The Court of Appeal for Bermuda

CIVIL APPEAL No. 17 of 2017

B E T W E E N:

HERBIE SPENCER

Appellant

-v-

CRIMINAL INJURIES (COMPENSATION) BOARD

Respondent

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

Appearances: Bruce Swan, Apex Law Group Ltd., for the Appellant
Wendy Greenidge, Attorney-General's Chambers, for the Respondent

Date of Hearing: **6 March 2018**
Date of Judgment: **23 March 2018**

JUDGMENT

Award of compensation under the Criminal Injuries (Compensation) Act 1973 – Complaint of inadequacy of award – Lack of reasons for Board's decision

Bell JA

Introduction

1. The Appellant in this case, Herbie Spencer ("Mr Spencer"), was seriously injured when his step-son, Garth Bell, attacked him with weapons variously described

as a hammer, a knife, and a cement block, on 11 August 2014. Mr Spencer was said to have received a variety of injuries, including extensive spinal cord injuries, as a result of the assault, and in due course I will set out the full extent of these injuries as they appear in the medical reports. According to the notes of the hearing before the Criminal Injuries (Compensation) Board ("the Board"), Mr Bell was convicted of causing Grievous Bodily Harm and was sentenced to 18 months' imprisonment. In due course Mr Spencer made an application for compensation under the provisions of the Criminal Injuries (Compensation) Act 1973 ("the Act").

2. The hearing of Mr Spencer's application for compensation took place before the Board on 22 June 2017, and the Board's award ("the Award") is dated 22 June 2017. The Award gave Mr Spencer a total sum of $39,000 by way of compensation, of which $7,117.46 was said to be in respect of pain and suffering. The next head under the Award was the sum of $19,948.54, which was an amount reimbursable to the Lady Cubitt Compassionate Association ("the LCCA"), which organisation had paid for certain medical and related expenses, including the cost of an air ambulance which had effected Mr Spencer's transfer from the King Edward VII Memorial Hospital ("KEMH") to the Lahey Clinic in Burlington, Massachusetts. The final item was $11,934, which was an amount reimbursable to the KEMH, making up the total award of $39,000.

3. The attorneys acting for Mr Spencer did not file his appeal within the designated time period provided for under the Act, but on 20 September 2017, the Chief Justice acting as a single judge of the Court of Appeal granted the extension of time sought for filing an appeal out of time. In extending time, the Chief Justice indicated that while the reasons for the delay were "not entirely impressive", his real concern was that on the face of it there were two seriously arguable grounds of appeal. The first of these was the complaint that one of the members of the

Board, Dr Panagal Chelvam, had "personal knowledge of the matter". The second was that no sufficient reasons had been given for the Board's decision.

The Proceedings before the Board

4. The Appellant was not present at the meeting of the Board, but was represented by counsel. The quorum comprised Madam Justice Stoneham, Dr Chelvam, (who coincidentally, and only coincidentally, was one of the physicians who had treated Mr Spencer at the KEMH following his admission there), and Ms Cheryl Lister. As appears from the case of *Raynor*, referred to in paragraph 7 below, Dr Chelvam had been a member of the Board since 2005.

5. At the time of the hearing, Mr Spencer was a resident of Jamaica, and it was for this reason that he was not present for the hearing. On his behalf, Mr Swan submitted a letter dated 6 June 2017 from Dr Lucien Jones, his family doctor in Jamaica. There were two earlier medical reports from Dr Jones in the record of the proceedings before the Board, the first dated 8 February 2016, and the second dated 5 July 2016.

6. Mr Swan advised that Mr Spencer resided in Jamaica due to the costs of his treatment and his family situation. He was by then 65 years old, requiring continuing care in the future, and was said not to be able to spend much time standing, as well as suffering from anxiety and impaired memory. The amount put forward on Mr Spencer's behalf as the sought after level of compensation was a total figure of $370,000 (which is of course much higher than the Board was able to award under the provisions of the Act), representing $217,000 by way of loss of earnings, and the balance, of more than $150,000, not being broken down as between pain and suffering and medical expenses. In fact the application which Mr Spencer had originally made broke down the sum of $170,000 claimed, giving actual expenses of $2,253, loss of earnings of $62,440, other loss resulting directly from the injury of $43,960, and pain and suffering

and loss of amenity at $61,998 (a rather curious number for an award of general damages), to give the total figure $170,651 which is referred to in the notes of the Board.

