The Court of Appeal for Bermuda

CIVIL APPEAL No. 23 of 2017

B E T W E E N:

TAJMAL WEBB

Appellant

-v-

CRIMINAL INJURIES (COMPENSATION) BOARD

Respondent

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

Appearances: Bruce Swan, Apex Law Group Ltd., for the Appellant
Tanaya Tucker, 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, Tajmal Webb ("Mr Webb"), sustained serious injuries on 2 July 2015, when he was present at the Bailey's Bay Cricket Club and an

unknown gunman entered the premises and opened fire. Mr Webb was shot in the abdomen, and was taken to the King Edward VII Memorial Hospital ("KEMH") for treatment, where he underwent surgery. He remained in the Intensive Care Unit of the KEMH until August 2015, when he was transferred to the Lahey Hospital and Medical Center in Burlington, Massachusetts ("Lahey").

2. The record of appeal is, unfortunately, deficient in terms of indicating when it was that Mr Webb returned to Bermuda, and, more importantly, what was his medical status at the time that the Criminal Injuries (Compensation) Board ("the Board") considered his application for compensation. This application had been made on 9 October 2015, more than three months after the initial injury, at which time Mr Webb was said to remain hospitalised, suffering from persistent biliary leak, liver injury and intra-abdominal injuries. There was a reference in the application for compensation to an attached doctor's report, but the only report in the record is an undated report from one Dr Halligan of Lahey, which appears to have been faxed on 19 August 2015. This report shows that Mr Webb had been transferred directly from Bermuda to the Lahey on 5 August 2015, but gives details of the medical position at that time and the treatment Mr Webb required, rather than offering any guidance to his later condition. It is, however, abundantly clear that Mr Webb sustained very serious injuries, which fact is evidenced by the lengthy period of his hospitalisation.

3. The application for compensation was dated 9 October 2015, and claimed a total of $207,250, an amount which does of course exceed the maximum which the Board can award under the provisions of section 10 of the Criminal Injuries (Compensation) Act 1973 ("the Act"). Again unfortunately, very little detail was provided in support of the figures claimed, which included $85,000 for expenses, $8,750 for loss of earnings, $4,500 for other pecuniary loss, $34,000 for "other expenses", $5,000 for pain and suffering and loss of amenity, and $70,000 for the costs of proceeding under the Act. No doubt this paucity of detail was caused by the fact that Mr Webb was acting in person.

The Decision of the Board

4. The Board met on 27 July 2017, some 21 months after the original application had been made, and its award was made on 16 September 2017, although the amount of compensation appears to have been agreed on by the members of the Board at its 27 July meeting. The notes of the Board's deliberations are scant, and, for instance, it is not possible to discern which members of the Board were present for its deliberations, although we learned during the course of Ms Tucker's submissions that she and a colleague had been present. The Board's findings were listed as being:

- *Mr Webb is physically mobile*
- *Very sad*
- *A long recovery*
- *Urinary system okay*
- *Spleen due to previous accident*
- *Very low mood.*

5. At that time, the Board's notes show that it granted a total award of $25,000, from which payments were to be made to the Lady Cubitt Compassionate Association ("the LCCA") of $10,000, and to Dr Steven Dore of $5,000, as a contribution to the latter's substantial account receivable, leaving a balance of $10,000 to be paid to Mr Webb. The record shows the amount of funds advanced by the LCCA to have been $170,000, but as to the supporting evidence there is nothing beyond a note reading "LCCA paid for overseas approximately $170,000 / air ambulance", and we were told that the basis for this note was a statement made by Mr Webb before the Board. Yet nowhere in the documentation is there any detail as to the actual amount which the LCCA outlaid. Given that this expenditure alone takes the claim well over the maximum figure which the Board can award, this is a significant defect in the record. For the Board to make any payment to the LCCA, it should have had some documentation. There is a bill

for Dr Dore's expenses showing a balance due of $23,878, from a total charge made of $25,519. It is not possible to determine how much of the amount of $10,000 paid to Mr Webb was in respect of special damages, and how much represented compensation for pain, suffering and loss of amenity. Quite simply, the numbers do not add up. The reason for this seems to be the Board's practice of deducting the payment of medical expenses from an award made to an applicant, as opposed to proceeding in accordance with the provisions of section 6(1)(a) of the Act, and making awards for the payment of medical expenses separate and distinct from awards for pain and suffering.

Notice of Appeal

6. The substantive complaints are that the Board failed to provide reasons why its award for pain and suffering was not in line with the range of possible awards under the Board's tariff ("the Tariff"), the table of possible levels of award accompanied by descriptions of the relevant injury. The reference to the Tariff appears in the notes of the Board's meeting of 27 July 2017, in the form of "level 17 - $20,000"; as appears from the Tariff itself, level 17 can be applied to various forms of injuries, including a final reference to a significant disabling disorder, where symptoms persist for more than six weeks after the incident, representing permanent disability. Mr Webb's injuries would appear to fit within that category.

