judicial review.

[8] The applicant's amended grounds for judicial review are as follows –

(1) The Panel misdirected itself in law in concluding that paragraph 12 of the Scheme precluded the application from recovering compensation under the Scheme.

(2) The Panel misdirected itself in law in failing to find that there was a deliberate act or attempt to inflict injury on the applicant.

(3) The Panel, in breach of the principles of fairness and their obligation under Section 6 of the Human Rights Act 1998 to ensure to the applicant the protection of her rights under Article 6 of the European Convention on Human Rights, failed to give adequate reasons for the decision.

(4) The Panel's conclusion on the balance of probabilities that there was insufficient evidence to conclude that there was a deliberate attempt to inflict injury on any person was a conclusion that no reasonable tribunal properly directing itself on the evidence could have reached in the circumstances of this case.

(5) The Panel in breach of their obligations under sections 3 and 6 of the Human Rights Act 1998 and contrary to Article 14 of the European Convention on Human Rights failed to ensure that the applicant was not discriminated against – whether on the grounds of her race, her national or social origin or her association with a national minority – by failing to adopt the broad inclusive and flexible approach to interpreting the Scheme which is adopted elsewhere in the United Kingdom in interpreting the Great Britain Scheme and which involves a narrow and restrictive interpretation of exclusions from the Scheme. Under this approach, paragraph 12 would exclude from the Scheme only those

criminal injuries caused by a traffic offence on a public road or in a public place and for which compensation could be recovered from an insured driver or from the Motor Insurers Bureau and would thereby have preserved the applicant's Article 6 right to a remedy for the injuries she sustained as a victim of violence that victims of violence continue to enjoy elsewhere in the United Kingdom.

Ground (1) The interpretation of paragraph 12 of the Scheme.

[9] The Panel's final decision notice of 4th May 2006 stated that the Panel had decided that the applicant was not entitled to an award of compensation under paragraph 12 of the Scheme. The reasons were stated to be - "The Panel was not satisfied that on the balance of probabilities there was a deliberate attempt to inflict injury on any person."

[10] The applicant was not entitled to compensation under the MIB Scheme for untraced drivers as the incident did not occur on a public road. The applicant contends that the construction of paragraph 12 of the Scheme should only exclude those victims who sustained injuries caused by motor vehicles who were entitled to recover compensation from other sources such as an identified drivers insurance or the MIB Schemes for uninsured or unidentified drivers. The respondent contends that the wording of paragraph 12 is clear in requiring that, for compensation to be paid, it must be established that the vehicle was used so as deliberately to inflict injury, a matter on which the Panel were not satisfied in the present case.

[11] The applicant relies on R v. The Criminal Injuries Compensation Board ex parte Letts (unreported 8th February 1989) being a decision under the Criminal Injuries Compensation Board Scheme in England. The applicant was knocked down by a motor vehicle in a car park at a public house. MacPherson J dismissed an appeal against a refusal of compensation based on a finding that the incident arose out of careless driving rather than recklessness. The driver of the vehicle was uninsured and the incident was outside the MIB Scheme as it did not occur on a public road. Paragraph 11 of the English Scheme provided that "Applications for compensation for personal injury attributable to traffic offences will be excluded from the Scheme, except where such injury is due to a deliberate attempt to run the victim down." Paragraph 11 of the Guide to the English Scheme stated that although certain traffic offences were crimes of violence (e.g. motor manslaughter, furious driving, reckless driving or cycling), they were also traffic offences and "An application based on an injury arising from these offences will be considered by the Board only if the compensation is not available to the victim under motor vehicle or cycle insurance or under one of the agreements between the Secretary of State for Transport and the Motor Insurers Bureau." So the applicant was entitled to recover on proof of recklessness. MacPherson J proceeded to determine whether the facts of the

case could amount to a crime of violence as well as traffic offence but found against the applicant on the facts.

[12] The applicant contends that she would have recovered compensation under the 1988 Order and that if she is not entitled to recover under the 2002 Scheme that will involve an unintended change in the payment of criminal injury compensation. The form of the 1988 Order was based on exclusion of compensation for injury directly attributable to a traffic offence, unless the vehicle was "primarily used for the purpose" of a violent offence or causing injury. Greer on Compensation for Criminal Injury at page 92 compared the Northern Ireland scheme to the English scheme and referred to ex parte Letts in relation to the interpretation of the English scheme so as to complement the arrangements for third party insurance and the MIB agreements.