Notice of Appeal

7. The Notice of Appeal dated 25 September 2017 identifies the part of the Board's decision complained of as being the grant of $7,117.46 for pain and suffering. The substantive grounds of appeal complain that Dr Chelvam sat as a member of the Board when he was also Mr Spencer's attending surgeon, that Stoneham J failed to provide reasons for her award, and that the level of award was not in line with the range of possible awards which might be made under the provisions of "the Tariff", to which some reference should be made at this stage. The two authorities on which both counsel relied included *Raynor v Criminal Injuries Compensation Board* [2009] Bda LR 19, and *Bean v Criminal Injuries (Compensation) Board* [2015] CA (Bda) 2 Civ 20 March 2015. Both cases recognised the efficacy of using the Tariff, which, coincidentally, Dr Chelvam had been involved in preparing. Its purpose was to provide for a standard amount of compensation for injuries of various descriptions. As indicated in those cases, the Tariff does not yet appear to have any legislative or regulatory backing, but that does not detract from its use as a guide. As Stuart-Smith JA pointed out in *Raynor*, at 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 ….".

8. In fact, the Board's finding did indicate that it accepted that Mr Spencer had suffered some level of permanent disability, and there is a reference in the notes to Level 17, and an amount of $20,000, which appears in the Tariff under the description of a number of different injuries. Despite this reference, there is then a note to indicate that Mr Spencer should receive $8,000.

The Nature of Mr Spencer's Injuries

9. The attack on Mr Spencer left him with an injury to the spinal cord, and in the first of the three reports from Dr Jones, it was stated that one of the direct consequences of the spinal cord injuries was significant muscle weakness in Mr Spencer's right lower limb. In addition, he had recurrent constipation, urinary difficulties, and a loss of sexual function, all of which caused him anxiety and depression. By the time of the 5 July 2016 report, Dr Jones indicated that there was some improvement in muscle function in the lower limbs, as the patient was able to walk with more power. In the final report of 6 June 2017, Dr Jones advised that Mr Spencer continued to experience weakness in both knees, with the right side causing more problems than the left; he also continued to experience stiffness in both hands, making it difficult for him to perform minor functions, and meaning that he was also unable to work in his garden as he would like.

10. The findings of the Board mirrored the contents of Dr Jones' reports. Unfortunately, the skeleton argument put forward on behalf of Mr Spencer, exaggerated the position substantially. Those submissions referred to a lack of movement in his lower limbs, indicating compensation at either level 24 or level 21 of the Tariff. The former is payable in respect of paraplegia, defined as paralysis of the lower limbs, and the latter as hemiplegia, defined as paralysis on one side of the body. Clearly, neither of these levels of injuries was made out by the medical reports, despite which the skeleton argument had contended that Mr Spencer was "paraplegic as stated by Dr Jones". Dr Jones did not make any such statement; there is a world of difference between paraplegia and weakness in both knees.

11. The submissions carried on to say that there should be an increase in the level of award of between $11,000 and $51,000. This variation is substantial, and it transpired was based on the difference between hemiplegia and paraplegia. But

it also appears to have been calculated without reference to the payments to be made to the LCCA and KEMH.

