Re Jane Doe and Criminal Injuries Compensation Board
22 O.R. (3d) 129, [1995] O.J. No. 278
Ontario Court (General Division), Divisional Court,
McMurtry C.J.O.C., O'Driscoll and W.A. Jenkins JJ.

BY THE COURT: --

I. Nature of the Proceedings

The four appeals before us are brought from three orders of the board, dated January 21, 1994, in which the board awarded $15,000 to each victim, thereby reducing the maximum award of $25,000 available to each victim for pain and suffering by forty per cent on the grounds that the victims contributed directly or indirectly to their injuries.

The four appeals were argued together; three appeals were brought by the Attorney General for Ontario on behalf of Jane Doe, Joan Doe and Jean Doe (the "victims"). Jane Doe also appealed on her own behalf.

Under s. 1 of the Compensation for Victims of Crime Act, R.S.O. 1990, c. C.24 (the "Act"), "Minister" means the Attorney General. Under s. 2 of the Act, the Minister is responsible for the administration of the Act. Under s. 9(1) and (2) of the Act, the Minister is "a party" to the proceedings before the Criminal Injuries Compensation Board ("C.I.C.B." or "board").

Under s. 23 of the Act, "an appeal lies to the Divisional Court from any decision of the Board on any question of law". It follows that the Attorney General, if she or he so elects, may be a party to any appeal and counsel for the Attorney General has the same scope as counsel for any other party to an appeal: Re Northwestern Utilities, [1979] 1 S.C.R. 684 at pp. 709-10, 89 D.L.R. (3d) 161 at pp. 178-79, per Estey J.

At the opening of the appeals, counsel advised: (1) that the evidence on the hearing before the board was not transcribed; and (2) that all parties consented to the affidavit of Detective Inspector Terry Hall of the Ontario Provincial Police sworn October 17, 1994, being filed. That officer testified during the application before the board, at London, Ontario, on August 11, 1993.

The appeals succeed.

II. The Parties, the Chronology and the Evidence

1. Charles Ssenyonga ("C.S.") was born in Uganda in 1957. He attended university in his homeland. He came to Canada in 1983 and attended McMaster University until 1986; he received a degree in political science. Both in Uganda and in Canada, he was enrolled in a law program, but he did not obtain a law degree in either country.

2. In the autumn of 1987, C.S. opened a store in London, Ontario that specialized in African artifacts.

3. In the autumn of 1987, C.S. sought medical attention. Because of the symptoms exhibited and because of his place of origin, he was a high risk for H.I.V. and his physician recommended that C.S. be tested for H.I.V. C.S. refused. The physician explained to C.S. the importance of practising "safe sex" by using a condom.

