[2018] AACR 35

(Criminal Injuries Compensation Authority v First-tier Tribunal and Y [2017] EWCA Civ 139)

CA (Sir Brian Leveson P, McFarlane and LJ Henderson LJ) JR/2930/2014
14 March 2017

Criminal Injuries Compensation - Compensation Authority— whether compensation payable to a person conceived and born with serious genetic disability as result of incestuous rape—whether injuries suffered directly attributable to a crime of violence

Y who was born with a serious genetic disorder resulting from his conception and birth as a consequence of an act of incestuous rape, claimed compensation under the Criminal Injuries Compensation Scheme 2008. The Criminal Injuries Compensation Authority ('CICA') refused the claim on the grounds that Y was not a victim of a crime of violence and that his congenital condition had arisen as a result of the relationship between his parents and not of the assault itself. The First-tier Tribunal dismissed Y's appeal and concluded that as he had never had an uninjured state and had not suffered injury within the terms of the scheme. On an application for judicial review, the Upper Tribunal granted his application for relief, concluding that Y had "in common parlance" suffered injuries which were directly attributable to a crime of violence within the meaning of paragraph 8 of the 2008 scheme and so was entitled to compensation thereunder. The CICA appealed.

Held, allowing the appeal, that:

1. issues of entitlement to compensation under the Criminal Injuries Compensation Scheme 2008 were to be determined by reference to the proper construction of the scheme which, being governed by section 1 of the Criminal Injuries Compensation Act 1995, had to be read in accordance with the normal principles of statutory construction;

2. on the facts, the victim of the crime of violence could only have been Y's mother;

3. to suggest that Y, who had not been conceived at the time of the crime, was himself a victim of crime (the nature of the crime involved being difficult to discern) or that it was possible to assess compensation on the postulate that Y would otherwise have been born without disability and so should be compensated for the genetic disorder from which he suffered, went beyond that which the scheme sought to cover.

The court set aside the decision of the Upper Tribunal (AAC) and upheld the decision of the First-tier Tribunal.

DECISION OF THE COURT OF APPEAL

Ben Collins Q.C. (instructed by Criminal Injuries Compensation Authority, Legal Services, Glasgow) for the Appellant

Malcolm Johnson (of BL Claims, London) for the Interested Party

The Respondent did not appear and was not represented.

Judgment

Sir Brian Leveson P:

1. How broad is the definition of those who can properly describe themselves as victims who have sustained personal injuries in and directly attributable to a crime of violence? The

question is determinative for qualification to claim compensation pursuant to the terms of the Criminal Injuries Compensation Scheme now established by the Criminal Injuries Compensation Act 1995 ("the 1995 Act"). In the usual case, the answer is straightforward and rarely gives rise to challenge. In this case, however, it raises a question of law as to the proper meaning of the Scheme.

2. The facts can be summarised very shortly. From the age of 9 years, M was sexually abused by her father KM which, after two years, progressed to full sexual intercourse. Ten years later, on 14 October 1987, Y was born following incestuous sexual intercourse (agreed to have constituted rape) between M and KM and just over two years later, M gave birth to another child, also by KM. Thereafter, this course of conduct came to light and KM subsequently pleaded guilty to incest and was sentenced to a term of three years' imprisonment. M brought a successful claim under the Criminal Injuries Compensation Scheme 1990 ("the 1990 Scheme") on the basis of the crimes of violence (including that which led to the conception of Y) of which she was a victim.

3. Tragically, Y was born with a serious genetic disorder which it is accepted was probably caused by the incestuous intercourse. This conclusion has been reached on the basis that there is a 50% chance of such problems appearing in those born of an incestuous relationship as compared with a chance of 2-3% in the general population. In that regard, it is noteworthy that Y's sibling did not have the genetic disorder. I add that the compensation which M received did not encompass any payment in relation to the condition, care or upbringing of Y.

4. In February 2012, a claim was made on behalf of Y under the Criminal Injuries Compensation Scheme 2008 ("the 2008 Scheme") which, on 25 June 2012, was refused on the grounds that Y was not a victim of a crime of violence and that his congenital condition was a result of the relationship between his parents and not of the assault itself. The decision was maintained after review. On appeal, the decision being dated 20 March 2014, the First-tier Tribunal ("F-tT") followed the reasoning of Lord Osborne in the Scottish case of *Millar (Curator Bonis to AP) v Criminal Injuries Compensation Board* 197 SLT 1180, 13 November 1996. It concluded that Y "did not have and could never have had an uninjured state" and had not suffered an injury within the terms of the 2008 Scheme. Thus, the appeal was dismissed.

