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Judgment: approved by the Court for handing down | *Delivered:* **21/12/2009**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Fegan's (Thomas) Application [2009] NIQB 103

APPLICATION FOR JUDICIAL REVIEW BY

THOMAS FEGAN

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WEATHERUP J

Background

[1] This is an application for Judicial Review of a decision of the Criminal Injuries Compensation Appeals Panel dated 18 May 2009 refusing the applicant's claim for compensation by reason of his criminal convictions. Mr Lyttle QC and Ms Williamson-Graham appeared for the applicant and Ms Murnaghan for the respondent.

[2] An incident occurred on 16 September 2007 at 10.30 pm when the applicant was attacked and struck by a solid object which he believed was a baseball bat. As a result of this incident he sustained a number of injuries which he lists in his grounding affidavit as involving loss of vision in the left eye, loss of hearing in the left ear, a fractured skull, laceration to his forehead requiring multiple stitches, recurrent headaches, nervous shock, extreme anxiety, sleepless nights and altered balance. The applicant's Counsel estimated the value of the applicant's personal injuries claim at some £88,000 together with a claim for past and future loss of earnings.

[3] The Criminal Injuries Compensation (Northern Ireland) Order 2002 provided for the introduction of a Criminal Injuries Compensation Scheme. Paragraph 14(e) of the Scheme relates to an applicant's previous convictions. It provides that the Secretary of State may withhold or reduce an award where he considers that the applicant's character as shown by his criminal

convictions, excluding convictions spent under the Rehabilitation of Offenders (Northern Ireland) Order 1978, at the date of application or by evidence available to the Secretary of State makes it inappropriate for a full award or any award to be made.

[4] A Guide to the Criminal Injuries Compensation Scheme was issued.

Paragraph 8.15 provides that the provision in the Scheme in relation to the withholding of compensation for convictions was introduced because a person who has committed criminal offences has probably caused distress and loss of injury to other persons and has certainly caused considerable expense to society by reason of court appearances and the cost of supervising offences, even when they have been non custodial, and the victims may themselves have sought compensation, which is another charge on society.

Paragraph 8.16 provides for a scale of penalty points as an indicator of the extent to which any unspent convictions may count against an award. It is stated that the points are a guide to the gravity of a criminal record in relation to a claim. There is set out a proposed set of penalty points depending upon the sentence imposed by the court and the period between the sentence and the application for compensation. It is then provided that the penalty points accrued may attract percentage reductions in the award. If an applicant has 10 or more penalty points the percentage reduction is stated at 100% of the award.

Paragraph 8.17 states that the scale of penalty points is not binding at any stage, whether on decisions made by the Compensation Agency or a determination made by the Appeals Panel. It is intended to provide a readily understood guide to the significance of the claimant's criminal record. The convictions recorded in an individual case and the points attributed to them will be assessed within the context of the particular circumstances of the claim and other related factors. There may be mitigation of the reduction or refusal of the award, for example by evidence of rehabilitation not otherwise indicated by the points system. Conversely a low points score is no guarantee that an award will be made where for example the record contains offences of violence or sexual offences.

[5] The Panel's decision was set out in writing. Paragraph 9 of the reasons states that the Panel took the following matters into account –

(a) the gravity and the nature of the attack upon the applicant;
(b) the applicant had committed offences over a 5 year period;

(c) the offences though mostly of a motoring nature did include offences in relation to disorderly behaviour and resisting or obstructing police;
(d) the motoring offences included many repeat convictions of no insurance and no driving licence together with five convictions for driving while unfit;
(e) a total of 14 of the offences occurred after the date of the incident giving rise to the claim, resulting in a total of 42 points under the Guide.

[6] Having considered all of the evidence the Panel stated that they were satisfied that there was no evidence of rehabilitation as outlined in the continuing offending behaviour. Further the Panel were satisfied that the applicant has caused considerable expense to society by reason of his repeated court appearances. The Scheme requires the Panel to take into account the applicant's character as shown by his criminal convictions and in doing so the Panel were satisfied that the reduction of 100% of any award was both proportionate and reasonable in all of the circumstances.