4. On February 15, 1989, C.S. was tested for H.I.V. He tested positive. Early in March, 1989, C.S. was told the results.

5. On February 21, 1989, at London, Ontario, C.S. met with a public health nurse from the London-Middlesex Health Unit. The nurse advised C.S. that some women who had tested H.I.V. positive had named C.S. as a contact. C.S. agreed to H.I.V. testing. C.S. did not reveal that he had already been tested on February 15, 1989.
6. On March 2, 1989, the same public health nurse met with C.S. for the second time. By now, C.S.'s family doctor had told him that he had tested H.I.V. positive and warned C.S. that any sex that he engaged in should be with a condom. The public health nurse reinforced the family doctor's advice. At the March 2, 1989 meeting, C.S. told the nurse "that he was not currently involved in a relationship".
7. During 1989, the public health nurse met with C.S. on several occasions and re-emphasized the importance of "safe sex". C.S. continued to insist that he was not involved in any sexual activity.
8. In the autumn of 1989, the Public Health Department received information that C.S. was continuing to engage in unprotected sexual activities.
9. On February 12, 1990, the public health nurse personally served C.S. with an order of the Medical Officer of Health for London-Middlesex pursuant to s. 22 of the Health Protection and Promotion Act, 1983, S.O. 1983, c. 10. C.S. was ordered: "1. Not to engage in sexual acts that involve any penile penetration".
10. The public health nurse met with C.S. in March 1990 and January 1991. C.S. continued to insist that he was not engaged in any sexual activity.
11. In March 1991, the London-Middlesex Health Department received information that one person with a unique and rare strain of H.I.V. appeared to have infected a number of women. The Attorney General for Ontario ordered an investigation by the Ontario Provincial Police.
12. C.S. was charged with criminal negligence causing bodily harm regarding each of the victims/appellants. C.S. was tried, without a jury, by McDermid J. at London, Ontario. The trial was completed and judgment was to be delivered on August 4, 1993. On July 20, 1993, C.S. died of A.I.D.S.-related causes.
13. Joan Doe (No. 922-029680; Appeal: 279/94) (D.O.B. October 24, 1967) was a 22-year-old university student at London, Ontario, when she had a sexual relationship with C.S. from July 1989 until October 1989.
Joan Doe met C.S. at his store in July 1989 and a sexual relationship commenced. The victim told the C.I.C.B. that C.S. used a condom on the first occasion; after that, he ripped off the condom and was insistent about not wearing a condom. Joan Doe told the police that she had twice asked C.S. about H.I.V. and he assured her that there was no problem. Joan Doe developed Herpes Simplex II within three weeks of her first sexual contact with C.S. Thereafter, she insisted that C.S. wear a condom when she was suffering an outbreak of herpes.
Joan Doe testified that after October 1989, the relationship cooled because she doubted C.S.'s character and she was busy with her studies at the university.
In January 1991, Joan Doe received an anonymous telephone call advising her that C.S. was H.I.V. infected as were several women he had dated. Joan Doe was tested and found to be infected with H.I.V.
14. Jean Doe (No. 922-034759; Appeal: 280/94) (D.O.B. February 22, 1953), a registered nurse, met C.S. at Harbourfront, Toronto on August 13, 1989 when she was 36 years of age. Ten days later, she visited C.S. at his London store.

On September 9, 1989, Jean Doe and C.S. checked into a hotel in Hamilton. Prior to check-in, Jean Doe asked C.S. if he had a condom with him; he said, "yes".
Jean Doe testified that just prior to intercourse, C.S. ripped off the condom and announced that it was the only one he had. Jean Doe said that she was taken by surprise but intercourse continued. She said it would not have been possible to prevent intercourse because C.S. "was a very powerful guy".
The C.I.C.B. found that there was no evidence that Jean Doe attempted to resist.
A sexual relationship between C.S. and Jean Doe continued without the use of condoms until November 1989.
In November 1989, Jean Doe tested positive for H.I.V. Thereafter, their sexual relationship continued on a twice monthly basis with the victim insisting that C.S. use a condom on each occasion.
Jean Doe testified that their last sexual encounter was on November 4, 1990 (nine months after the February 12, 1990 order that C.S. not engage in sexual acts that involve penile penetration).
Jean Doe testified that C.S. had told her that he did not have any diseases.
In her application to C.I.C.B., dated April 1, 1993, Jean Doe stated: "I was originally diagnosed as being H.I.V. positive and my health has progressively failed. I now have A.I.D.S. with a T]4 count of 60."
15. Jane Doe (No. 922-0293447; Appeals 278/94 and 402/94) (D.O.B. December 23, 1956) was a 35-year-old single mother when she met C.S. in the laundry room of her apartment building on January 7, 1991.
On January 9, 1991, the first act of sexual intercourse took place between C.S. and Jane Doe and, on the insistence of Jane Doe, C.S. wore a condom on that occasion.
Jane Doe testified that on the morning of January 10, 1991, she was awakened by C.S. who was having sexual intercourse with her without a condom.
Jane Doe testified that she had sexual relations with C.S. on January 10, 16 and 30, 1991.
Jane Doe testified that on those occasions, C.S. did not use a condom because "C.S. had gained her trust".
She testified that this was the first time in eight years that she had sexual relations without the use of a condom. Jane Doe testified that she asked C.S. and he denied that he had any infectious diseases.
Jane Doe became suspicious that C.S. may have exposed her to H.I.V. and on February 25, 1991, she was tested. In May, 1991, she was advised that she was H.I.V. positive.

III. The Evidence of Detective Inspector Tracy Hall of the Ontario Provincial Police
This police officer, at the request of the Attorney General for Ontario, commenced an investigation of C.S. on March 25, 1991.
Detective Inspector Hall gave evidence before the C.I.C.B. on August 11, 1993. His affidavit, sworn October 17, 1994 states, in part:

> The women who became involved with Mr. Ssenyonga had some interest in his African background and would meet him in different social situations.
>
> Mr. Ssenyonga would spend time with the women, gaining their trust, and often times using them for food, money or accommodation for himself.

The relationship would lead to sexual relations. Mr. Ssenyonga would mislead the women with whom he was involved, advising them that he was not involved in any other relationship and would represent himself as being in good health and not having any infectious diseases.

As I testified before the Criminal Injuries Compensation Board, in my opinion, Mr. Ssenyonga was basically a "con man" who lied to the women with whom he was involved.

Mr. Ssenyonga, being well-educated and well-spoken, would use these attributes to gain the trust and confidence of the women with whom he was involved.

IV. Findings of the CICB

1. That these three victims/appellants all tested H.I.V. positive with the same unique strain of the virus identified in C.S.
2. That when C.S. entered into each of these three relationships, he knew that he was H.I.V. positive and he knew why it was necessary to wear a condom for "safe sex".
3. That C.S. deliberately kept from each of these three victims/ appellants the fact that he had tested H.I.V. positive.
4. That C.S. infected each of these three victims/appellants with H.I.V.
5. That the actions of C.S. amounted to conduct that revealed "a marked and significant departure from the standard which could be expected from a reasonably prudent person in the circumstances" and amounted to criminal negligence as set out in ss. 219 and 221 of the Criminal Code of Canada, R.S.C. 1985, c. C-46: R. v. Tutton (1985), 18 C.C.C. (3d) 328, 14 C.R.R. 314 (Ont. C.A.), affirmed [1989] 1 S.C.R. 1392, 48 C.C.C. (3d) 129.
6. That the actions of C.S. constituted a crime of violence under s. 5(a) of the Compensation for Victims of Crime Act and, therefore, each victim/appellant was compensable.

No one takes issue with the above findings of the C.I.C.B.

V. The Quantum Issue

A. Relevant sections of the Act

1. In this Act, ...

"victim" means a person injured or killed in the circumstances set out in section 5. . . . . .

5. Where any person is injured or killed by any act or omission in Ontario of any other person occurring in or resulting from,

the commission of a crime of violence constituting an offence against the Criminal Code (Canada), including . . . criminal negligence . . . . . .

the Board, on application therefor, may make an order that it, in its discretion exercised in accordance with this Act, considers proper for the payment of compensation to,

C. the victim; . . . . .

7(1) Compensation may be awarded for, ...

C. pain and suffering; . . . . .

17(1) In determining whether to make an order for compensation and the amount thereof, the Board shall have regard to all relevant circumstances, including any behaviour of the victim that may have directly or indirectly contributed to his or her injury or death. . . . . .

19(1) The amount awarded by the Board to be paid in respect of the injury or death of one victim shall not exceed,

in the case of lump sum payments, $25,000;

VI. The Grounds of Appeal

1. The board erred in law in finding that the victims'/ appellants' injuries were the result of "contributory behaviour".

Counsel for the Attorney General argued that "contributory behaviour" as found in s. 17(1) of the Act is analogous to the tort concept of "contributory negligence". Therefore, to qualify as "contributory behaviour", the injury must have been: (i) foreseeable, (ii) the victim must have breached the standard of care; and (iii) the injury must have been caused by the breach.

A. Foreseeability

Reliance was placed on Dalton v. Ontario (Criminal Injuries Compensation Board) (1982), 36 O.R. (2d) 394 at p. 398 (Div. Ct):

By going with these two men in the circumstances she incurred a risk, that is true. But she surely could not have expected that, as a result, she would be pushed out of a moving truck on a highway so brutally. Although the Board could properly find that her behaviour contributed to her injury, to hold that she was the exclusive cause of this particular injury was legal error.

(Emphasis in original)

Counsel for the Attorney General argues that here, while some dangers of engaging in unprotected sexual intercourse may have been foreseeable, the victims/appellants "could not have expected" that they were dealing with a dishonest person who would deliberately infect them with H.I.V.

B. The Standard of Care

Counsel for the Attorney General further argues that even if the injury is foreseeable, in order to have a breach of the standard of care required by the Act, the victim must have

shown "flagrant, reckless or foolish disregard for his/her own safety". The case of Manson v. Ontario (Criminal Injuries Compensation Board) (1989), 68 O.R. (2d) 222 at p. 227, 32 O.A.C. 236 (Div. Ct.), is quoted as authority for that proposition.

In the alternative, counsel for the appellants submitted that if the standard of care was whether the victims acted as "reasonable persons", the board erred in holding that the victims' behaviour was not reasonable in the absence of evidence of the level of knowledge the women had in the late 1980s and the early 1990s about the dangers of contracting A.I.D.S. Counsel for the Attorney General argued that the published material at the relevant time (Attorney General's Book of Authorities; tabs 5 to 12, inclusive) demonstrates that there was a very low level of public awareness or acceptance of the genuine risk of contracting A.I.D.S. in heterosexual relationships.

2. The Doctrine of "Ultimate Negligence" or "Last Clear Chance".

Counsel for the appellants submit that this doctrine is applicable to these appeals. C.S.'s actions were the direct cause of the injuries and C.S. alone is responsible. He alone is the cause of the injuries to the victims.

3. The board failed to consider "all of the relevant circumstances" as required by s. 17(1) of the Act and the board considered irrelevant factors.

The board considered it relevant that the sexual activity occurred after "a brief acquaintance". The appellants submit that this is not a relevant factor because a longer period of "trust building" would have not have changed the risk to the victims.

"I cannot conceive that the legislature intended to enunciate any particular moral code when it enacted the relevant legislation but rather had in mind compensation to persons of all descriptions when they were injured by the act of another person resulting from or in the commission of one of the relevant criminal offences listed in the Act." (Poholko v. Nova Scotia (Criminal Injuries Compensation Board) (1983), 58 N.S.R. (2d) 15 at p. 20, 123 A.P.R. 15 (C.A.).)

4. Counsel for the appellants submitted that the board erred in finding that the only step taken by the victims was "to simply ask . . . for a H.I.V. status" from C.S. It was submitted that the board, in applying s. 17(1) of the Act, failed to consider that all the victims had:

(i) asked C.S. to use a condom; or

(ii) that he had ripped off the condom or commenced sexual intercourse without a condom while the victim was sleeping; or

(iii) insisted on sexual intercourse without a condom.

5. The board erred in determining the amount of the compensation.

The board found that each victim suffered injuries that were "overwhelming" and "ultimately terminal".

Counsel for the appellants submitted that these three appellants have cases that demand and deserve the maximum amount under the statute and that there is no rational basis for reducing the award by 40 per cent.

VII. Submissions of Counsel for the Board

1. No applicant before the board has any right to compensation. So long as it does not act arbitrarily or err in law, the board has an untrammelled jurisdiction to determine in each case what were the relevant circumstances and to grant or withhold compensation having regard to the circumstances it considers relevant: Manson v. Ontario (C.I.C.B.), supra, p. 226.
2. The Act restricts appeals to questions of law. As long as the board exercises its discretion in accordance with the Act in allowing or refusing compensation, the Divisional Court should not interfere: Dalton, supra, at p. 396.
3. In this case, the board was not considering or applying any particular moral code -- it was considering whether the victims' behaviour was prudent in relation to their own safety -- the board was required to do so by s. 17(1) of the Act. The board made findings with respect to the reasonableness or foolishness of the behaviour of the victims -- those are findings of fact.
4. The board considered all of the evidence, made findings of fact and those findings included the behaviour of the victims. The board concluded that their behaviour may have directly or indirectly contributed to their injuries to the extent of 40 per cent.
5. The board has committed no error in law and the appeals should be dismissed.

VIII. Conclusions
1. The board was correct when it applied the "reasonable and prudent man" standard of care under s. 17(1) of the Act as the test to be applied to the behaviour of the victims: Manson, supra, p. 224; Dalton, supra, p. 398.
2. The board correctly determined that the victims had been injured by C.S.'s criminal negligence (reckless, wanton disregard for the safety of other human beings). The board found C.S. was criminally negligent towards each victim in that (i) knowing that he had been diagnosed as H.I.V. positive, C.S. lied to each of the appellants and said that he did not have any potentially lethal communicable disease; and (ii) thereafter, he ripped off or refused to use a condom while having sexual intercourse with the victims. As a result the board found that the injuries of the victims were compensable under s. 5 of the Act.
3. The law of negligence is not applicable to an application under the Act.

I think it should be kept in mind that these cases are not ones in which the court is assessing various degrees of civil liability for certain damages. The Board by its statute is obliged to consider, having regard to all of the circumstances, whether it is an appropriate case for somebody who is injured to be compensated out of public funds.
(Lischka v. Ontario (Criminal Injuries Compensation Board) (1982), 37 O.R. (2d) 134 at p. 136 (Div. Ct.), per Galligan J.)
4. The principal issue before us is whether or not the board erred in law in finding that the behaviour of the victims directly or indirectly contributed to their injuries.
In all three decisions the board used almost the identical language in relation to the victims' conduct as contributing to their injuries, as follows:

The board does not consider it reasonable to entrust one's life to an almost complete stranger on such a brief acquaintance. Given the dangers of unprotected sexual activities a reasonable person would require a much longer period of trust-building. Furthermore the board does not consider it sufficient to simply ask a sexual partner for an

H.I.V. status. One does not need the protection of such a question against an honest person and the question does not protect against a dishonest person. The board does not condone the behaviour of the alleged offender but in the H.I.V. world in which we all find ourselves living today it is the view of the board each person must accept some responsibility for the consequences of unprotected sexual intercourse.

Therefore in assessing compensation the board will therefore have regard for s. 17(1) of the Act. The applicant's behaviour in engaging in unprotected sexual intercourse was behaviour which contributed to the injury which she sustained. The potential consequences of such behaviour are foreseeable.

5. In assessing the behaviour of the victims that directly or indirectly contributed to their injuries the board erred in law in demanding an unreasonably high standard of behaviour. There was also no evidence before the board to determine the degree of foreseeability applicable to the facts of this case. The board did not have before it the evidence of the low level of public awareness in 1991 of the dangers of unprotected sex that was in the material before this court. The board appears to have wrongly assumed that the victims knew that there was a big risk and that they had a significant degree of control with respect to unprotected sex. It was not unreasonable for the victims to make certain inquiries of the accused in relation to his health and for them to accept his answers as truthful. The accused was a well-educated businessman who was able to earn the trust of his victims. The victims also made efforts to have protected sex. While the victims may not have been extremely cautious it cannot be said that their behaviour fell below the standard of a reasonable person.

6. The board failed to give effect to its finding that the consequences were overwhelming, and having regard to the horrific consequences the board failed to seek any proportionality between the criminal conduct of the accused as compared to the conduct of the victims in misplacing their trust. The conduct of the accused was so outrageous that any lack of prudence on the part of the victims pales into oblivion. Nevertheless the board has in effect found the victims 40 per cent responsible for their injuries without giving any rationale whatsoever for this finding.

The case of Huff v. Price (1990), 46 C.P.C. (2d) 209, 51 B.C.L.R. (2d) 282 (C.A.), provides useful comments with respect to the role of an appellate tribunal with respect to substituting its opinion for that of the tribunal that heard the evidence. At p. 249 C.P.C., pp. 318-19 B.C.L.R., in Huff v. Price it was stated:

In many cases, of which Jaegli Enterprises v. Ankeman, [1981] 2 S.C.R. 2, 40 N.R. 4, 124 D.L.R. (3d) 415, is only one example, the Supreme Court of Canada has said that when a trial Judge has reached the conclusion, on all the evidence, either that there was, or there was not a duty of care, and that there was or there was not a breach of the duty of care, a Court of Appeal should not substitute its own view for the view of the trial Judge unless it is satisfied that the trial Judge made a material and identifiable error of law or a clear and identifiable error of fact in his appreciation of the evidence.

In our opinion the board demonstrated a clear and identifiable error of fact in its appreciation of the evidence which is tantamount to a material and identifiable error of law.

IX. Result

The four appeals are allowed and each victim is awarded the amount of $25,000 under s. 19(1) of the Act.

X. Costs

Neither counsel for the Attorney General nor counsel for the board seeks costs. Mr. Bennett seeks costs of the appeal (No. 402/94) that he brought on behalf of Jane Doe. In all of the circumstances, in our view, this is not an appropriate case for costs.

Appeal allowed.