Dr Chelvam's Position

12. Turning to Dr Chelvam's role, his notes were made at the KEMH on Mr Spencer's admission on 11 August 2014, and these notes indicate that Dr Chelvam was simply the admitting doctor. This is confirmed by the notes relating to Mr Spencer's admission to the intensive care unit of the hospital, which were made by Dr Hammond. Those notes indicate that arrangements were in hand to transfer Mr Spencer to the Lahey Clinic, which had accepted him as a patient, and that Dr Chelvam had been in contact with a neurosurgeon at the Lahey. Although Mr Swan made much of the fact that Dr Chelvam had "given evidence", there is nothing in the notes of the proceedings before the Board to indicate that Dr Chelvam did indeed give evidence as to Mr Spencer's then current medical state, let alone evidence which would, as was contended, allow the Board to ignore the contents of Dr Jones' letters, which were again mischaracterised in terms of equating Mr Spencer's injuries to paraplegia. Critically, it is self-evident that Dr Chelvam's role in Mr Spencer's treatment would come to an end as soon as Mr Spencer's care was taken over by the Lahey Clinic, and there is no evidence that Dr Chelvam participated in Mr Spencer's treatment at any time after his limited initial role as admitting physician. The reason for Mr Swan's misunderstanding of the position appears to have come from his acknowledgement, made during the course of his submissions, that he had not previously seen the documents which now appear in the record. And it should go without saying that the Board is concerned to assess damages at a time when the patient's medical condition has stabilised, not immediately following the injury. So the "personal knowledge" and the "giving of evidence" attributed to Dr Chelvam by Mr Swan on Mr Spencer's behalf were not, on examination, established, and neither was anything established which might properly give rise to concerns that there had been a breach of the rules of natural justice. There is nothing to this ground of complaint.

Lack of Reasons for Award

13. The Award dated 22 June 2017 is cursory at best. Mr Spencer's application was dated 12 February 2016, and had been completed without the benefit of counsel. No doubt for this reason, the claimed expenses set out in paragraph 6 above are difficult to follow. Nothing in Mr Swan's submissions clarified the basis upon which Mr Spencer had made his claim, and indeed Mr Swan conceded that the figures in the claim were not ones he could justify.

14. In his submissions before the Board, Mr Swan took these figures at his starting point, saying that the amount claimed in 2014 had been $170,000. He then submitted that the figure for loss of earnings of $1,400 per week (which had led to the calculation of $62,440 in the original application for compensation) should be amended. Whereas the original claim had covered approximately 18 months, Mr Swan submitted that the weekly amount should now be claimed for three years, so that the correct figure would be $217,000. It can of course be seen that for the 18 month period between the attack which caused Mr Spencer injury and the completion of his application for compensation, a loss of earnings calculated at the rate of $1,400 per week would not produce the figure claimed of $62,440. It would be in excess of $100,000. The next point to be made is that on the basis of the exercise which Mr Swan was asking the Board to accept, that figure of $62,440 should have been deducted from the amount claimed of $170,000, and the amount of $217,000 substituted. This would have given a total amount of approximately $325,000. In fact, Mr Swan's figures contrived to reach a total of $370,000, and it is to be noted at this point that not only was Mr Swan unaware of the Tariff when he made his submissions to the Board, he was also unaware of the maximum limit for an award by reason of section 10 of the Act, in the sum of $100,000. Both of these matters were conceded by Mr Swan. Be that as it may, that figure of $370,000 was the claim put forth on Mr Spencer's behalf, and it was at this point that the Board considered its findings, and these appear from the record as follows:-

- *Does not need 24 hour care*
- *He is able to do some gardening*
- *Significant medical bills for overseas medical*
- *Moderate function to daily living accepted*
- *No evidence of his earnings*
- *Accept some permanent disability – Level 17 - $20,000.00*
- *On a balance having considered the evidence before Board*
- *LCCA bill - $19,948.00*
- *Hospital Bill*

15. While there are obvious difficulties with the mathematical approach taken by the Board, it appears that the starting point is that they did accept a level of permanent disability, calculated with reference to level 17 of the Tariff, which for these purposes appears to have been the figure appearing on page 20 of the Tariff, for "Significant disabling disorder where symptoms persist for more than 6 weeks from the incident – permanent disability". It is to be noted that this level of award appears in respect of various other injuries, but this is the item which counsel for the Respondent indicated had been used by the Board. There are then the two heads of award for medical expenses, the first being the LCCA bill which was in an amount $19,948.54, of which the majority was for the air ambulance which took Mr Spencer to the United States. Strangely, that amount was rounded down to $19,000 as opposed to the relatively nominal uplift which would have taken it to $20,000. Last was the bill for the KEMH treatment, the total of which was $11,934. So in approximate terms, one had the level 17 award for pain and suffering in the amount of $20,000, and the awards in favour of the LCCA in the sum of $19,948 and to KEMH in an amount of $11,934.