[13] However the approach to cases of this nature was later revised in England as appears from R v. Criminal Injuries Compensation Board ex parte Keane and Marsden (unreported 29th October 1997) at first instance and R v. Criminal Injuries Compensation Board ex parte Marsden [2000] RTR 21 on appeal. Marsden was struck by an off road motor cyclist who was subsequently convicted of dangerous driving. Keane was struck by a motor vehicle being driven in a public house car park by an untraced driver. In both cases the MIB Scheme did not apply as the incidents occurred otherwise than on a public road. In both cases the applicants accepted that the injuries were not the consequence of intentional conduct by the driver. In each case it was accepted that the conduct was capable of being characterised as a criminal offence of violence. In each case the CCCB declined to make an award in reliance on paragraph 11 of the 1990 English Scheme which provided that "Applications for compensation for personal injury attributable to traffic offences will be excluded from the Scheme, except where such injury is due to a deliberate attempt to run the victim down."

[14] Ognall J at first instance traced the history of the approach to cases such as the present and stated that "…. the interface between (the Board's) Scheme and the MIB reveals a succession of uncertain and essentially unsuccessful attempts to reconcile the exclusion in terms of 'traffic offences' within the Scheme with its implications where the injury was caused by a motor vehicle but not on a public road." This history included reference to the 1980 Report of the English Board after the Board had taken advice form the Home Office as to the reason for excluding traffic offences from the Criminal Injury Compensation Scheme. The stated reason concerned the existence of compulsory third party motor insurance and MIB agreements so that "…. where injuries inflicted by a motor vehicle were not covered by motor insurance or the MIB agreements the application could be considered in the same way as any other." On that approach those in the circumstances of the present applicant would have received compensation. A 1986 Inter-Departmental Report on the operation to the English Scheme recommended

statutory arrangements that reinforced the prevailing approach so as to exclude applications arising from traffic offences, except where the offence constituted a crime of violence and compensation was not payable under motor insurance arrangements or one of the MIB agreements. A statutory provision was introduced in section 110(7) of the Criminal Justice Act 1988 but this was never brought into effect. When the 1990 Scheme was brought into effect in England the relevant paragraphs of the Scheme were described by Ognall J as being "remarkable only in their failure to address this discrete problem at all." However the prevailing approach continued to apply until 1995 when there occurred what was described as a "volte-face". New officials in the Board, apparently unaware of the previous approach, changed the approach that had adopted by the Board from 1980 and rejected claims such as the present. Against that background Ognall J considered the issue as a matter of interpretation of the relevant provisions of the 1990 English Scheme and was satisfied that the applicants did not qualify for compensation.

[15] On appeal Auld LJ referred to the exclusion provided by paragraph 11 of the English Scheme and stated that –

> "The words of the exclusion are broad and clear, referring to traffic offences without qualification according to where causes or whether compensation was otherwise recoverable, and expressly exempting from the exclusion traffic offences involving deliberate attempts to run the victims down. Although the Board may have taken other views from time to time, that could only be persuasive if there were some ambiguity. Here, my view is that there was not."

[16] The wording of paragraph 11 of the 1996 and 2001 Schemes in England provided for an exclusion where "…. the injury is attributable to the use of a vehicle, except where the vehicle was used so as deliberately to inflict, or attempt to inflict, injury to any person." Padley and Begley "Criminal Injuries Compensation Claims" discusses R v. CICB ex parte Marsden [2000] RTR 21 at paragraphs 3.5.7 under the heading "Incidents outside scope of CICA and MIB Schemes" and concludes - "Although the specific arguments which were raised in the *Marsden* case about the meaning of 'traffic offence' are no longer relevant due to the change in wording of the 1996 and 2001 Schemes, the general principles, namely that the Schemes are not intended to cover all cases in which a person has no other form of redress from insurers or the MIB, remain applicable to the 1996 and 2001 Schemes." The reference to traffic offence echoes the previous position in Northern Ireland.

[17] For compensation to be payable to the applicant paragraph 12 requires proof that the vehicle was used so as deliberately to inflict or attempt to inflict injury.

Ground (5) Discrimination between criminal injuries in Northern Ireland and England.

[18] It is appropriate at this stage to deal with the discrimination ground. The applicant claims discrimination on the basis that an essentially identical Criminal Injury Compensation Scheme operated in England to that operated in Northern Ireland is interpreted in England in a manner that would admit the applicant's claim but is interpreted in Northern Ireland in a manner that rejects the applicant's claim. First of all I do not accept that there is differential treatment in the circumstances of the applicant's claim between the application of the Criminal Injuries Compensation Scheme in England and the application of the 2002 Scheme in Northern Ireland. While the approach of MacPherson J in Letts prevailed for a time in England that approach was later revised in Marsden by the Court of Appeal. Marsden and the commentary in Padley and Begley on Criminal Injuries Compensation Claims illustrate the same approach in England to that taken in Northern Ireland as represented by the decision of the Agency and the Panel in the present case.

