CLAIMING ON THE CRIMINAL INJURIES COMPENSATION BOARD

By Dennis Foster

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Foreword

In the first full year of its operation the Criminal Injuries Compensation Board had 4 Members. It received 2,452 applications and paid out £400,000 in compensation.

At the present time CICB has 43 Members, it receives over 50,000 applications a year and will pay out over £100 million in compensation in the current year.

It is by any test "big business" and it is, therefore, essential that all legal practitioners who hold themselves out to give general legal advice should have a knowledge of its workings and its scope.

Mr Foster has for many years been an active lawyer on the staff of the Board, advising on cases and presenting them at hearings. In this admirable book he has now produced a thoroughly professional and authoritative account of the workings of the Scheme which will be of great practical help to all practitioners.

He goes carefully through the various provisions of the Scheme, gives reference to those High Court decisions which are relevant on its interpretation, and deals with the various cases where the decisions of the Board have been subject to judicial review.

Whilst recognising that the Board is not bound by precedent in what is largely a discretionary Scheme, he has usefully drawn together the "case law" which the Board has itself formulated over the years and which is at the moment to be found scattered amongst its various Annual Reports.

This book will, I believe, be of great assistance to many practitioners and as Chairman of the CICB I have no hesitation in commending it to them.

Lord Carlisle of Bucklow Q.C.
March 1991

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Introduction

The Criminal Injuries Compensation Scheme which came into operation on 1 August 1964 provided a means whereby a victim of violent crime could obtain compensation from the state. Until that time the only possibility of obtaining compensation was by way of civil proceedings against the assailant for damages, which was of no value where the assailant had no resources.

The situation before 1964 thus left the victim of violence effectively without any remedy. It was this serious gap which the Scheme was intended to fill. The 1964 White Paper which announced the proposed Scheme, whilst not accepting any new form of legal liability on the part of the state for any failure by government to maintain law and order, stated that "the public does, however, feel a sense of responsibility for and sympathy with the innocent victim, and it is right that this feeling should find practical expression in the provision of compensation on behalf of the community".

The Scheme gave the injured person the real prospect of receiving compensation appropriate to the injury suffered. As the measure of compensation was based upon common law damages, it included loss of earnings as well as "general damages" for pain and suffering attributable to the injury itself.

The nature of the entitlement to compensation under the Scheme has always been ex gratia. Paragraph 4 of the Scheme begins with the words "the Board will entertain applications for ex gratia payments of compensation ...". The Criminal Justice Act 1988 makes provision for the Scheme to become statutory, one of the effects of which would be to make the entitlement to compensation a legal right. However this part of the Act is not yet in force. Entitlement to compensation is still governed by the terms of the Scheme, the current form of which came into operation on 1 February 1990.

The Board is independent in the performance of its duties and its day-to-day administration, and decisions on individual cases are not subject to ministerial review. However, Government responsibility

for the Scheme rests with the Home Secretary and the Secretary of State for Scotland. They jointly appoint members to the Board and answer questions in Parliament about the Board. The grant-in-aid by which the Board is funded falls on the votes of the Home Office and the Scottish Home and Health Department. The Board is not subject to investigation by the Parliamentary Commissioner for Administration, the Ombudsman.

The terms of the Scheme govern the Board's decisions, but they give the Board a number of discretionary powers in reaching those decisions. In para 6 of the Scheme, for example, "the Board may withhold or reduce compensation" in the circumstances set out in that paragraph – these include delay in reporting the incident to the police, failing to co-operate with the police in "bringing the offender to justice" and a record of criminal convictions on the part of the applicant which would make it "inappropriate" for an award to be made out of public funds.

The Scheme is, after all, the expression of the will of the general public, through the decision of Parliament, to compensate innocent victims of violent crime. The fair and reasonable reflections of the man on the Clapham omnibus generally underscore the Scheme, especially with regard to para 6, whereby an applicant who has fallen seriously short of his "John Citizen" duties cannot expect to receive compensation from the pockets of his fellow citizens.

The great majority of applications are decided by the Board "on the papers" without oral hearing. The Board decides first whether the application is within the terms of the Scheme and, if so, proceeds at the same time with assessment of the award. If the applicant does not accept the decision or the assessment and is granted an oral hearing, that hearing is informal so that the layman, who can be legally represented if he wishes, can readily present his own case. Although para 25 of the Scheme requires the Board to "reach their decision solely in the light of the evidence brought out at the hearing" the Board is not bound by the laws of evidence and "is entitled to take into account any relevant hearsay, opinion or written evidence, whether or not the author gives oral evidence at the hearing".

