Easter Term
[2013] UKSC 19
On appeal from: [2011] EWCA Civ 400

JUDGMENT

Jones (by Caldwell) (Respondent) *v* First Tier Tribunal (Respondent) and Criminal Injuries Compensation Authority (Appellant)

before

Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Sumption
Lord Carnwath

JUDGMENT GIVEN ON

17 April 2013

Heard on 28 February 2013

Appellant	*Respondent*
James Eadie QC Ben Collins (Instructed by Treasury Solicitor)	Robert Glancy QC Georgina Hirsch (Instructed by Pattinson Brewer)

LORD HOPE

1. On 18 January 2005, at about 2.20 am, a tragic incident occurred on the A282 north of the Dartford River Crossing. The A282 is a six-lane carriageway which links the Dartford Crossing bridge and tunnel with the M25 motorway. The respondent, Mr Gareth Jones, was driving a Highways Agency gritter along the nearside carriageway. Slightly ahead of him, in the central lane of the north bound carriageway, was an articulated lorry driven by Mr Brian Nash. Ahead of him there was a car which was parked on the hard shoulder of the carriageway.

2. As Mr Nash's lorry approached it a man ran from near the car into the middle of the central lane, turned towards the lorry, stood in its path and raised his arms. Mr Nash braked, but he was unable to avoid hitting the man, who was killed instantly. As a result of the braking the rear nearside corner of the articulated lorry swerved into the path of the gritter vehicle. There was a collision between the two vehicles, as a result of which the cab of the gritter was destroyed and Mr Jones was thrown from it onto the roadway. He suffered very severe injuries and now requires full-time care. The man who ran onto the carriageway was Mr Barry Hughes. The inquest into his death returned an open verdict. But the obvious inference from his actions was that his intention was to kill himself.

3. On 17 May 2007, acting by his mother Mrs Maureen Caldwell, Mr Jones applied to the Criminal Injuries Compensation Authority ("the CICA") for an award of compensation under the Criminal Injuries Compensation Scheme 2001 ("the Scheme"). On 6 March 2008 he was informed by the CICA that it was unable to make an award under the Scheme. The reason that was given for this decision was that the Scheme provided that compensation was payable only if the claimant was the victim of a criminal injury. The CICA had obtained details of the incident from the police and the doctors who provided treatment, but it had been unable to pinpoint a crime of violence of which Mr Jones was a victim which would have enabled an award to be made.

4. Mr Jones then appealed to the First-tier Tribunal ("the FTT"). Suicide is no longer a criminal act. So it was contended on his behalf that Mr Hughes had committed two criminal offences: (i) intentionally and unlawfully interfering with a motor vehicle, contrary to section 22A of the Road Traffic Act 1988 (as inserted by section 6 of the Road Traffic Act 1991), and (ii) inflicting grievous bodily harm, contrary to section 20 of the Offences against the Person Act 1861. On 8 May 2009 the FTT held that it was not open to it to make a full or a reduced award. It was not satisfied that an offence under section 22A had been committed.

Nor was it satisfied that any such offence would amount to a crime of violence within the meaning of the Scheme rules: para 39. That conclusion is no longer being challenged, and it is unnecessary to say anything more about it. But the FTT also rejected the claim based on section 20 of the 1861 Act, as it was not satisfied that Mr Hughes intended to cause harm, or was reckless as to whether harm of whatever degree might be caused by his actions, when he ran out into the carriageway: para 38.

5. Mr Jones applied to the Upper Tribunal (Administrative Appeals Chamber) for relief by way of judicial review of the FTT's decision under section 15 of the Tribunals, Courts and Enforcement Act 2007. On 11 June 2010 the Upper Tribunal (Nicol J, Judge Sycamore and Upper Tribunal Judge Mesher) dismissed the application: [2010] UKUT 199, [2011] RTR 55. It accepted that the mens rea for an offence under section 20 of the 1861 Act was that the defendant either intended or foresaw that his act would cause harm to some person: *R v Parmenter* [1992] 1 AC 699, 752 per Lord Ackner. It noted that the FTT had held that there was no evidence that Mr Hughes deliberately intended to harm the users of the road. This left the question whether he was reckless, in the sense that he actually foresaw that his actions might cause physical harm of whatever degree to other road users: para 37. It held that the FTT had properly directed itself to the question it had to consider, and that its finding that Mr Hughes was not reckless was one to which a rational tribunal could have come: para 39.

6. The Upper Tribunal refused permission to appeal to the Court of Appeal, but on 25 August 2010 Mr Jones sought and was granted permission to appeal to the Court of Appeal under section 13 of the 2007 Act. On 12 April 2011 the Court of Appeal (Mummery, Rix and Patten LJJ) [2012] QB 345 allowed the appeal and granted judicial review of the FTT's decision. It remitted the matter to a differently constituted FTT to reconsider the issue of recklessness in the light of the reasons given in the court's judgment. The CICA now appeals against that decision to this court.

The Scheme

7. The Scheme was made under section 1 of the Criminal Injuries Compensation Act 1995. That Act was enacted to establish a scheme for compensation for criminal injuries in place of the non-statutory system which had been in existence since 1964 following the publication of the White Paper "Compensation for Victims of Crimes of Violence" (1964) (Cmnd 2323). In para 13 of the White Paper it was acknowledged that personal injury might arise from a great variety of offences and it refrained from specifying a comprehensive list of crimes whose victims might apply for compensation. The 1964 Scheme did not set out a list of that kind either. But revisions to the 1964 Scheme in 1969 introduced

into it the words "crime of violence" for the first time. As amended, the 1964 Scheme provided for applications for compensation in circumstances where the applicant had sustained "personal injury directly attributable to a crime of violence (including arson and poisoning)". The same wording was used when a new scheme was introduced in 1979. That scheme has now been replaced by the Criminal Injuries Compensation Scheme which was introduced by the CICA on 27 November 2012.

8. The first statutory scheme was made in 1996. It was followed by the Scheme which was made on 1 April 2001 and is the relevant scheme for the purposes of this case: see para 3, above. Paragraph 6 of the Scheme provided that compensation might be paid in accordance with it to an applicant who had sustained a criminal injury on or after 1 August 1964. In paragraph 8 it was stated:

> "For the purposes of this Scheme, 'criminal injury' means one or more personal injuries as described in the following paragraph, being an injury sustained in Great Britain and directly attributable to:
>
> (a) a crime of violence (including arson, fire-raising or an act of poisoning); or
>
> (b) an offence of trespass on a railway; or
>
> (c) the apprehension or attempted apprehension of an offender or a suspected offender, the prevention or attempted prevention of an offence, or the giving of help to any constable who is engaged in any such activity."

The expression "personal injury" is stated in paragraph 9 to include physical injury, mental injury and disease.

Section 20 of the 1861 Act

9. Section 20 of the Offences against the Person Act 1861 is entitled "inflicting bodily injury, with or without weapon." It is in these terms:

> "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and

> being convicted thereof shall be liable … to be kept in penal servitude."

10. In *R v Mowatt* [1968] 1 QB 421, 425 Diplock LJ observed that the expression "unlawfully and maliciously" was a fashionable phrase of the Parliamentary draftsman in 1861. It is plain that it is not to be taken to have been used here in the old, rather vague, sense of wickedness. A more precise appreciation as to the test it lays down is required. In *R v Cunningham* [1957] 2 QB 396 the Court of Criminal Appeal approved of the principle which had been propounded by Professor C S Kenny in the first edition of his *Outlines of Criminal Law* (1902) and had been repeated in the 16th edition (1952), p 186, that any statutory definition of a crime must be taken to require either (1) an actual intention to do the particular kind of harm that in fact was done, or (2) recklessness as to whether such harm should occur or not (in other words, that the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).

11. That formulation was disapproved in part in *R v Mowatt*. Diplock LJ said at p 426 that the word "maliciously" does import on the part of the person who unlawfully inflicts the wound or other grievous bodily harm an awareness that his act may have the consequence of causing some physical harm to some other person. But it was unnecessary that he should have foreseen that his unlawful act might cause physical harm of the gravity described in the section:

> "It is enough that he should have foreseen that some physical harm to some person, albeit of a minor character, might result."