7. The first difficulty with this reference to level 17 of the Tariff is that it does not represent either the amount of the total award or the amount of compensation actually paid to Mr Webb, and this goes directly to the complaint made that the Board did not provide reasons for its awards, whether in terms of a reference to the Tariff, or otherwise. But as also appears later in this judgment, based on the advice given to the Court by counsel for the Respondent, in fact the reference to a level 17 award did not represent the totality of the Board's consideration as to the application of the Tariff.

8. There are then complaints indicating that the Board failed to appreciate the extent of Mr Webb's mental and physical health, closing with a reference to the fact that Mr Webb had not been aware at the time of the hearing that he was able to provide additional evidence as to his mental health and to his eye condition. In relation to that last aspect of matters, counsel for Mr Webb submitted a report from Dr Teye-Botchway dated 3 November 2017. The report indicates that Mr Webb has suffered reduced vision in the right eye for some two years, but nowhere does the report explain why his severe injuries to the abdomen should have been linked with the reduced vision in his right eye.

Mr Webb's Eye Injury

9. As appears from Dr Teye-Botchway's report, this eye condition was not a new complaint. Yet the hearing before the Board was only just over three months before the date of Dr Teye-Botchway's report, and the description appearing in the notes of the Board's meeting make no reference to the eye injury at all. Neither is any reference made in those notes to Mr Webb's mental health, save for the reference to Mr Webb's "very low mood".

10. The short answer to this complaint is that Mr Webb could have produced such medical evidence had he wished. He attended the Board's meeting in person, although presumably without an attorney. But the Board cannot be criticised for a failure to take into account matters of which it was unaware. Accordingly, I would dismiss this ground of complaint as against the Board. Further, there is provision in section 11 of the Act for the variation of an award, in the event of new evidence, any change of circumstance, or for any other reason that the Board may consider relevant. But that would still leave an obligation on the part of any applicant to satisfy the Board that the condition was a consequence of the original injury in respect of which compensation was sought.

Reasons for Awards

11. The findings of the Board are listed in paragraph 4 above, and these findings were the subject of submissions during the course of argument, when it transpired that the amount of the award agreed by the Board with reference to the Tariff was not in fact restricted to $20,000, in respect of level 17. Ms Tucker, who appeared to argue the matter on behalf of the Attorney-General's Chambers, had been present during the Board's deliberations and advised that the Board had considered, in addition to the amount of $20,000 under level 17, an amount of $5,000 to be awarded under level 12, (where the standard amount under the Tariff is $7,500). Ms Tucker produced her notes, and those of a colleague who had also been present, and both show that an award had been made by the Board under this head. The description of the injury which the Board appears to have accepted was "disabling mental disorder confirmed by diagnosis lasting over 1 year but not permanent", and this seems to have been done on the basis of the Board's finding of "very low mood". This was described in counsel's notes as being for PTSD, with a note that this amount had been reduced from $7,500 to $5,000 "due to PTSD not confirmed", presumably a reference to the lack of medical evidence. So quite apart from the fact that the numbers in the Board's notes do not add up, there is nothing in the notes of the Board to indicate its reasons for apparently arriving at a total award of $25,000. That appears now to have been clarified, but without the assistance of counsel that confusion would never have been explained. The Court now understands that the sum of $25,000 was reached by adding a level 17 amount of $20,000 to a level 12 award of $5,000. On the other hand, the notes of the Board suggest that this total sum of $25,000 was made up as $10,000 to the LCCA, $5,000 to Dr Dore and $10,000 to Mr Webb. So, as with the case of *Spencer*, on which the Court has delivered judgment this session, one sees an award being made to an applicant, which is then reduced by the payment made in respect of medical expenses, when one would expect that medical expenses would be dealt with separately, by way of addition to the award to the applicant, as required by section 6 of the Act.

Lack of Reasons given by the Board

12. As with the case of *Spencer*, the complaint regarding the lack of the Board's reasoning is clearly made out, and if anything, the facts of this case are even more clear. For the avoidance of doubt on the issue, the Court in *Spencer* held that it viewed the need for a body such as the Board to give reasons for its findings as being fundamental. The provision of such information would possibly, the Court indicated, have avoided the confusion in its reasoning and the mistakes in its mathematics that occurred in that case. The position is no different in this one, and indeed in this case matters become more complicated by reason of the fact that the medical expenses alone (assuming the expenses of the LCCA to have been $170,000, as the Board seems to have found) took the level of the Board's award over the upper limit provided for in the case of a lump sum payment under section 10 of the Act. So, as in the *Spencer* case, the failure on the part of the Board to provide reasons for its decision permits this Court to substitute the exercise of its discretion for that of the Board. This I would now proceed to do, but would first comment on the general way in which the Board seems to have approached the discharge of its duties.

13. The first point to be repeated is that awards for pain and suffering to an applicant should not be cut down by deducting from them the payment of medical expenses, which ought to be dealt with under a different head of section 6 of the Act. There is absolutely no warrant for doing so. But in this case the Court has also had to grapple with a different problem, which is one that the Board would have faced if it had discharged its duties under the Act properly. This problem arises where the total award exceeds the section 10 maximum. Section 7 of the Act enables the Board to apportion its awards of compensation, and section 7(2) permits the Board to make any payment directly to the person entitled thereto. In practical terms this is what the Board did; the problem is that in so doing it chose to reduce the amount of award otherwise payable to an applicant.