16. The next aberration is that the words "Total approximate $33,000" then appear in the notes of the Board's meeting, despite the fact that the total of the three figures above is approximately $52,000. The findings then conclude with a note that the agreed award should be $39,000, from which should be deducted the

payment to the LCCA of $19,000 and that to the Bermuda Hospitals Board (KEMH) of $12,000, to leave a balance of $8,000 to Mr Spencer.

17. However, when the letter to Mr Swan's firm advising details of the Award was sent out on 22 June 2017, the more precise numbers were used, which in fact resulted in a payment to Mr Spencer not of $8,000, but of $7,117.46.

18. The first point to be made in relation to the figures is that they are quite impossible to follow. There are no figures which add up to the amount of $33,000, and there is no basis upon which one can arrive at the figure which the Board appears to have reached of $39,000. One would have expected that there would be a finding of the appropriate level of an award for pain and suffering, followed by awards for the expenses which the Board could properly find to have been payable under the provisions of section 6(1)(a) of the Act.

19. During the course of counsel's submissions, Ms Greenidge accepted that the proper way of looking at matters was indeed to fix a sum for pain and suffering, which she agreed should be $20,000, recognising, as she did, that Mr Spencer had sustained a level 17 injury. She also agreed that this amount should be added to the sum of $19,948.54 representing the payment to be made to the LCCA and that of $11,934 for KEMH. That would give a total of $51,882.54.

20. Before this court, Mr Swan submitted that the figure of $20,000 awarded by the Board should have been between $50,000 and $90,000. These figures came from page 22 of the Tariff, and are set with reference to hemiplegia and quadriplegia. There being no evidence to support the contention that Mr Spencer suffered from either of these conditions, the submission cannot be accepted. And Mr Swan made no attempt to pursue the claim for loss of wages which had been made to the Board, but on which there was no evidence giving any detail as to the amount which Mr Spencer had actually been paid prior to the attack upon him.

21. If any support were needed for the proposition that the Board ought to give reasons for its awards, an examination of the process evidenced by this record demonstrates that need beyond a shadow of a doubt. In fact, to take a contrary position is unarguable, and Ms Greenidge did not attempt to do so. For the avoidance of doubt, I would confirm that it is fundamental that a body such as the Board should provide reasons for its findings. The reasons need not be extensive, but they should be sufficient to explain to the applicant why the Board has concluded that each of the headings in its award is appropriate. If the Board had chosen to do that in this case, the confusion in its reasoning and the mistakes in its mathematics might perhaps been discovered before the award was sent out in the form that it was.

The Substitution of this Court's Discretion for that of the Board

22. It follows from the calculation of the Award appearing between paragraphs 15 and 18 above that the amount of the Award was, to put it at is kindest, confused both as to the appropriate approach to be followed in making an award, as well as in the relevant mathematical calculation. Particularly, the Board was in error in deducting the medical expenses from the award to Mr Spencer in respect of pain and suffering, when these expenses should be dealt with as separate payments – see paragraph 19 above.

23. In these circumstances it is clearly appropriate for this Court to substitute its view of the proper level of the Award for that reached by the Board. For my part, I would use the figures referred to in paragraph 19 above, and substitute an award in the sum of $51,882.54, representing the sum of $20,000 to be paid to Mr Spencer as compensation to him, making no change to the amounts to be paid to the LCCA and the KEHM, respectively of $19,948.54 and $11,934.00. The practical effect is that the figure of $7,117.46 appearing in the award of 22 June 2017 is replaced by a figure of $20,000, and the appeal is allowed to this extent.

Postscript

24. It would not be appropriate to conclude this judgment without making some further reference to the Tariff. I concluded my judgment in *Bean* by saying that if the Tariff is to be used by the Board, it would be preferable for it to have the force of regulation. That clearly remains the case, and no doubt is something on which the Board can, and should, make the appropriate representation.

Bell JA

Baker P

Clarke JA