The Court of Appeal for Bermuda

CIVIL APPEAL No 4 of 2014

Between:

DELVIN BEAN

Appellant

-v-

CRIMINAL INJURIES (COMPENSATION) BOARD

Respondent

Before: **Baker, President**
Kay, JA
Bell, JA

Appearances: Ms. Simone Smith-Bean, Charter Chambers Bermuda Ltd, for the Appellant
Ms. Wendy Greenidge, Crown Counsel, Attorney General's Chambers, for the Respondent

Date of Hearing: **6 March 2015**

Date of Judgment: **20 March 2015**

JUDGMENT

Bell, JA

Introduction

1. The appellant in this case, Delvin Bean, was seriously injured in an assault which occurred on 8 February 2003, when he was struck with a crash helmet, and sustained injuries to the right side of his face. In the record there are various descriptions of Mr. Bean's injuries, but for the purposes of this appeal it is convenient to use the description given by Dr. Christopher Johnson, a consultant

plastic and reconstructive surgeon, in the report which he made to the Respondent ("the Board") on 9 December 2009, in the following terms:-

> "He sustained multiple injuries to the face; namely, right zygomaticomaxillary (Cheek) complex fracture. He underwent a surgery that required multiple surgical approaches resulting in open reduction internal fixation of the right zygomaticomaxillary complex. He post-course has been complicated by nagging right cheek pain. He required secondary follow-up at Lahey Clinic 3 times. He has required several steroid injections to the cheek to relieve pain. Recent CT scan suggests that the original reconstruction plate used to repair the right cheek is impinging on a nerve to an upper tooth, which may explain the chronic (pain). We will remove that plate in a surgery that will require general anaesthesia and a 3 week recovery. I suspect that this patient will suffer from chronic pain due to injury to the nerve to the tooth and the main nerve of the cheek (V2 – trigeminal Cranial Nerve 5)."

2. Mr. Bean made an application to the Board for compensation on 29 October 2003. However, it was not until 12 March 2014 that the Board deliberated on Mr. Bean's application, and the decision of the Board was rendered on 3 April 2014 (although the letter sent to his attorneys at the time was misdated 3 March 2014).

3. The Board granted Mr. Bean an award totalling $28,000, made up of $11,5000 in respect of pain and suffering, $15,000 in respect of loss of wages, and $1,500 in respect of legal fees.

The Decision of the Board

4. Mr. Bean was represented by counsel at the hearing before the Board, and was himself in attendance. The note of the Board's deliberations is not easy to follow, and at the outset there is a reference to the delay, which by then had lasted some eleven years. Before this Court, counsel for Mr. Bean indicated that the papers had been lost for a substantial period, but it is also clear from the material enclosed in the record that Mr. Bean's treatment had continued for much of the period of the delay, with medical reports from 2005, 2009, 2010, 2011 and 2012 in the record

which was before the Board. Ms. Smith-Bean conceded that the delay might well have worked to her client's benefit, and no point was taken in regard to it.

5. Mr. Bean's original claim for compensation had indicated that he had been earning between $3,000 and $3,500 per week. The Board regarded the evidence which was supplied in support of this claim as unsatisfactory, and while at the outset a claim in respect of special damages had been pursued, an Amended Notice of Appeal was filed in which the claim relating to special damages was abandoned.

6. There are two references in the notes of the Board's meeting which have some significance in relation to this appeal. The first is a note that "the cap was $70,000" and the second is a note in relation to the appropriate level of compensation for Mr. Bean's pain and suffering, which is in the following terms:-

> "Pain & Suffering as a result of fracture of face requiring surgery – Level 12 - $7,500
> Persistent numbness Level 9 - $4,000"

As indicated, the Board awarded the amount of $11,500 in respect of Mr. Bean's pain and suffering, so this figure appears to have been reached by adding together the two amounts referenced above.

The Statutory Regime

7. The Board was established by the Criminal Injuries (Compensation) Act 1973 ("the Act"), which act was amended by the Criminal Injuries (Compensation) Amendment Act 2005 ("the 2005 Act"). Section 10 of the Act provided a maximum figure, or cap, in respect of compensation for injury to any one victim. Pursuant to the amendment effected by the 2005 Act, the amount of the cap was increased from $70,000 to $100,000. Mr. Bean's injuries had of course been incurred before the amendment act, so that the words "the cap was $70,000" was a reference to the position as it was at the time that Mr. Bean had sustained his injuries.

