



The Court of Appeal for Bermuda
CIVIL APPEAL No. 9 of 2018

B E T W E E N:

LIONEL THOMAS

Appellant

- v -

THE CRIMINAL INJURIES (COMPENSATION) BOARD

Respondent

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

Appearances: Christina Herrero, Marshall Diel & Myers Ltd., for the Appellant;
Wendy Greenidge, Attorney-General's Chambers, for the Respondent

Date of Hearing: **14 November 2018**
Date of Judgment:

J U D G M E N T

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, Lionel Thomas (“Mr Thomas”), was the victim of a firearm attack which occurred in the small hours of 29 April 2014. Mr Thomas

was disturbed by the presence of people close to his house, and as he investigated, one of those people shot him. He is said to have suffered gunshot wounds to his upper right thigh and his left calf, for which he received medical treatment from Dr Kyjuan Brown.

2. Mr Thomas made an application for compensation from the Criminal Injuries (Compensation) Board (“the Board”) on 24 October 2014, and in that application he indicated that four persons had been arrested and charged with attempted murder.
3. Mr Thomas’ application was made by attorneys, and was accompanied by a medical report from Dr Brown dated 17 June 2014. This report was relatively minimal, and was accompanied by some photographs of the wounded area. Under the heading “Subjective” appeared the following:

“Patient was injured with gunshot wounds on his upper right thigh and left calf on April 29, 2014, which he had surgery on. His concern is his left calf and foot which is having some swelling and also pain in the left foot. Limited mobility in his left toes.”

4. More than three years later a further report from Dr Brown was filed, dated 27 February 2018, and which was expressed to be in preparation for Mr Thomas’ meeting with the Board, scheduled to take place the following day. Again, the report is scant, and the material part reads as follows:

“Patient is a victim of a gun related crime which is [sic] resulted in the following long term effects:

1. *Permanent disfiguration of the left lower leg lateral aspect*
2. *Chronic leg pain and muscle cramps*
3. *Permanent scar on the medial aspect of the left lower leg*
4. *Hyperpigmented scarring secondary to a skin graft on the upper left thigh”*

5. Included in the record of appeal is a transcription of the Board's meeting held on 28 February 2018. This details in summary fashion the fact that Mr Thomas sustained two wounds, one to his left leg, and one to his right hip. In respect of the left leg injury, this was described as a soft tissue injury, and there is then a reference to "level 10 - \$5,000". In respect of the right hip injury, there is a reference to "level 1 - \$750". At the end of the notes there is a reference to an agreed total award of \$5,750 in respect of pain and suffering.
6. Mr Thomas was notified of the Board's decision by letter dated 9 March 2018, but this letter said no more than that the Board had granted him an award in the sum of \$5,750 in respect of his pain and suffering. The letter did not make any reference as to how the Board's award had been calculated, and made no reference to the Tariff which had been applied by the Board in its deliberations.
7. The Board's letter led to a response from attorneys then acting for Mr Thomas, Marshall Diel & Myers Ltd. ("MDM"), by letter dated 24 April 2018. This letter made complaint of the fact that the Board had not provided reasons indicating how it had arrived at the amount of the award, given the serious nature of Mr Thomas' injuries. The Board was invited to increase its award under section 11 of the Criminal Injuries (Compensation) Act 1973 ("the Act"), as an alternative to Mr Thomas taking the more costly route of an appeal to the Court of Appeal. Section 11 of the Act permits the Board to vary any order previously made by it for the payment of compensation in such manner as the Board thinks fit.
8. The letter from MDM went into some detail as to the basis upon which the Board might increase its award, and in relation to the issue of providing reasons for its decision, referred to two cases which had been decided by this Court on 23 March 2018, which date was of course shortly after the Board had written to Mr Thomas advising him of the award. These were the cases of *Herbie Spencer v Criminal Injuries (Compensation) Board* [2018] CA (Bda) 6 Civ and *Tajmal Webb v Criminal Injuries (Compensation) Board* [2018] CA (Bda) 2 Civ. It appears from

an affidavit which Mr Thomas swore in support of an application seeking leave to appeal out of time that at the time of his affidavit, 16 May 2018, no response had been received from the Board to his attorneys' letter, and counsel confirmed at the hearing that this remained the case. That no response to the MDM letter was ever provided by the Board is something we regard as highly regrettable. Suffice to say that if a considered reply had been given to the MDM letter, it might well be that this appeal could have been avoided. But it was not, and an extension of time within which to pursue the appeal was granted on 26 July 2018.

Grounds of Appeal

9. In broad terms, Mr Thomas' complaints are:
- (i) that the Board failed to give reasons for its decision,
 - (ii) that the award was unreasonable when considered against the statutory maximum permissible under the Act,
 - (iii) that the level of the award was not in line with the range of possible awards which might be made under the provisions of the Tariff,
 - (iv) that the level of award was not in line with the range of awards granted in previous cases, and/or
 - (v) that the Board failed to consider the full extent of Mr Thomas' pain and suffering when determining its award.

Accordingly, this Court was invited to increase the level of that award.

Reasons for Decision

10. In the two cases referred to above, *Spencer* and *Webb*, the failure on the part of the Board to give reasons for the Board's decision was particularly significant because in each case there were substantial medical expenses, and the manner in which the Board had dealt with the payment of these expenses had led to the awards which the Board had made for pain and suffering being reduced so as to allow for the payment of medical expenses. In the case of *Webb*, the medical expenses were so substantial that the statutory cap under the Act of \$100,000

was exceeded, and it became necessary for the medical expenses to be pro-rated. In those two cases, the Court proceeded on the basis that, given the failure by the Board to give reasons for its decision, it was appropriate for the Court to substitute its own view of the proper level of award for that reached by the Board.

The Board's Lack of Reasons for its Award

11. Ms Greenidge for the Board wisely did not seek to counter this complaint, and during the course of the hearing accepted both that there had been a failure on the Board's part to give reasons for its decision in Mr Thomas' case, and that because of such failure, this Court should substitute its own view of the appropriate level of award for the Board's.

The Level of Award – the Appellant's Written Submissions

12. So in practical terms, the real question to be decided in this appeal is whether the Board's award was at the appropriate level, when considered against other awards made by the Board, and against the statutory maximum. If the award was inadequate, the next question for this Court would normally be whether it was sufficiently inadequate that we should substitute our view for the Board's. But Ms Greenidge also accepted that it was appropriate for the award to be increased, although not to the level sought by Ms Herrero. In the light of Ms Greenidge's concession, this second question became academic.
13. For Mr Thomas, the written submissions contended that the Board had paid no or no sufficient regard to the severity of Mr Thomas' injuries. Dr Brown's report had referred to four different long term effects which Mr Thomas was said to have sustained, three of which related to the scarring which he had suffered; the fourth was the complaint of chronic leg pain and muscle cramps. Although the Board, in its "Consideration and Findings" noted that Mr Thomas suffered no limitation of movement, no nerve damage, and that his presentation before the Board was "normal", it is clear from slightly higher in the note that Mr Thomas had referred to the pain and cramps he continued to suffer in his leg, a matter

which had been identified in Dr Brown's second report. This is significant because under the Tariff, higher awards may be made where the claimant for compensation is suffering from some permanent disability. It should be remembered that the hearing before the Board was almost four years after the initial injury and treatment. Mr Thomas' attorneys' submissions set out four heads from the Tariff which they maintained were applicable in Mr Thomas' case, all involving some degree of permanence. The total of these items came to \$31,750, of which the most substantial was a claim for \$20,000 under the "Medical Condition" part of the Tariff, where the description of the relevant injury was "Significant disabling disorder where symptoms persist for more than 6 weeks from the incident – permanent disability", and the relevant level was level 17, which would call for an award of \$20,000.

14. Mr Thomas' attorneys then turned to the difficult question of the level of comparable awards. Although reliance was placed on *Spencer* and *Webb*, these were cases involving significantly more serious injuries. Following a gunshot wound to the stomach, Mr Webb had been sent from hospital in Bermuda to a facility in the United States where he remained hospitalised three months after his injury. Mr Spencer's injuries were also very serious, involving injury to the spinal cord, which left him with significant permanent disability. The full nature of the injuries suffered by those victims appears in the judgments.
15. Mr Thomas' attorneys also made reference and placed reliance on various other awards. In relation to scarring, reliance was placed on *Simons v Criminal Injuries (Compensation) Board*, Civil Appeal #9 of 1981, judgment dated 14 November 1990. This was a case of facial scarring suffered by a female. The Court noted that "any form of permanent scarring must necessarily cause acute embarrassment to the victim, particularly if she is young and female". The level of such embarrassment is bound to be much less acute in the case of a male with scarring sustained to the lower leg. Next, reliance was placed on the case of *Raynor v Criminal Injuries (Compensation) Board* [2009] CA (Bda) 2 Civ, in

relation to continuing disability. It was submitted that the Board had overlooked or not given adequate consideration to Mr Thomas' continuing medical complications.

16. To my mind the key word in the relevant part of the Tariff is "disabling". Dr Brown's report does not identify the extent to which Mr Thomas' chronic leg pain and muscle cramps constituted a disabling disorder of a permanent nature. It is to be noted that level 17 awards in the Tariff apply to a number of different types of injury to different parts of the body, including the eye, the torso, and the lower limbs. It would be fair to say that the injuries described where a level 17 award was deemed appropriate for other types of injury, eg loss of one eye, or loss of kidney, are substantially more serious than the leg pain and muscle cramps suffered by Mr Thomas.

The Respondent's Written Submissions

17. The Respondent's submissions set out the relevant law and referred to those cases relied upon by counsel for Mr Thomas, but in addition referred to awards detailed in the annual reports of the Board. The problem with the cases mentioned in the Respondent's submissions is that very little detail is given of the injuries sustained by the victims, and hence the cases are of limited assistance in this case. More detail is provided in some of the cases set out in the CICB annual reports to the responsible minister for 2010, 2012, and 2013, but again, the necessary detail with which to make a meaningful comparison is absent in most cases. And, as Ms Herrero pointed out, these are awards which have not been reviewed by this Court. Looked at broadly, these reports demonstrate the relevance of the statement made by Dr Chelvam, and referred to in the judgment of Stuart-Smith JA in *Raynor*, that the broad intent of the Board's awards is to express Society's sympathy and compassion for the harm done to the victim, rather than provide costs or loss on a "dollar for dollar" basis. Many of the cases show awards well below that sought for the Appellant in this

case, where the injuries sustained by the victim appear to be more serious than those in this case.

The Court's Award

18. Counsel's oral presentations followed the form of the written submissions, and I would not propose to rehearse the arguments further. The award of \$5,750 does seem to us to be unreasonably low. Mr Thomas suffers some continuing consequences from his injuries, with particular reference to the chronic leg pain and muscle cramps identified in Dr Brown's second report. Even if these complaints do not technically rise to the level of being a disability, they clearly represent some continuing level of discomfort suffered by Mr Thomas. And while the Board's notes refer only to "Pains in foot with cramp", the Board had before it Dr Brown's report prepared the previous day. For my part, exercising the Court's discretion in relation to the appropriate level of award, I would not accept that the Board should have awarded as much as the level 17 award contended for by Ms Herrero. Ms Greenidge accepted that some level of additional award would be appropriate, but urged that it should not go above \$10,000. I agree that this is the appropriate level of award for this case, and would therefore substitute an award of \$10,000 for that of \$5,750 granted by the Board.

Legal Costs

19. Mr Thomas' application included a claim for \$1,500 for the costs of proceeding under the Act. The application form included the name of his then attorneys, and it is reasonable to infer that they assisted Mr Thomas with the preparation of the form claiming compensation. The Board clearly directed its collective mind to the item just above the claim for legal fees on the form, that of other expenses resulting from the injury, which the notes of hearing indicated that Mr Thomas had been unable to recall. When the Board is dealing with an applicant in person such as Mr Thomas, I would have expected the issue to have been addressed by the Board. While Ms Greenidge objected to any such award being made, it is to be noted that in the case of *Simons*, Sir Denys Roberts P reviewed a number of

cases in which costs awards had been made. In that case he dealt with the costs of both the application and the appeal together. I do not have the necessary detail to do that in this case, but I do not regard the figure of \$1,500 as unreasonable in the circumstances, and would award Mr Thomas his legal costs in this amount, to be added to the award for pain and suffering of \$10,000, to give a total award of \$11,500.

The Costs of this Appeal

20. Ms Herrero also sought an order for the costs of the appeal, and having been successful, I would grant Mr Thomas his costs of the appeal, to be taxed if not agreed.

Delay

21. I should refer at this point to the length of time which it took the Board to deal with this matter. As indicated in paragraph 13 above, the time lag between injury and award was almost four years. There was no way of telling from the record why such a delay should have occurred, and neither counsel was able to assist the Court in this regard. One can infer from the terms of the second medical report that it was prepared expressly for the meeting with the Board, but there is nothing to indicate, for instance, that it had been necessary to delay the hearing for medical reasons. The Court was given a list showing that at this point the Board has some 37 applications outstanding, but without further detail there was no way of knowing whether appeals are generally being dealt with on a timely basis. The Court raised this and a number of other queries with counsel for the Board, so that it could be satisfied that applications are being promptly processed and the statutory scheme created by the Act is operating efficiently. Chief in importance of these queries is the Board's failure to comply with its statutory obligation to deliver annual reports to the responsible minister, as required by section 19 of the Act. Next are the failure to respond to the MDM letter of 24 April 2018, and the delay in processing this application generally. Ms

Greenidge appeared again before the Court on 20 November, and subsequently responded in writing to the Court's queries.

22. Those answers were, in many respects, thoroughly unsatisfactory. I shall leave it to the President to deal further with this aspect of matters.

The Tariff

23. One of the matters of which Ms Herrero made complaint was that the Tariff, which she accepted was an appropriate guide for the Board to use, was not available to the general public. This complaint goes beyond its accessibility, to the basis for its use by the Board. The genesis of the Tariff was set out in the judgment of Stuart-Smith JA in *Raynor*. In this Court's judgment in *Bean v Criminal Injuries Compensation Board* [2015] Bda LR 31, we noted at the end of the judgment that counsel had had difficulty in ascertaining the details of the Tariff, no doubt because the Tariff had not been given recognition by having the force of regulation, which we regarded as an appropriate course if the Board were to continue to rely on it. Yet nothing had happened in this regard when we came to deal with the cases of *Spencer* and *Webb*, some three years later, and for this reason we concluded the judgment in *Spencer* by repeating the point, and commenting that this was a matter on which the Board should make the appropriate representation. At the risk of this request again falling on deaf ears, we repeat that if the Board is to place reliance on the Tariff, it would be helpful to applicants and counsel alike for the Tariff to have the force of regulation, something which the chairman of the Board supports. We have been told that requests have been made to successive Attorneys-General for the necessary regulations to be authorised. This is a simple matter which should not be delayed further.

BAKER, P

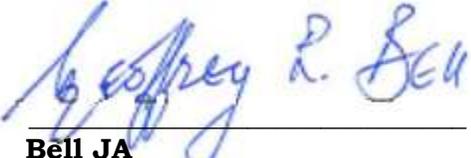
24. I agree with the judgment of Bell J.A. At the conclusion of the hearing, because of our concerns about the operation of the Board, we asked Ms. Greenidge to

obtain the answer to a number of questions. It appears that no annual reports have been submitted to the Attorney General for the years 2016 or 2017, and nor is there any plan for disposing of the serious backlog of claims. If the Government is to provide a scheme for the compensation of the victims of crime, as it currently does under the Criminal Injuries (Compensation) Act 1973, it must be properly funded with adequate administrative support. This is ultimately the responsibility of the Attorney General.

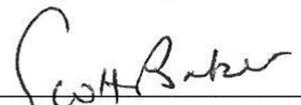
25. There is a statutory duty of the Government under section 17 of the Act to make payment of the Board's awards out of monies appropriated by the legislature. There is also a statutory duty on the Chair of the Board to submit an annual report to the Attorney General as soon as practicable at the end of the calendar year and a statutory responsibility on the Attorney General to put that report before both Houses of the Legislature. We have had no explanation why neither of these duties has been met for 2016 and 2017.
26. Unless prompt action is taken to remedy these problems, there are likely to be further appeals which come at an unnecessary cost to the public purse.

KAY, JA

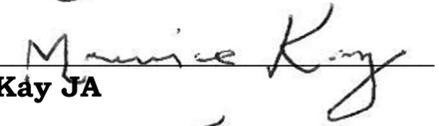
27. I agree.



Bell JA



Baker P



Kay JA