[7] The record of the applicant indicates a total of 23 convictions, being two for traffic regulations, seventeen road traffic offences, one riotous/disorderly behaviour and three of obstructing the police. Convictions prior to the incident began on 5 November 2003, being motoring offences resulting in fines and disqualifications; in 2006 he was found guilty of driving while unfit through drink or drugs in relation to an incident on 8 May 2005 for which he was fined £200 and disqualified from driving for 12 months; in 2007 in respect of incidents occurring on 16 February 2007 he was convicted of driving with excess alcohol and fined £400 and disqualified from driving for 3 years and for no insurance fined £300.

[8] On 16 September 2007 the applicant sustained his injuries and he appeared at the Magistrates Court on 19 June 2008 in respect of two sets of offences. The first occurred on 14 December 2007 where he was convicted of driving with excess alcohol, applying for or obtaining a driving licence while disqualified and no insurance. He was placed on Probation for 18 months and disqualified from driving for 4 years. Secondly in respect of five offences occurring on 22 February 2008 of obstructing the police, resisting the police, driving while disqualified, no insurance and a further driving with excess alcohol he was fined, placed on Probation and disqualified from driving for 4 years. The post incident convictions register 40 points and thus the applicant was well above the level specified in the Guide for a full reduction from any award.

[9] The applicant relies on two broad grounds. First of all that the respondent failed to take into account medical evidence in relation to the injuries and their connection with the applicant's later offending. Secondly that

the application of the Guide produced a disproportionate result in so far it resulted in this very substantial award being denied to the applicant.

[10] In relation to the first matter the applicant's case is that the injuries caused a medical condition that contributed to the subsequent offending. The applicant contends that he sustained psychological injuries and features of post traumatic stress disorder and the trauma caused an increase in the misuse of alcohol and the alcohol misuse was a component of the subsequent offending.

[11] The applicant was examined by a consultant psychiatrist, Dr Brian Mangan, who provided a report which recorded that the applicant had reported an increase in his alcohol consumption in the aftermath of the incident. It was reported that previously the applicant drank alcohol in moderation but now he drank two bottles of brandy between Thursday and Monday. The diagnosis was of mixed anxiety and depressive disorder. Dr Mangan stated that following the applicant's attack he had developed serious and disabling psychological injuries in the form of a mixed anxiety and depressive disorder and his psychological injuries contained many features of post traumatic stress disorder. For up to 13 months following the assault the applicant described distressing flashbacks of the incident, significant problems with hyperarousal since the attack and continued heightened startle reflex. The report stated that many patients who are traumatised misuse alcohol and that this had been the case with the applicant. It was stated that his ongoing alcohol misuse was likely to be contributing to the slow recovery of his psychological injuries.

[12] There was also a report obtained from Mr McConnell, consultant neurosurgeon. He reported further to an examination on 29 January 2009. The late report did not find its way into the file of medical reports initially presented to the Tribunal but it did find its way into the papers that the Tribunal had at the hearing.

[13] Mr McConnell recorded his findings as involving a significant head injury resulting in deafness, monocular blindness and a loss of facial sensation and in addition he had symptoms in keeping with post concussion syndrome including depression. Whilst some of these symptoms would ameliorate with time his visual and auditory loss were said to be unlikely to do so and would in conjunction with his head injury impede him in day to day activities and with his disability he was likely to have difficulties obtaining and staying in employment. The symptoms described by the applicant related to difficulty hearing with his left ear, absence of sight, background sounds, depression, difficulty sleeping, profuse sweating, difficulty in judging distances and depth. Examination noted problems with sight, perception of light, hearing and slight diminution of sensory function on the left side of his face.

[14] The medical member of the Panel, Professor Meban is a retired Professor of anatomy at Queen's University, Belfast. He examined the medical reports and states in his affidavit that the question of whether the applicant's offending might have been exacerbated by his injuries was something that he specifically considered whilst reading the papers. However pursuant to his detailed consideration of all the medical evidence he formed the view that this was highly unlikely, a conclusion which the applicant challenged.