[19] Article 14 operates in the first place where there is discrimination in respect of a Convention right and secondly it operates on the grounds specified in Article 14 - R v. Carson v. Secretary of State for Work and Pensions (2005) UK HL 37 per Lord Nicholls at paragraphs 3 and Lord Hoffman at paragraph 11. As to the first matter, Article 14 is parasitic and it is necessary to establish that the decision is within the ambit of a Convention right. The applicant asserts a right under Article 6 to a remedy for the injuries she sustained as a victim of violence, namely entitlement to criminal injuries compensation. There is no entitlement to criminal injuries compensation beyond the scope of the domestic scheme. In any event Article 6 provides fair trial rights which are procedural guarantees that are not in issue in the present case. Accordingly Article 14 is not engaged.

[20] Secondly, discrimination is limited to the specified grounds and the applicant relies on race, national or social origin or association with a national minority. Interpretation of the Scheme applies to all who sustain criminal injuries in Northern Ireland without regard to race or national or social origin or association with a national minority. Any distinguishing feature between Northern Ireland and England (which, as found above, does not exist) would be based on the criminal injury having occurred within the jurisdiction of Northern Ireland. The last specified ground in Article 14 is "other status". The ECHR has interpreted this as meaning a personal characteristic, see Kjeldsen v. Denmark (1976) 1 EHRR 711 at paragraph 56. The occurrence of a criminal

injury in a particular territory is not a matter of personal characteristic. Accordingly none of the specified grounds of discrimination applies.

[21] In any event differential treatment on any of the specified grounds may be justified. Different jurisdictions may legitimately apply different criminal injury compensation schemes. In Emerson's Application (2006) NIQB 41 the applicant contended that persons in her position would have received criminal injury compensation under the Scheme operated in England and Wales whereas they were not entitled to compensation under the Scheme operated in Northern Ireland. At paragraph 27 it was stated –

> "…. this is a matter of Parliamentary choice and scrutiny and each jurisdiction is entitled to determine the needs and priorities of its jurisdiction…. That one Parliament might make a different choice and accord a different priority to a matter to that of another Parliament does not in itself amount to a basis for reliance on Article 14 to claim discrimination between the citizens of the different jurisdictions."

[22] In the present case any differential treatment is not the result of Parliamentary choice but ultimately of judicial interpretation. While decisions of the Court of Appeal in England and Wales are of persuasive authority and should be followed at first instance they are not binding on the courts in Northern Ireland. Accordingly, were it the case that the Court of Appeal in England and Wales had pronounced on the interpretation of a particular provision, a Court in Northern Ireland would be entitled to reach a different conclusion on the interpretation of the same provision. The issue that would arise from different interpretations would not be one of discrimination.

Ground (2) Misdirection by the Panel.

[23] The applicant contends that the Panel misdirected itself in law in failing to find that there was a deliberate act or attempt to inflict injury on the applicant. It appears from the applicant's affidavit that during the appeal one of the three Panel members expressed the view that the incident was a "buzzing". This is stated to arise where a person drives towards another a high speed, turning away at the last minute with the intention of making that other believe that he or she would be hit and instilling in him or her the fear of imminent physical injury.

[24] The applicant contends that while the Panel state that they applied a civil burden of proof they appear to have imposed a much higher burden on the applicant. The applicant contends that the Panel was not prepared to draw any inferences from the evidence and required direct and specific evidence

from the applicant or her witnesses that the act was deliberate. I read the Panel's decision as indicating that the members were not prepared to draw any inferences from the evidence to the effect that the actions of the motor cyclist amounted to a deliberate attempt to cause injury. From paragraph 13 of its written reasons it is clear that the Panel was prepared to draw inferences if it felt entitled to do so. However the conclusion of the Panel was that "it was more likely that the collision was unintended although almost certainly the result of reckless or dangerous activity." The applicant makes particular reference to the Panel's treatment of the evidence of a witness to the event. At paragraph 12 the Panel stated "it noted that in her written statement to the police shortly after the incident she had not given any indication that the collision appeared to be deliberate. It also took the view that the opinion expressed by her at the hearing that the rider could have avoided hitting the applicant could only be based on assumptions about the rider's competence and skill. These were matters about which the Panel had no evidence." This did not amount to the Panel requiring direct evidence of the motor cycle rider's skill or intention. It amounted to a refusal to accept the evidence of the witness as to the motor cyclist's ability to avoid the collision. This was a conclusion that the Panel was entitled to reach on the evidence.

Ground (3) Adequacy of Reasons for Refusal of Compensation.

[25] The applicant contends that the Panel failed to give adequate reasons for its decision. The Criminal Injury Compensation Agency decision of 28th September 2004 made it clear that compensation was not payable under paragraph 12 of the Scheme unless the vehicle was used in a deliberate attempt to cause injury and that in the applicant's case there was no evidence to show that the vehicle involved was deliberately used in that way. The review decision on 3rd August 2005 confirmed the original decision on the same grounds. The decision of the Panel of 4th May 2006 also stated that the applicant was not entitled to compensation under paragraph 12 of the Scheme as the Panel was not satisfied on the balance of probabilities that there had been a deliberate attempt to inflict injury. The Panel's Guide to applicants on "Your Panel Hearing" at page 23 states that if a party would like the Panel's decision explained in greater detail they should contact the Panel within one month from the date of the decision. The applicant did not make a request for a detailed decision. However as the applicant proceeded by way of judical review the Panel Chairman issued further written reasons dated 18th August 2006. By affidavit in these proceedings Herbert Wallace, the Panel Chairman, affirmed that had the applicant requested detailed reasons for the decision they would have been provided in the form of those provided on 18th August 2006.

[26] The applicant objects to the detailed reasons being considered by the Court. In R(Ermakov) v Westminster City Council [1996] 2 All ER 302 Hutchison LJ stated at page 315 H:

> "The court can and in appropriate circumstances should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should …… be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertedly omitted, or where the language used may be in some way lacking clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction."

Following this approach in R -v- Secretary of State for Home Department ex parte Martin Lillicrop (1996) EWHC Admin 281, Butterfield J dealt with a submission that it was inappropriate to seek to supplement ill-focused decision letters by affidavit evidence because of the risk of ex post facto rationalisation. At paragraph 35 it is stated –

> "Accordingly we conclude that where evidence is proffered to elucidate correct or add to the reasons contained in the decision letter a Court should examine the proffered evidence with care, and should only act upon it with caution. In particular, a Court should not substitute the reasons contained in proffered evidence for the reasons advanced in a decision letter. To do so would unquestionably raise the perception, if not the reality, of subsequent rationalisation of a decision that had not been properly considered at the time".

[27] The Panel gave adequate reasons to enable the parties to understand the basis of the decision. In any event the applicant was entitled to request detailed reasons and failed to do so. The detailed written reasons prepared for the judicial review amount to elucidation and addition to the original reasons and do not involve fundamental alteration, contradiction or substitution. The written reasons explain the original decision. There has been no failure to provide adequate reasons.

Ground (4) Irrationality of the Panel's decision.

[28] Finally the applicant contends that the conclusion of the Panel was irrational. In recognising that the motor cycle rider deliberately drove at the applicant and in finding that this was not a deliberate attempt to cause injury the Panel has concluded that this was indeed what was described as a "buzzing". Accordingly the motor cycle rider occasioned personal injuries to the applicant that were directly attributable to a crime of violence. However this was not a criminal injury for the purposes of the Scheme as the injury was attributable to a vehicle that was not used so as deliberately to inflict or attempt to inflict injury. The vehicle was used so as deliberately to frighten the applicant. That would amount to a "personal injury" if it involved mental injury, that is a disabling mental illness confirmed by psychiatric diagnosis. There may be such cases arising from a "buzzing" but the present case was not shown to be one such case.

[29] Much of the applicant's challenge to the conclusion of the Panel was taken up with evidence of the applicant and the witness about the motor cycle rider avoiding the collision with the applicant. It is certainly clear on the balance of probabilities that the motor cycle rider deliberately drove at the applicant. If he did so intending to strike the applicant it is a criminal injury for which the applicant would recover compensation if she otherwise satisfied the conditions of the Scheme. If he did so intending to avoid the applicant, but nevertheless to frighten the applicant, then it is not a criminal injury. If, despite his intention to avoid colliding with the applicant the motor cycle rider mishandles the situation and collides with the applicant, he is certainly guilty of being involved in a dangerous and reckless activity, but it is not a criminal injury. The Panel concluded that the latter was the case. That was a conclusion they were entitled to reach on the evidence.

Conclusion.

[30] The Northern Ireland criminal injury compensation schemes have followed the English schemes in providing for exclusions relating to those injured by the use of motor vehicles. The wording of the exclusions has changed from time to time. However the previous legislative schemes and the present 2002 Scheme have not reflected what was stated in the 1980 Report of the English Board to have been the original intention of the Home Office in relation to the criminal injuries compensation scheme in England and Wales to exclude only those who would otherwise recover compensation from road traffic insurance or the MIB schemes for uninsured or untraced drivers. The original intentions of the drafters of the earlier Northern Ireland legislative schemes and of the 2002 Scheme are not known. As presently drafted the 2002 Scheme in Northern Ireland excludes those injured by off-road reckless drivers. In such cases compensation is not recoverable where there is no road traffic

insurance and the MIB schemes do not apply. The unfortunate consequence is that those in the applicant's position are left without any compensation. This is the clear result of the wording of the Scheme.

[31] The applicant has not made out any of the grounds of judicial review and the application must be dismissed.