Practitioners who have appeared before it will be aware that at a hearing the Board goes straight to the heart of the issues which it is required to decide, so that the evidence needed to decide the case will soon have been heard or read. The strength of the Board, and the protection which that gives to the entitlement of the individual applicant, lies in the seniority and experience of its members. Cases at a hearing will generally be decided by three, or sometimes two,

Board members who are all leading counsel or solicitors of equivalent seniority. That weight of experience enables the Board to deal with a heavy daily list of cases, many of which have previously been the subject of sometimes lengthy Crown Court trials. The ever-increasing number of cases coming before the Board makes such expedition of the hearings process essential.

The term "crime of violence" is wide in its scope. In addition to the obvious circumstances of a violent attack by one person on another, the Scheme encompasses injuries attributable to arson (including, for example, a fireman injured while fighting a fire caused by arson) and poisoning. Also within the Scheme is the policeman or citizen injured accidentally while trying to apprehend an offender or prevent an offence from being committed – if the injured party was at that time taking an exceptional risk which was justified in all the circumstances. This type of case is discussed in Chapter 3.

The last sentence of para 4 of the Scheme widens the scope of the Scheme to include victims of actions which would generally be regarded as criminal but are not by reason only of the mental or other legal incapacity of the "offender". This provision brings within the Scheme nurses who have been injured by the aggressive actions of mental patients who cannot be prosecuted as no guilty intent can be established, and victims of crimes committed by children below the age of criminal responsibility.

The Scheme applies to England, Wales and Scotland, and the Board membership reflects this. Certain differences in the laws of England and Scotland are recognised within the Scheme so that where necessary the appropriate "local" law is applied.

The original 1964 Scheme has had three major overhauls – in 1969, 1979 and 1990. Important changes came into operation on 1 February 1990 and these are all incorporated and discussed in the chapters which follow. The changes have come about partly to make the Scheme achieve its intended objectives more accurately and efficiently, and partly also to reflect developments in society's attitude towards the matters with which the Scheme has to deal. An illustration of the latter is the treatment of violence within the family under the 1969 Scheme and the 1990 Scheme respectively. Paragraph 7 of the former Scheme said:

> "Where the victim who suffered injuries and the offender who inflicted them were living together at the time as members of the same family no compensation will be payable. For the purposes of this paragraph where a man

> and a woman were living together as man and wife they will be treated as if they were married to one another".

The effect of this was to exclude from the Scheme not only violence between husband and wife, but also all child sexual abuse by the father or stepfather with whom the child was living. As a consequence of variations contained in the 1979 and 1990 Schemes, these circumstances now fall within the Scheme, subject to certain requirements (discussed in Chapter 7) which relate to persons "living in the same household at the time of the injuries". It will come as no surprise that the publicity given recently to the subject of child abuse and the encouragement given to young victims to report such abuse have produced a considerable volume of applications on behalf of child victims.

Given that the purpose of the Scheme is to provide the innocent victim of criminal violence with compensation for the injury which he or she has suffered, this widening of the scope of the Scheme had become essential. In so doing, however, it presents the Board with difficulties similar to those experienced by the criminal courts in terms of evidence where young children are involved. This rapidly growing aspect of the Board's work is discussed in Chapter 9.

It is not a general requirement of the Scheme that the offender is charged with and convicted of the "crime of violence" giving rise to the application, although there are certain rules which apply to "domestic" violence between adults under para 8 of the Scheme.

In many cases the assailant is never identified or arrested. The acquittal of the alleged offender in the magistrates' court or Crown Court will not necessarily be fatal to the application to the Board for compensation by the injured victim, but equally the assailant's conviction will not guarantee the success of the application. There can be many reasons why the alleged assailant is acquitted of the "crime of violence" relied upon by the Board's applicant, such as uncertainty of identification of the particular assailant where the victim is attacked by a gang. The facts may nevertheless establish that the applicant was injured as a result of a "crime of violence".

Likewise an assailant may be convicted of, for example, wounding, but may be found on the evidence to have been provoked by the applicant's "conduct". The application would therefore be likely to fail under para 6(c) of the Scheme.

With regard to civil proceedings relating to the same incident and injury, para 21 of the Scheme (discussed in Chapter 12 at page 145) requires repayment of compensation paid by the Board where the applicant succeeds in obtaining damages in civil proceedings; every

applicant who obtains an award is required by the Board to sign an undertaking to make such repayment should damages be recovered.

It must be noted that, wide as they are, the terms of the Scheme do not include injuries attributable to "traffic offences" except where the injury is due to a deliberate running down. Aspects of this provision are considered in Chapter 10.

The Scheme provides for the re-opening of finalised cases in certain circumstances. This "safety net" enables the Board to make a final award in appropriate cases without having to quantify a possible future deterioration in the applicant's medical condition and the economic loss, such as loss of career, which would flow from that event if it occurred. Paragraph 13 provides that, where "after a final award has been accepted there has been such a serious change in the applicant's medical condition that injustice would occur if the original assessment of compensation were allowed to stand", the Board has a discretion to reconsider the case.