[15] Professor Meban states further in his affidavit that he found it significant that Dr Mangan found the applicant to have no cognitive defect and that he was clear and lucid. Accordingly there was said to be nothing to suggest that the applicant's behaviour in committing offences was as a result of a brain injury. The applicant was equally critical of that statement by Professor Meban. None of the medical reports identifies any cognitive defect. Professor Meban states that he had been advised that the applicant had advanced the case that the Panel was specifically directed to consider the applicant's injuries having an effect on his offending behaviour. That did not accord with his own recollection. He states that even if this argument had been advanced he did not consider it particularly likely that the applicant's offending was caused by his injuries. He noted the absence of any medical reason by way of brain injury that would have caused the applicant to have committed offences.

[16] Further Professor Meban did not believe that the apparent depression suffered by the applicant would have been exclusively as a result of the injury, rather the applicant had been depressed to some extent before the subject incident had occurred. The applicant challenged Professor Meban's comments in that the applicant's case goes no further than indicating that this was only exacerbation of an existing condition, accepting that there was a prior history.

[17] Further Professor Meban states that he considered it significant that Dr Mangan's diagnosis of the applicant's level of depression was at the bottom end of the scale and it appeared to be mild or moderate. Again this is criticised by the applicant as Dr Mangan did not so describe it but I understand this to be Professor Meban's description of what Dr Mangan reported. Professor Meban continued by stating that he understands that the applicant's attendance at the 'Think First' course, which he undertook for alcohol abuse, was directed by the Court and that subsequent offending indicated that there was no evidence of genuine rehabilitation. Again the applicant was critical of that conclusion because it was said not to give sufficient credit for the applicant having successfully completed the course.

[18] There was also an affidavit filed by Mr McAllister who was the Chairman of the Panel. He considered the nature of the convictions and the extent to which that they had directly caused distress or loss to others and he considered whether they would have caused expense to society and whether court appearances would have had that effect. He disagreed with the

applicant's contention that the Panel was specifically directed to consider that the injuries had had an effect on the subsequent offending behaviour. He stated his opinion that if the case was being made that the injuries had affected the applicant's decision making processes as regards continued offending he would have expected that case to have been made explicitly and evidence to be adduced to that effect.

[19] Was this issue raised before the Panel? The applicant says that it was and in any event it is said that there is an investigative obligation on the Panel that required the issue to be examined. I have not been satisfied that the issue was raised before the Panel in a sufficiently coherent manner. Further I do not accept that it was for the Panel to take up this issue without it being addressed at the hearing by Counsel or being raised by the evidence that was adduced before the Panel. In any event I accept that the issue was considered at the time of the hearing by at least Professor Meban and he found no basis for making a causal connection. Mr McAllister says that if it had been raised before him there was no evidence on which it could have been established.

[20] The issue here is one of a causal link between the injuries, the increased alcohol use and the subsequent offending. There is evidence of increased alcohol use because Dr Mangan indicates such increased alcohol use, which is not unusual in the aftermath of trauma. However his report does not proceed to suggest a causal connection with further offending.

[21] There were offences after the injuries, first in December 2007, 3 months after the incident, when there was a conviction for excess alcohol. There was a further conviction for excess alcohol in February 2008, 5 months after the incident. Inevitably alcohol or the misuse of alcohol was a feature of the very performance of the offences. It is to be noted that in the year prior to the injuries there had been convictions for driving while unfit through drink or drugs and driving with excess alcohol and it is not in dispute that the applicant had been suffering from depression and had been partaking of excessive alcohol prior to the incident.

[22] Mr Hall, the third member of the Panel, noted questions as to the reason the applicant persisted in driving. The response was that the applicant had gone through a bad time with depression, there was always a car about, he would go out to his local pub for a few drinks, his mother had been diagnosed with cancer and had died, he had lived with his father, his brother called with him every night, he took the applicant to his farm and he had a visit from his daughter aged 13 years every weekend.