8. The other significant change which was effected by the 2005 Act was the addition of a new section, Section 6A, which provided for a standard amount of compensation to be determined in accordance with a table, known as "the Tariff". The 2005 Act recognised that the Tariff would not cover every type of injury, but insofar as was possible, the Tariff was intended to contain a description of the nature of any injury which might be suffered by applicants for compensation, and would show the standard amount of compensation to be payable in respect of such injury. The 2005 Act envisaged that the Board would make regulations providing for the standard amount of compensation to be determined in accordance with the Tariff, but in the event, no such regulations have yet been made. This lack of regulation was dealt with in the case of *Raynor v Criminal Injuries (Compensation) Board* [2009] Bda LR 19, where Stuart-Smith JA said (paragraph 12):-

> "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 injury described, there may obviously be variations in severity."
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> and
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> "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."

Grounds of Appeal

9. Pursuant to section 16 of the Act, an appeal lies to this Court from any decision of the Board upon the grounds that the decision of the Board is:-

   (a) erroneous in law; or

   (b) unreasonable.

10. The grounds of appeal in this case contend that the decision of the Board was erroneous in law in making the award as it did, and that the Board was unreasonable in that it failed to consider the full extent of Mr. Bean's pain and suffering and loss of amenity when determining the award.

11. In relation to the first ground, there were no errors of law on the part of the Board identified, either in the Notice of Appeal or by counsel in argument. There was a suggestion that an error of law arose because the Tariff, which the Board appears to have been guided by in assessing compensation for pain and suffering at a figure of $11,500, is a document which was not in existence at the time of the assault upon Mr. Bean which led to his claim for compensation. We do not think that the use of the Tariff in these circumstances represents an error in law. First, as Stuart-Smith JA noted in *Raynor*, there is no reason why the Board should not regard the Tariff as a helpful guide to the injuries with which it deals. That is the case even though the Tariff had not been promulgated in 2004. And although the Board recognised that the applicable cap for Mr. Bean's case was the figure of $70,000 which had pertained prior to the amendment effected by the 2005 Act, it is clear that since the Tariff is a post-2005 document, no similar adjustment can sensibly be made to the figures contained in the Tariff to achieve the pre-2005 position. There simply was no Tariff in existence prior to 2005.

12. The other point to be made is that even if the Board were to have been wrong in looking to the Tariff for guidance, that would have been an advantage to Mr. Bean, not a disadvantage.

13. The second ground of appeal is that the Board acted unreasonably in making the award at the level it did, and in this regard, Ms. Smith-Bean stressed that the Board should have taken into account the fact that Mr. Bean had suffered pain throughout the period of eight years following his injuries. Ms. Smith-Bean also argued that because Mr. Bean suffered more than one fracture of his facial bones, the appropriate reference in the Tariff should have been to "multiple fractures to

face", a level 13 injury, for which a standard amount of $10,000 might be the appropriate guide.

14. The problem with such an approach is that it suggests that the exercise of reaching the appropriate level of compensation is a much more exact science than is in fact the case. As Stuart-Smith JA said in *Raynor*, the Tariff should be no more than a guide, and within the various types of injuries described, there may obviously be variations in severity. It is also clear that the exercise in adding together two different injury descriptions, as suggested amounts of compensation, without any discounting factor, as appears to have happened in this case, might have been the subject of challenge, had it not been for the fact that, again, this approach on the part of the Board has been to Mr. Bean's benefit. So we do not think that the first ground of appeal has been made out.

15. On the question whether the Board acted unreasonably in making the award it did, the Board noted that Mr. Bean had been treated between 2003 and 2011. The reality is that the figure appearing in the Tariff for which Ms. Smith-Bean contends is not significantly greater than the component used by the Board, and when one bears in mind that the Board simply added two suggested figures together without any discounting factor, the end result may not be significantly different from the result for which Ms Smith-Bean contends. Certainly, the difference is not in our view so great as to warrant a finding that the Board was unreasonable in reaching a figure that it did.

16. It follows that this second ground of appeal must also fail and accordingly we dismiss the appeal.

Post Script

17. In the course of her submissions, Ms. Smith-Bean referred to the fact that it had not been possible to find any details of the Tariff in the legislation, no doubt a consequence of the fact that regulations have yet to be made which provide for the

standard amount of compensation to be determined with reference to the Tariff. We do think that if the Tariff is to be used by the Board with a view to achieving a standard amount of compensation for identified injuries, it would preferable for the Tariff to have the force of regulation, recognising that even then it will operate only as a guide, with variations made on a case by case basis.

Bell, JA

Baker, P

Kay, JA