The Exercise of this Court's Discretion

14. Before determining the correct amount of award in the exercise of the Court's discretion, I should deal with the submissions of counsel. Mr Swan submitted, somewhat strangely, that when looking at the outstanding medical bills, Dr Dore should be reimbursed first and the LCCA and the KEMH thereafter, though because of the level of their unpaid accounts, there would be some reduction in each case. In the case of KEMH, the Board did not make an award in its favour, but there were details of its expenses in the record, showing that it was owed an outstanding balance of $67,155, though the record also showed balances due of $1521 and $386. There was no logic offered to support this suggestion. In relation to the award for pain and suffering, Mr Swan submitted that it was his client's case that the eye injury arose from the shooting incident, although there was no evidence to support that contention, and he also sought an award in respect of Mr Webb's loss of spleen, (the medical report from the Lahey had referred to Mr Swan having previously had a partial splenectomy), but presumably the loss of the full spleen would be covered by the award under level 17. Ms Tucker noted that Mr Webb was making payments to reimburse the LCCA, and accepted that the Board could not properly deduct the payment of medical expenses from an award for pain and suffering. Interestingly, and I will return to this aspect of matters, Ms Tucker advised that the Board's budget had been repeatedly cut, and was now at an annual level of $320,000, when the Board had to deal with approximately 20 cases per year.

15. How then should this Court exercise its discretion? It seems to me that the first question is how the apportionment exercise should be conducted. On any basis, the amount of the award including the payment of medical expenses in this case is going to exceed $100,000, and accordingly an apportionment under section 7 will be required. In the case of *Raynor v Criminal Injuries Compensation Board* [2009] Bda L R 19, Stuart-Smith JA quoted from an affidavit of Dr Chelvam, a longstanding Board member, which indicated that the broad intent of the Act is not to meet costs or loss in dollar terms, but rather to express Society's sympathy

and compassion for the harm done to the victim. That sentiment makes good sense, and applying it in this case, it seems to me wholly inappropriate to cut down an award for pain and suffering to a victim in the same manner as cutting down the expenses of a medical service provider, or those of a charity assisting those in need of assistance in meeting medical expenses. Accordingly, I would accept the amount of the Board's award to Mr Webb of $25,000, and rule that such award should not be reduced by reason of the payment of medical expenses or the effect of apportionment under section 7 of the Act. That leaves an amount of $75,000 to be applied towards the outstanding medical expenses, and I would rule that this amount should be apportioned on a pro rata basis to those medical expenses, using the details of the amounts to be found in the record. The exercise should be straightforward, but bearing in mind that the order of this Court on the issue is likely to require the assistance of the Board in regard to its implementation, I would order that the Board should supervise the apportionment exercise and the consequent distribution of funds to the medical service providers. So the Board's award should be amended to reflect the finding of the Court as set out above.

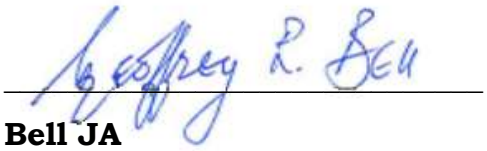
Postscript

16. There are three matters arising from the judgment to which I would wish to make specific reference. First is the question of the attendance of Crown representatives when counsel for an applicant has withdrawn. I can see an argument that the Board is effectively the Crown, but on the other hand, in terms of optics, the result is unattractive. The role of the Attorney-General's chambers should, it seems to me, be concluded at the same time as is counsel for the applicant's.

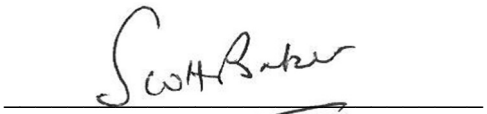
17. The second matter concerns the Board's budgetary constraints, and no doubt the reason for steps such as the deduction of medical expenses from awards for pain and suffering stems from an understandable desire to stay within budgetary constraints. But it does seem to me that when it comes to reimbursing a medical

practitioner or a hospital for medical expenses actually and reasonably incurred as a result of the victim's injury, those setting budgetary limits need to decide whether the Board should operate as an expression of Society's sympathy and compassion for the harm done to the victim or not. It makes no sense to me to make an award for the pain and suffering to a victim and then reduce the amount of that award on account of medical expenses. So those responsible for securing the proper administration of the Act must, it seems to me, ensure that there are funds available to allow the Board to discharge its functions under the Act.

18. The final matter is to voice this Court's very great concern at the deficiencies identified in this judgment and that of *Spencer*. I regard these as sufficiently serious to warrant a request to the chair of the Board that she should review the Board's practices and procedures with a view to ensuring that all future proceedings of the Board comply with the principles of natural justice.



Bell JA



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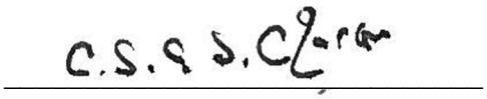

Clarke JA