[23] If the applicant wished to make the case to the Compensation Agency or the Panel that his injuries caused increased alcohol use which caused or contributed to his reoffending he should have obtained medical evidence to support that case. It is not sufficient to state that there was increased drinking

as a result of his trauma and that he committed the offences while intoxicated. The alcohol was obviously an aspect of the offending but is there a casual link between the offending and the injuries? That to my mind was not established by the evidence that was produced before the Panel. So even if it had been made an issue before the Panel I am satisfied that it could not have been made out. If the issue had been raised directly the Panel would inevitably have looked to the evidence that was produced by the medical witnesses to determine whether or not the causal link had been established. It might be said that his offending could be mitigated to the extent that it was caused by his misuse of alcohol which in turn was exacerbated by the injuries. However there is a missing link in the present case. The medical evidence might have provided the link if it could have established that the injuries were such that they resulted in some fashion in the commission of these offences. The present medical evidence has certainly not established anything of that character. By his alcohol misuse he committed the offences but the evidence has not established that his injuries contributed to the commission of the offences.

[24] I am not satisfied in relation to the applicant's first ground of failing to take into account the medical evidence in relation to the causal link between the injuries and the subsequent offending.

[25] The second ground is that the Guide produced a disproportionate result. The question is really whether the Guide was applied rigidly and produced a disproportionate result. It is clear from the terms of the Guide that it does not purport to be a fixed rule and it is written in terms that are flexibile. The approach to this issue is that set out by Girvan J in Snoddy's Application [2006] NIQB 45 where at paragraph 7 he stated –

> "The Guide expressly states that the Panel retains discretion and is not bound to follow the terms of the penalty points tariff. Thus, in para. 8.17 it is pointed out that the scale is intended to be a readily understood guide to the significance of the claimant's criminal record. A points total which indicates a reduction or a refusal of an award may be mitigated where the injury resulted from the applicant's assistance to the police in upholding the law or from genuinely helping someone under attack or there may be evidence of rehabilitation not otherwise indicated by the points system which may be taken into account. Conversely a low point score is no guarantee that an award would be made where, for example, the record contains offences of violence or sexual offences. It is clear that the Panel must approach its task with care to ensure a proportionate, fair and balanced result. Accordingly, it must consider all the circumstances of the individual case including the nature and extent of the applicant's past

> wrong doing and the relevance of the wrong doing to his character and to the injury sustained. A relevant decision based simply on a computation of penalty points without regard to the particular circumstance and facts of the case would result in an outcome in which the decision maker failed to have proper regard to all the circumstances of the claim and related factors and would have failed to properly appreciate the nature and extent of his discretion."

[26] On the question of the approach the Panel took to the Guide Mr McAllister's affidavit at paragraph 6 states that he considered the nature of the convictions and the impact that they might have had on society. At paragraph 13 he says that on the basis of all the evidence, especially the medical evidence and the oral evidence given at the hearing, he did not believe there was any compelling reason for the Panel to exercise its discretion in respect of derogating from the Guide in relation to the penalty points accrued by the applicant. He looked at all of the case to see whether there was a wider aspect to it and on the question of the proportionality of outcome he did not accept that the outcome was disproportionate. He had participated in Panels on occasions when the Panel has exercised its discretion to ensure there was no disproportionate impact and he gave an example where the Panel exercised their discretion and awarded some compensation. He stated his awareness of the lack of rigidity in the Scheme and of the capacity to exercise discretion. However he did not find it necessary to do so on the particular facts of the case.

[27] Professor Meban says something to similar effect at paragraph 10 of his affidavit. He had participated in Panels on occasions when the Panel had exercised a discretion to ensure there is no disproportionate impact. He gave an example of an applicant who had 148 points but he been awarded 50% of the full value of his claim. He too was clearly conscious of the discretion and lack of rigidity and the need for proportionality and applied those considerations in the present case. I do not feel that I can interfere on judicial review grounds with the approach that the Panel has taken given that they approached the matter in the proper way and took into account the relevant considerations.

[28] I dismiss the application for judicial review.