5. Acting with his mother as his litigation friend, Y then sought judicial review of the F-tT by application to the Administrative Appeals Chamber of the Upper Tribunal ("UT") which stayed the hearing pending an appeal in *CP v First-tier Tribunal and Criminal Injuries Compensation Authority.* That case concerned foetal injury caused by maternal self-induced alcohol poisoning: see [2014] EWCA Civ 1554. As a result, it was only on 25 April 2016 that Judge H. Levenson sitting in the UT determined the appeal, reversing the decision and concluding that Y was eligible for an award of compensation. On 19 May 2016, the judge granted permission to the Criminal Injuries Compensation Authority ("CICA"), interested parties to the application, to appeal to this court.

The 2008 Scheme

6. The 2008 Scheme is governed by s. 1 of the 1995 Act which requires the Secretary of State to make arrangements for the payment of compensation to, or in respect of, persons who have sustained criminal injuries, the phrase 'criminal injury' being defined in the Scheme itself. It applies to any application for compensation received on or after that date and provides (at para. 6) that compensation may be paid to "an applicant who has sustained a

criminal injury on or after 1 August 1964" (i.e. after the date when a compensation scheme was first started).

7. The phrase 'criminal injury' is defined by para. 8 in terms as meaning one or more personal injuries being an injury or injuries sustained in and directly attributable to an act occurring in Great Britain as described in para. 9 which is in these terms:

> "For the purposes of this Scheme, personal injury includes physical injury (including fatal injury), mental injury (that is temporary mental anxiety … or a disabling mental illness…) and disease (that is a medically recognised illness or condition). Mental injury or disease may either result directly from the physical injury or from a sexual offence or may occur without any physical injury. Compensation will not be payable for mental injury or disease without physical injury, or in respect of a sexual offence, unless the applicant:
>
> > (a) was put in reasonable fear of immediate physical harm to his or her own person; or
> >
> > (b) had a close relationship of love and affection with another person at the time when that person sustained physical and/or mental injury … and
> >
> > > (i) that relationship still subsists (unless the victim has since died) and
> > >
> > > (ii) the applicant either witnessed and was present on the occasion when the other person sustained the injury or was closely involved in its aftermath; or
> >
> > (c) in a claim arising out of a sexual offence, was the non-consenting victim of that offence (which does not include a victim who consented in fact but was deemed in law not to have consented)."

8. Putting these provisions together generates two questions which, on analysis, can be linked. The first is whether the applicant for compensation, Y, is a victim who sustained an injury (including a medically recognised condition) directly attributable to the act of incestuous rape. This involves a consideration of the necessity for a pre-existing state which is altered by the relevant act (i.e. the rape). The second is whether compensation is being claimed in respect of a sexual offence which is caught by para. 9 and whether that provision itself presupposes the existence of Y at the time of the offence (rather than being conceived as a consequence of it). The link is the fundamental issue of whether it is sufficient that Y's condition is a consequence of the act of sexual violence which occurred prior to Y's existence.

The Approach of the Tribunals

9. The facts which form the background to this case are identical to those considered in *Millar (supra)*, decided under the 1969 Scheme. The Board then argued that the applicant had not suffered injury as her condition and disabilities were congenital and 'inherent' to her. Having reviewed UK and US authorities, Lord Osborne agreed with the first submission. He said (at 1199):

> "It appears to me that the concept of injury, in the context of a situation in which compensation for it must be assessed, presupposes a pre-injury state which is capable

> of assessment and comparison with the post-injury state. It is obvious from the circumstances of this case that the child concerned never had, nor could have, any existence save in a defective state. Accordingly, in my opinion, it is inevitable that her plight, grievous though it may be, cannot be seen as 'personal injury', within the meaning of para. 5 of the revised 1969 Scheme."

10. At the F-tT, it was argued that reliance should not be placed on *Millar* because it was decided under a scheme founded on common law principles of damages that had no place under the 2008 Scheme. The Tribunal concluded however that the issue – could the applicant show that he had suffered personal injury which was directly attributable to a crime of violence? – remained at the heart of the 2008 Scheme and was in almost identical terms to the relevant language of the 1969 Scheme. Further, Y's 'uninjured' state could only be never to have been conceived. The fact that 50% of children conceived by his parents could have avoided the disorder did not assist because the question had to be articulated whether, prior to the assault, there was a person or entity 'Y' upon whom the impact of the crime of violence could be measured. The answer was that there was not.

11. The Tribunal set out the reasons for refusing to treat Y's conception and birth as being an injury for the purposes of the 2008 Scheme in the following terms:

> "(a) That argument would require a submission that [Y] has a claim for 'wrongful life'. The fact of his being born at all would be his actionable injury.
>
> (b) The common law does not recognise a claim for 'wrongful life' by a child whether injured or uninjured: [*McKay v Essex Health Authority* [1982] QB 1166] has been unchallenged authority for that proposition for over 30 years.
>
> (c) Although the Scheme is a free-standing scheme the terms of which are to be applied to the evidence presented, it is not to be interpreted in a vacuum; regard can and should be had to the relevant common law where appropriate ([*Rust-Andrews v. F-tT (Social Entitlement Chamber and another)* [2012] PIQR P7; [2011] EWCA Civ 1548 at para. 34]). …
>
> (d) At common law [Y] would have no claim (although his mother would have a claim for certain additional costs of bringing up a disabled child).
>
> (e) It would be impossible to quantify [Y's] claim. How does one define his 'injury', if his uninjured state is to be defined as not being conceived or born at all? Where does his condition fall in the tariff of awards? What is the benchmark against which loss of earnings and loss of earning capacity are to be assessed?
>
> (f) It is implausible that the Scheme would have provided far greater recovery (out of public funds) than that available under the common law (the cost of being looked after without any discount for the cost of raising a child without his genetic disorder) at the very least without a specific provision to that effect.
>
> (g) The only possible comparator which could lead to a meaningful quantification of compensation for 'special expenses' under para. 35 is a child born without the genetic disorder from which [Y] suffers. But [Y] could never be that child: from the moment of conception his genetic disorder and consequent disability were pre-determined – not because every fruit of conception between those parents was bound

> to suffer that disorder but because [Y] was so bound and was in fact born with that disorder."

12. The F-tT recognised that the 2008 Scheme recognised novel claims which would not succeed at common law (such as claims arising out of the apprehension of an offender) and thus Y's claim was not, for that reason, excluded, but it concluded that the decision in *Millar* although based on the 1969 Scheme applied with equal force to the 2008 Scheme. Thus the claim was rejected.

13. On appeal to the UT, citing *Rust Andrews*, it was argued on behalf of Y that the common law should not be imported into an interpretation of the 2008 Scheme but that, even if it was, the law relating to wrongful birth and wrongful conception had moved on since 1996. Thus, claims had been upheld for pregnancy and associated costs following the negligent failure of a vasectomy (*McFarlane v Tayside Health Board* [2000] 2 AC 59) and in respect of the extra costs of bringing up a disabled child following a negligently conducted failed sterilisation (*Parkinson v St James and Seacroft University Hospital NHS Trust* [2002] QB 266; [2001] EWCA Civ 530). It was wrong to say that the child could not have had an existence save in a defective state because there was an element of chance involved.

14. It was also argued that there was nothing in the 2008 Scheme that indicated that a victim of a crime of violence had to be a fully formed embryo, foetus or new born child and, indeed, a conviction for manslaughter could follow the death of an unborn child: see *Attorney General's Reference No 3 of 1994* [1998] AC 245. Thus, the criminal law could penalise those who commit crimes against a foetus "and by extension" a person in Y's situation: the claim could be formulated when such a child came into existence.

15. In response, following *Millar*, the CICA submitted that it was 'necessarily correct' to say that Y's uninjured state could only be never to have been conceived and that, in the absence of the crime of violence, Y would never have been born. Furthermore, following the foetal alcohol case, *CP*, harm caused before birth which had consequences after birth could not be treated as injury sustained by a living person, although (as Ben Collins Q.C. for CICA now concedes) that case concerned the conclusion that an offence under s. 23 of the Offences Against the Person Act 1861 (administration of a noxious thing to a person) could not be committed by the mother in relation to her then unborn child and does not take this case further.

16. In the UT, Judge Levenson considered that the development of claims relating to wrongful life were of limited assistance, albeit that Lord Osborne had been heavily influenced in *Millar* by common law developments, as to which he went on (at para. 32):

> "That might have been appropriate under the 1969 Scheme, which explicitly provided that compensation was to be assessed on the basis of common law damages. In contrast the 2008 Scheme has a self-contained set of provisions for assessing the amount of compensation…"

17. The judge in the UT recognised that whether a claimant had sustained a personal injury was logically and chronologically a prior question, not to be determined by a premature assessment of whether compensation can be calculated (save only where it could not meet the minimum award). He concluded (at paras. 34 and 36):

> "The crime of violence was an incestuous rape which led both to the birth of the claimant in his condition (*sic*). The issue is whether his condition can be regarded as a personal injury. On this issue I find the reliance on *Millar* unconvincing. … The scheme is intended to be a practical self-contained workable pragmatic scheme to compensate victims of crimes of violence. Subject to specific decisions of the Court of Appeal and Supreme Court/House of Lords, it is inappropriate to consider its provisions in the context of deep philosophical discussions about the nature of life and existence. …
>
> The 2008 Scheme provides that compensation be payable to 'an applicant'. Clearly, at the time of the claim, the applicant is a person. There is no provision in the scheme that the applicant must have been 'a person' at the time that the crime of violence was committed. In everyday terms and in common parlance it seems to me that he has suffered injuries. Those injuries have been sustained in and are directly attributable to a crime of violence."

The Appeal

18. In this court, Mr Collins made it clear that the CICA had conceded, for the purposes of this case, that the disability suffered by Y was 'sustained in and directly attributable to an act occurring in Great Britain' (within the language of para. 8 of the Scheme) and, thus, it is important not to look to this judgment for an evaluation of that issue. The issues were, first, whether it was possible to identify an injury without there having been a person who had been injured, existing in a pre-injured state. A related point could be articulated by asking the question whether Y was a victim of a crime of sexual violence. The second issue, raised in a supplementary skeleton argument was whether para. 9(c) precluded an applicant from obtaining compensation in respect of a sexual offence unless he or she was a non-consenting victim of that offence.

19. In short, Mr Collins relied upon *Millar* and its citation from *McKay v Essex Area Health Authority (supra)* in which Ackner LJ (as he then was) dealt with the claim for damages of a child born disabled as a result of an infection of rubella. In relation to the assessment of damages when the complaint had to be that the child was allowed to be born at all, Ackner LJ observed (at 1189) that the compensation would have to be based on a comparison between the value of non-existence (the negligence having deprived her of that) and the value of her existence in a disabled state. He went on:

> "But how can a court begin to evaluate non-existence, 'the undiscovered country from whose bourn no traveller returns'? No comparison is possible and therefore no damage can be established which a court could recognise."

20. The claims for wrongful birth identified above are claims by the mother, not the child who was the product: the only exception is provided by statute in the Congenital Disabilities (Civil Liability) Act 1976. Thus, if the crime of violence had not been committed, Y would not have existed; Y could not be a victim prior to conception and if he had not received the genetic material that caused him to fall on the wrong side of the 50% possibility of genetic disorder, he would not have been 'Y' but some other person. Putting the matter another way, it is impossible to assume that Y had a pre-disability state from which to measure the extent of injury.

21. Furthermore, although Mr Collins recognised that para. 9(c) of the 2008 Scheme was intended to remove the right to claim compensation following consensual sexual activity (rendered unlawful by age or other reason), it underlined the need for the applicant to exist at the time and to have been the subject of the sexual offence, looking at his or her state of mind at the time.

22. Mr Malcolm Johnson for Y went back to *R v Criminal Injuries Compensation Board ex parte Webb* [1987] QB 74, in which, dealing with what was then the non-statutory scheme, Lawton LJ observed (at 78A) that the court should not construe the scheme as if it were a statute but "as a public announcement of what the government was willing to do", adding:

> "This entails the court deciding what would be a reasonable and literate man's understanding of the circumstances in which he could under the scheme be paid compensation for personal injury caused by a crime of violence."

This phrase, Mr Johnson argued, echoed the observations in the UT referring to what would be understood "in everyday terms and in common parlance".

23. Mr Johnson underlined that submission by arguing that caution had to be exercised before bringing the common law into the construction of a scheme intended to be understood and applied by lay people, seeking support from observations in *Rust-Andrews v First-tier Tribunal* [2011] EWCA Civ 1548 directed (per Carnwath LJ at [34]) to avoiding trying to fit the Scheme into "a pre-conceived 'common law' model". A reasonable and literate man would say that Y's disabilities were a consequence of the incestuous rape. As for para. 9(c), it was important to read it in the context of ruling claims based on consensual activity out of the Scheme. That was not this case.

Discussion

24. It is important to underline that whatever might have been its origins, the 2008 Scheme is governed by the 1995 Act and, by s 11(1) and (2), had to be laid before Parliament and approved by resolution of both Houses. It must now be governed by the rules of statutory construction which apply to all such instruments and the observations that some different standard should be deployed no longer apply. Having said that, however, Mr Johnson was unable to point to a difference between an approach adopted applying the usual rules of construction and those adopted applying the 'reasonable and literate man' test.

25. Furthermore, although the assessment of compensation is no longer to be approached using preconceived common law models, that is not because the 2008 Scheme is a different species of law but because the 1995 Act and the 2008 Scheme no longer assess damages by reference to common law principles but rather on a prescribed tariff. No authority suggests that it is appropriate to approach issues of entitlement other than by reference to a proper construction of the terms of the 2008 Scheme.

26. For my part, I would construe the 2008 Scheme to mean that the victim of the crime of violence in this case could only be M (with the result that she was entitled to receive compensation for the personal consequences to her of her father's actions). To suggest that Y, who had not been conceived at the time of the crime, was himself a victim of crime (the nature of the crime involved being difficult to discern) or that it is possible to assess compensation on the postulate that Y would otherwise have been born without disability and so should be compensated for the genetic disorder from which he suffers is to go beyond that

which the Scheme was seeking to cover. That M (and mothers in her position) should receive compensation to reflect the undeniable difficulties which she has experienced and continues to experience in carrying the responsibility for caring for a disabled child born as a result of the sexual crime of violence committed against her is another matter and one that should be addressed by the Secretary of State: for my part, it is difficult to see why, as a matter of fairness, the common law approach adopted in such cases as *Parkinson v St James and Seacroft University Hospital NHS Trust* should not be incorporated into the Scheme.

27. There are aspects of *Millar* which no longer fit with developments in the common law but I have no doubt that the fundamental analysis remains sound, as is the analysis of the F-tT which I would endorse. I agree with Mr Collins' submission that it was insufficient for the UT to conclude that in common parlance Y had suffered injury without adequate reasoning to justify that conclusion.

28. I cannot leave this case without again repeating my profound sympathy for M and the difficulties that Y experiences. That cannot, however, blind me to what I consider as the only proper construction of the 2008 Scheme. In the circumstances, I would allow the appeal and restore the order of the F-tT.

Lord Justice McFarlane:

29. I agree with all that my Lord, the President, has said and agree that, as a result, the appeal must be allowed. In particular I would wish to associate myself with his expression of profound sympathy for M and for Y. The courts are, sadly, familiar with cases in which both the physical and long-term emotional impact of child sexual abuse are all too plain to see. Here, because the abuse occurred over many years, the emotional impact on M is likely to have been, and to continue to be, of the highest order. The present case, however, goes even further than that for M and, in so far as he may understand it, Y, who have had to live out the adverse consequences of the close-blood relationship of Y's parents on a daily basis for the past 30 years. We know little of their circumstances, but I strongly suspect that M's action in bringing this claim on behalf of Y is but one example of the way that she has stood up for him, and stood by him, throughout this long period. Although, as a matter of law, we have, in my view, no option but to decide against this claim, I fully understand why M has brought it and I admire her for doing so. She is a survivor who continues to care for her needy and highly disabled son and is a lady who, despite my tenuous encounter with her, commands my great respect.

Lord Justice Henderson:

30. This is a very sad case, and I too wish to associate myself with the President's expression of profound sympathy for both M and Y. Nevertheless, for the reasons given by the President, with which I am in full agreement, I am satisfied that Y's claim for compensation under the 2008 Scheme cannot succeed.

31. The difficulties which confront Y's claim can be articulated in various ways, but to my mind one of the central points made by Mr Collins in his submissions for the CICA is that Y is a person who, of necessity, has never had any existence except as the genetic product of the union between his mother, M, and her father. This union involved the commission of a crime of violence, of which M was undoubtedly a victim, and in respect of which she has claimed and been awarded compensation in 1994 under an earlier version of the Scheme. But Y cannot claim to have sustained a personal injury in and directly attributable to that same

crime of violence, within the meaning of "criminal injury" in paragraph 8 of the 2008 Scheme, because he had no prior existence when the crime was committed. The injury of which he complains is, in truth, a complaint about the genetic inheritance which made him the unique person who he is. That is not a complaint of an injury sustained by him, because he, the person allegedly injured, has never existed in an uninjured state. On analysis, his real complaint would have to be that he should never have been conceived at all. A complaint of that nature, however, is not a claim for personal injury, but a claim for wrongful existence, which as this court explained in *McKay v Essex Area Health Authority* is not one which the law can recognise, or for which compensation could be assessed.