

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered:	27/4/2012
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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

AN APPLICATION BY L FOR CHRISTOPHER McCARTHY
FOR JUDICIAL REVIEW

McCarthy's (Christopher) Application [2012] NIQB 30

TREACY J delivering the judgment ex tempore

Introduction

[1] The applicant in this case is Christopher McCarthy and the respondent is the Criminal Injuries Compensation Appeal Panel. By this judicial review the applicant seeks amongst other things an order quashing the decision of the panel by letter dated 28 September 2011 that the applicant's scars are significant but not serious.

[2] The applicant was provided with written reasons dated 20 October 2011 following the refusal of his appeal to the panel.

[3] The Compensation Agency for Northern Ireland operates and administers the Criminal Injuries Compensation Scheme. The statutory authority for the scheme is to be found in the Criminal Injuries Compensation (Northern Ireland) Order 2002 which regulates all criminal injury claims made after 2002. In respect of criminal injury claims submitted under the 2002 Order a decision in respect of a claim for compensation may be reviewed and a decision on review may be appealed under Article 7 to the panel. The applicant made an initial application for compensation on 21 December 2010. The applicant disagreed with that finding and he appealed against it and that was the decision which was communicated in the first instance by letter dated 27 September 2011 and then supplemented by the written reasons furnished on 20 October.

[4] This case is concerned with a challenge to the classification of the scarring to the applicant's torso by the panel. As the panel themselves acknowledged in its written decision the difference in the categorisation makes a significant difference to the amount of compensation which is awardable to the applicant.

[5] In ascending level of gravity the scheme under the heading 'scarring' has four categories namely minor, moderate, significant and serious disfigurement. The tariff which an injury attracts depends on its classification. In the present case the appeal panel concluded that the relevant scarring was significant thereby attracting a tariff of £10,000. If it had been classified as serious, as the applicant contended, the tariff would have been significantly greater namely £22,500. In passing I note that classification of the highest rated injury affects the recoverable tariff for other qualifying injuries. In this respect I refer to paragraph 4.8 of the guide to the compensation scheme.

Role of Panel and scope of judicial review

[6] The role of the panel is to act within the terms of the compensation scheme and the guide to the scheme. The categorisation of injury within the scheme is on appeal a matter for the panel. It is undisputed that panel decisions are subject to judicial review. Equally, however, this court is exercising a supervisory jurisdiction and is not concerned with the substantive merits of the impugned decision. This court does not entertain appeals on the facts and I accept that it is constitutionally impermissible for the judicial review court to engage in a merits based review substituting its own assessment for that of the primary decision maker.

[7] Mr Leonard, consultant plastic surgeon provided a detailed report which was before the panel and in that report he indicated that he had been asked to provide his professional opinion as to the classification of the applicant's various scars in accordance with the guidelines for the assessment of general damages in personal injury cases in Northern Ireland which appears to have been a reference to what's referred to in this jurisdiction as the Green Book. On the third page of his report Mr Leonard stated as follows:-

"By far the most serious of all the scars is that on the back of the left shoulder. It is grossly widened at 17 millimetres in maximum width and its sinuous shape adds to the disfigurement. Most plastic surgeons would recognise another category of scarring above severe that is repulsive scarring. While this scar perhaps does not enter that category it certainly approaches it and I have no hesitation in classifying it as a serious scar."

[8] Mr Leonard also gave evidence before the panel. In its written reasons at paragraph 8 the panel stated as follows:-

"Mr Leonard opined that the scar on back of the left shoulder was the most serious. He talked about a category of scarring above severe which was

repulsive. However he accepts that this particular scar did not enter that category.”

And then later in its reasons the panel at paragraph 9 stated:-

“The panel agreed with Mr Leonard that by far the most serious of all scars was the one on the back of the left shoulder. However when we viewed same we did not wince or feel repulsed in any way. In our view the top category of disfigurement for scarring should be sufficiently serious as in the sense of critical and of the type that one really can’t look at it i.e. the category Mr Leonard called repulsive. Mr Leonard was happy to say it’s severe but not repulsive. We consider severe to be significant and not at the top level of award serious. In our view significant adequately covers moderate to severe disfigurement and only the repulsive type scarring would come under the serious disfigurement category.”

[9] As the panel rightly acknowledged its role is to act within the terms of the scheme and the guide to that scheme. Moreover the correct categorisation of an injury has very significant implications as we have seen for the amount of compensation awarded.

[10] The scheme in respect of scarring only has four categories of disfigurement – minor, moderate, significant and serious – and no definition of these terms is provided in the scheme or the guide. The scheme does not have a category of ‘repulsive’ scarring but plainly such scarring must come within the broader concept of ‘serious’. However it is equally clear that the terms repulsive and serious are not synonymous. Mr Leonard was making the point that while the applicant’s scar perhaps did not enter the repulsive category it certainly approached it. In other words by reference to the most serious type of scarring i.e. repulsive the consultant plastic surgeon was emphasising just how serious the applicant’s torso scar was. Hence the plastic surgeon’s conclusion that he therefore had no hesitation in classifying it as a serious scar.

[11] Whilst the panel is not bound by the professional opinion of Mr Leonard they were obliged to implement the scheme. The scheme does not have a category called repulsive and it was not open to the panel to effectively enunciate or promulgate an additional criterion which does not feature in the scheme. There would, of course, have been nothing objectionable in the panel saying that this scar is repulsive and therefore concluding that it is serious. But to equate serious with repulsive is to effectively introduce a new criterion. Alternatively it sets the bar too high by purporting to introduce an exhaustive definition of serious whereby, as the panel

put it, “*only* the repulsive type scarring would come under the serious disfigurement category”.

[12] The appropriate categorisation of the scar for the purposes of the scheme because of its importance in terms of the amount of compensation which the injury will thereby attract is not a straightforward or easy task. Whilst it is certainly not an exact science the decision maker must decide the matter in as objective a manner as possible within the context of the scheme which is being implemented. This will require careful and accurate consideration amongst other things of the medical reports and any relevant oral evidence. Ordinarily the scar or scars will be viewed and it can be expected that the panel as here will inspect the scarring and based on the totality of the evidence make its judgment as to categorisation. The questions before the panel will be –

1. is it a minor disfigurement attracting a level three tariff of £1,500; or
2. is it a moderate disfigurement attracting a level nine tariff of £4,500; or
3. is it a significant disfigurement attracting a level fourteen tariff of £10,000; or
4. is it a serious disfigurement attracting a level eighteen tariff of £22,500?

[13] It is in my view unhelpful and misleading to create a new and fifth category of ‘repulsive’ or to import into an undefined category of ‘serious’ a requirement of being repulsive which in my view sets the bar far too high and furnishes a restrictive definition of serious which is conspicuously absent from the scheme and finds no warrant within it.

[14] It is also objectionable because such a concept is very subjective. While subjectivity cannot be excluded in such assessments the determination must be made in as objective a manner as possible and not by introducing restrictive definitions and inflexibility not contained within the scheme. For these reasons, as I indicated yesterday, I quash the impugned decision.

Matter would be remitted to a freshly constituted panel to reconsider the application.