The burden is on the applicant to satisfy the Board that the "serious change" is attributable to the injury which has already been the subject of a final award. Whether he succeeds will largely depend upon the medical evidence put forward by the applicant in seeking reconsideration.

The informality of the Board's hearings procedure has already been mentioned. However, the Board is bound to conduct its hearings in accordance with the principles of natural justice.

The Board's decision is final both on eligibility and on assessment of compensation and "will not be subject to appeal or to Ministerial review" (para 3 of the Scheme). However, the High Court does have jurisdiction by way of judicial review, but only if there has been an error of law or breach of natural justice in reaching a decision: "The court will only interfere if there is an error of law or if the decision arrived at by the tribunal is one at which no reasonble tribunal properly directing itself could have arrived". Cases in which a Board's decision has been judicially reviewed are considered in Appendix 4. A number of these have been attempts to persuade the court that a particular circumstance was a "crime of violence" within the terms of the Scheme, such as "railway suicide" cases. Although these efforts proved unavailing in the court, the train driver applicant whose "injury" is mental illness resulting from seeing someone commit suicide by standing in front of his train, has now been brought within the Scheme by one of the amendments which came into operation in 1990 and is now covered by para 4(c).

As "crime of violence" is not a term which is defined in the Scheme or by statute, the cases in which the term has been considered judicially are a valuable guide to the scope of the Scheme.

There has always been a minimum award provision. If an injury which is otherwise within the Scheme would not attract damages in the court of at least the minimum award, then no award at all can be made. The Scheme is intended for only the more serious type of injury.

The minimum award is currently £750, having been increased to that figure in 1990 from £550 which had been the figure since 1986. The original limit in 1964 was £50; the figure has been the subject of regular review to take account of inflation.

The Board publishes guidelines from time to time regarding the level of compensation which a particular injury is likely to attract (see Appendix 3). These should be regarded as only a starting point, however, as every case is different and has to be considered on its individual merits.

The Board has also provided guidelines for use by magistrates' courts in making compensation orders against violent offenders (see Appendix 3). It is arguable that magistrates should use this power more frequently than they do. The Criminal Justice Act 1988 contains measures to encourage magistrates in this direction. Magistrates' court proceedings are usually very much nearer in time to the incident than the deliberations of the Board, and the broad justice of requiring a wrongdoer to make good the damage rather than the public at large is perhaps self evident. The effectiveness of such an order is often in doubt, however, where either the assailant has no means to pay or refuses to do so, and the court with its many other functions and responsibilities does not always have the resources to keep such cases under review and pursue enforcement proceedings to a conclusion.

To the legal practitioner appearing before the Board the informality of the Board's approach is in some ways a refreshing contrast to the complexities of High Court or even county court proceedings enshrined in the "White book" and "Green book" respectively. In the important field of personal injury litigation, which has many parallels with the Board's work, the courts have not been unaware of the benefits of a simpler procedure leading to the point at which decisions on liability (or eligibility) and assessment can be made. The Board's work has shown that a simpler approach can still arrive at the justice of the case.

The Board has power to award compensation without upper

limit similar to High Court damages, so that individual awards of hundreds of thousands of pounds are not uncommon in cases of very serious injury where loss of career earnings and the cost of future care have to be added to the damages for the injuries as such. There is, however, no process equivalent to the courts' "directions" or "discovery". The Board's legal staff, acting in concert with the applicant's advisers, prepare a bundle of documents for use at the hearing, including all medical reports submitted on the applicant's behalf and any obtained by the Board itself plus, where appropriate, a schedule of loss of earnings. The latter is prepared by the applicant's advisers on the lines of the High Court Practice Direction which requires such a calculation to be prepared before the hearing and submitted with supporting documents for possible agreement, subject to decision by the Board at the hearing.

This procedure is aimed at achieving wherever possible a final disposal of an application at one hearing only, including all issues of eligibility and assessment. Where this proves not to be possible, where the medical picture can be resolved only over a period of years, the Board will endeavour to make a decision on eligibility in the first instance and at the same time make an interim award. In such a case, the final award will be made only when the final medical position has been established.

From its first receipt of the application form from the applicant to final assessment at a hearing, the Board attempts to deal with applications in the simplest and most direct way. In many cases, the initial "fact gathering" – such as obtaining police reports and medical reports before submission for the initial legal decision on eligibility and then, as appropriate, the assessment of compensation – is straightforward. However, the timetable by which an application progresses through its various stages to a conclusion is regulated largely by the volume in which cases are received by the Board. In its annual report in respect of the year ended 31 March 1989, the Board stated:

> "The number of new applications received during the year was 43,385, higher than ever before in the history of the Scheme. At present rates of application it seems certain that the Board will receive more than 50,000 fresh cases in this financial year."

This prediction proved to be correct; the Board received 53,655 applications in the year to 31 March 1990. The report continued: