



The Court Of Appeal for Bermuda

CIVIL APPEAL No. 21 of 2007

Between:

GARY PATRICK RAYNOR

Appellant

-v-

CRIMINAL INJURIES (COMPENSATION) BOARD

Respondent

Before: Hon. Justice Zacca, President
Hon. Justice Stuart-Smith, JA
Hon. Justice Ward, JA

Date of Hearing: 12th March 2009
Date of Judgment: 19th March 2009

Appearances: Mr. Parry of Juris Law Chambers for the Appellant
Mr. M. Johnson of Attorney-General's Chambers for the Respondents

JUDGMENT

STUART-SMITH, JA:

1. This an appeal for an award for compensation by the Criminal Injuries (Compensation) Board (the Board) to the appellant in the sum of \$6,750 in respect of pain and suffering inflicted upon him and \$2,000 in respect of legal costs. There is no appeal in respect of the \$2,000. At the conclusion of the argument, the Court announced that it would allow the appeal and increase the sum in respect of pain and suffering to \$10,000 and that we would give our reasons in writing. We now give those reasons.

The Facts

2. On the 23 July 2005 the appellant, then age 33, was pursued by two assailants and eventually caught and beaten about his body with an iron bar and a hammer. He sustained a closed proximal right tibial fracture; a compound left radius and ulnar fracture; a Rolando type fracture on the base of his left thumb; and a lateral condyle fracture of the left distal humerus. On the 17 August 2005, when the appellant was discharged from hospital, the medical report states that the patient continued to an uneventful post-operative course.
3. In Dr. Oleksak's (Orthopaedic Surgeon) report dated 18 day of April 2007, he reported the following:

Three months following his injury, on 23 September 2005, he had regained full range of movement of his right knee and the fracture was solid and had united. The alignment was satisfactory. The range of movement of the wrist and the thumb was improving and was almost back to normal at that stage.

...No obvious cause for the numbness could be found. The right tibial fracture has united and consolidated and he has regained full range of movement of his right knee. He does have scarring to his right leg from the previous pin tracks and also from the initial injury to the proximal shin. The alignment of the leg is satisfactory. The left radius and ulna fracture has united both radiographically and clinically. He has regained full range of movement of

his left wrist both in active flexion and extension as well as pronation and supination. He has two scars where the open reduction internal fixation was performed and he still has two residual plates in situ. He has been advised to leave these in situ. The left Rolando fracture of his thumb has united and has no ill effects. He has regained full range of movement. His lateral condyle fracture to his left elbow has united and he has regained full range of movement. Left thumb and distal humerus fractures have been united. I do not see any long term consequences as a result of these injuries. He does remain with some residual numbness affecting his right lower leg and left upper arm, which are subjective in nature. No obvious cause could be found to explain the numbness. This may represent a mild cause of reflex sympathetic dystrophy. There is a small chance of development of premature degenerative changes to the base of his thumb on the left side as a result of the Rolando fracture which has subsequently united.

4. The Court has had the affidavit evidence of Dr. Chelvam who is a consulting Orthopaedic and Trauma Surgeon at the King Edward VII Memorial Hospital, and has been so since 1991. He has been a member of the Board since 2005 and was a member of the panel who considered the appellant's case. He was also involved in the preparation of the Tariff which was prepared following the increase of the upper limit of what the Board may award from \$70,000 to \$100,000; that increase took place in 2006.
5. Dr. Chelvam explains how the sum of \$6,750 was arrived at by reference to the Tariff.

ITEM	LEVEL	AMOUNT	TOTAL
Injury to the left leg	Level 7	\$3,000 divided by 2	\$3,000
Forearm	Level 7	\$3,000 divided by 2	\$1,500
Thumb	Level 3	\$1,500 divided by 2	\$750
Arm (elbow)	Level 7	\$3,000 divided by 2	\$1,500
Total		\$6,750	\$6,750

6. The Criminal Injuries (Compensation) Act 1973 (The Act) Section 6A provides:

- (1) *The Board, after consultation with the Minister, may make Regulations providing for a standard amount of compensation, determined by reference to the nature of the injury.*
- (2) *Regulations made under subsection (1) shall provide for the standard amount to be determined—*
 - (a) *in accordance with a table (the “Tariff”); and*
 - (b) *where no provision is made in the Tariff, in accordance with such provisions of this Act as may be relevant.*
- (3) *The Tariff shall show, in respect of each description of injury mentioned therein, the standard amount of compensation payable in respect of that description of injury.*
- (4) *An injury may be described in the Tariff in such a way, including by reference to the nature of the injury, its severity or the circumstances in which it was sustained, as the Board considers appropriate.*
- (5) *The Board, after consultation with the Minister, may at any time alter the Tariff—*

- (a) by adding to the description of injury mentioned therein;*
 - (b) by removing a description of injury;*
 - (c) by increasing or reducing the amount shown as the standard amount of compensation payable in respect of a particular description of injury; or*
 - (d) in such other way as he considers appropriate.*
- (6) Regulations made under subsection (1) or subsection (5) shall be subject to the affirmative resolution procedure and may include such transition provisions as the Board considers appropriate.*

Although the Board has prepared a Tariff, no regulations have been made.

7. In his affidavit, Dr. Chelvam explains how the Tariff was compiled and how it is used:

- 8) The Board expended considerable time and effort in researching and producing the document it calls a Tariff Scheme ("the Scheme") with the help of myself. The Board proposed that the adoption of a scheme similar to that used in other jurisdictions will both reduce the time taken by the Board and ensure long term consistency in awards.*
- 9) The Board with the help of my services prepared a draft proposal of injuries and categories.*
- 10) The draft was discussed extensively and approved by three senior surgeons who spent about thirty years together on the Board in a similar position as myself.*
- 11) The basic structure of the scheme broadly follows the scheme that is in use in the UK, assessing injuries and medical conditions into twenty-five (25) levels with 1 being the lowest and 25 being the highest. Level 1 equals \$750.00, whereas level 25 equals \$100,000.00. The injuries were taken in that order from head to toe, taking into consideration every vital part,*

organ or limb of the body for easy referral. Child-abuse and sexual assault were diligently considered. This will definitely save time and costs and at the same time ensure that awards are not incomparable with its previous awards and the guess work in calculating the award is eliminated.

- 12) *Consideration was given in the Bermudian context in assessing at which level a particular injury is compensated.*
- 13) *It is always the Board's position that the broad intent is not to meet costs or loss for dollar for dollar in earnings but rather to express Society's sympathy and compassion for the harm done to the victim.*
- 14) *As the number of items in the Tariff increases there is a risk that the Board might end spending time discussing into which classification a particular injury or injuries fall and thus make no gain in efficiency. We have decided that in the interest of the public, a suitable balance was required.*
- 15) *The Scheme was compiled after looking at previous awards and the different types of injuries in the British system of awards.*
- 17) *The Tariff is for the purposes outlined above and does not have the force of law and consequently, neither the Board nor this Honourable Court is bound by it although the Board has the option to make Regulations by virtue of section 6A of the Criminal Injuries (Compensation) Board Act 1973 and bring it into law.*
- 18) *The Tariff which is compatible with previous awards made by the Board is a very useful system the Board uses as a guide in their assessment of Compensation. By the use of the Tariff system, time is saved and the Board is able to process the numerous applications which come before them every year more efficiently.*

8. The Tariff is exhibited to Dr. Chelvam's affidavit; it deals extensively with injuries to different parts of the body in varying degrees of severity. It does not provide any guidance as to what is to happen in the case of multiple injuries. But the policy of the Board in such cases is explained by Dr. Chelvam.

16) The Board agrees to divide up multiple injuries (more than one injury) and grant an award in the upper limit for serious injury and half of the upper limit for the less serious injury to ensure a fairer balance in the assessment.

9. An appeal lies from the decision of the Board to the Court of Appeal on the grounds that the decision is "a) erroneous at law; or b) unreasonable" (see section 16)

10. By his Notice of Appeal the appellant raised two grounds of appeal:

1. That the decision of the Board is erroneous at law and that the Board took into account when determining its award for pain and suffering schedule or Tariff of the value of injuries where such schedule or Tariff has not been implemented as provided by section 6A of the 1973 Act as amended.
2. That the decision of the Board is unreasonable having regard to all the circumstances in that the award is manifestly inadequate.

11. With regard to ground 1 Mr. Parry on behalf of the appellant submits that when the Board referred to the Tariff, it acted in an unreasonable way because it knew or ought to have known that the Tariff had no force of law, whereas the appellant's submissions were grounded on previous decisions of the Board and case law.

12. We do not accept Mr. Parry's submission. Although the Tariff does not have the force of regulations, there is no reason at all why the Board should not regard it as a helpful guide to the injuries with which it deals. But it is no more

than a guide, and within the various types of injuries described, there may obviously be variations in severity. For example, in the case of a fractured elbow where there has been full recovery, the Tariff is at level 7 at \$3,000. But where there is continuing disability, it is level 12 at \$7,500. There is clearly scope for a figure between these two where for example, there has been prolonged hospital treatment, complicated healing, or lengthy periods of pain. Similarly the degree of continuing disability may vary markedly, justifying an increase in some cases from the Tariff figure. In the present case, the appellant spent nearly a month in hospital and there is a possibility of degenerative changes in the thumb. He has still in situ the plates which were used to mend the fracture. But the mere fact that the Tariff does not have the force of regulations does not prevent the Board from using it as a helpful guide to achieve a measure of uniformity of awards and so that those seeking compensation can know the approximate range of compensation that they can expect. The Board should always have regard for the particular facts of the case and not stick rigidly to the Tariff figure simply because an injury can be said to fall within what is the nearest description of the type of injury.

13. As to the second ground of appeal, the trouble in this case arises from the fact that the appellant suffered multiple injuries. The Board in such cases appeared to adopt a rigid rule of thumb in that it assesses what it considers the most serious injury, in this case the fractured tibia, at the Tariff value, but then divides all the other injuries in half. It is well established that when assessing damages for personal injuries, the Court should not, in the case of multiple injuries, simply add up the figures that it would award for each individual injury, but look at the position in the round. This will generally result in a lower figure. In our judgment therefore, the Board are justified in applying a discount for what could otherwise be the addition of the various Tariff elements. The rule of thumb adopted by the Board of discounting by 50% all other injuries save the most severe seems to us to be a fetter on the proper exercise of their discretion and in the present case produces in our judgment

a figure that is manifestly too low for the four separate fractures. The Board has to keep awards for multiple injuries in proportion to the overall limit of \$100,000.00 but a number of very serious injuries could aggregate to something in excess of this figure in a very serious case. Though of course the overall compensation payable would be limited to \$100,000.00.

Signed

Stuart-Smith, JA

Signed

I Agree

Zacca, President

Signed

I Agree

Ward, JA