His description of the principle was approved and applied by the House of Lords in *R v Savage; DPP v Parmenter* [1992] 1 AC 699: see Lord Ackner at p 752. Mustill LJ said in the Court of Appeal in that case at p 706 that the judgment in *R v Mowatt* laid down two propositions, one positive and one negative:

> "The positive proposition was that to found a conviction under section 20 it must be proved that the defendant *actually* foresaw that physical harm to some other person would be the consequence of his act. This is subject to the negative qualification, that the defendant need not *actually* have foreseen that the harm would be as grave as that which in the event occurred."

It was pointed out that the words "should have foreseen" in *Mowatt* were intended to bear the same meaning as "did foresee" or simply "foresaw".

"Crime of violence"

12. Various attempts have been made to define what is meant by the phrase "a crime of violence" for the purposes of the schemes for compensation for criminal injury. Different views were expressed in *R v Criminal Injuries Compensation Board, Ex p Clowes* [1977] 1 WLR 1353. Eveleigh J said at p 1359 that it referred to that kind of deliberate criminal activity in which anyone would say that the probability of injury was obvious. Wien J said at p 1362 that it meant some crime which as applied to the facts of a case involved the possibility of violence to another person. Lord Widgery CJ said at p 1364 that it was a crime which was accompanied by or concerned with violence. He described counsel for the board's submission that a crime of violence should mean a crime of which violence is an essential ingredient as a very neat and tidy package in which to put the problem.

13. In *R v Criminal Injuries Compensation Board, Ex p Webb* [1986] QB 184 the Divisional Court (Watkins LJ, Lloyd and Nolan JJ) preferred Lord Widgery's approach. Having asked itself at p 193 why these ordinary English words should not be given their ordinary English meaning, it endorsed at p 195 a submission by counsel for the board which was similar to that made by counsel for the board in *Clowes*:

> "A crime of violence is, he submits, one where the definition of the crime itself involves either direct infliction of force on the victim, or at least a hostile act directed towards the victim or class of victims. We think that this comes near enough to the ordinary meaning of the words as generally understood."

That was a case where the board had rejected applications by four train drivers who suffered from anxiety and depression after their trains struck and killed four people, three of whom had deliberately committed suicide. Their applications were rejected because the board had concluded that their injuries did not result from a crime of violence within the meaning of the scheme. The Divisional Court held that the board had been right to refuse the applications.

14. An appeal against its decision was dismissed by the Court of Appeal (Lawton and Stephen Brown LJJ, Sir John Megaw): [1987] QB 74. But, differing from the submission in *Clowes* which was endorsed by the Divisional Court, Lawton LJ said at p 79 that what mattered was the nature of the crime, not its likely consequences:

> "It is for the board to decide whether unlawful conduct, because of its nature, not its consequence, amounts to a crime of violence."

He added this further guidance as to the approach that should be adopted:

> "Most crimes of violence will involve the infliction or threat of force, but some may not. I do not think it prudent to attempt a definition of words of ordinary usage in English which the board, as a fact finding body, have to apply to the case before them. They will recognise a crime of violence when they hear about it, even though as a matter of semantics it may be difficult to produce a definition which is not too narrow or so wide as to produce absurd consequences…"

Subsequent to that decision provision was made in the 1995 Scheme for compensation to be paid in respect of injuries directly attributable to an offence of trespass on the railway.

15. The same point, that the board had to look at the nature of the crime and not at its results, was made by Lord Macfadyen in *C, Petitioner* 1999 SC 551, where he dismissed a petition for judicial review of the board's decision to refuse compensation for personal injury attributable to incidents of indecent exposure. At p 557 he said that there was a valid distinction between the criminal act and its consequences:

> "The question whether a criminal act constitutes a crime of violence is to be answered primarily by looking at what was done rather than at the consequences of what was done. As Lawton LJ pointed out in *Webb*, 'Most crimes of violence will involve the infliction or threat of force but some may not.' It may be that there are cases in which examination of the actual or probable consequences of the criminal act will cast light on its nature. But it is for the light that they cast on the nature of the criminal act rather than for their own sake that the consequences may be relevant."

In *R (August) v Criminal Injuries Compensation Appeals Panel* [2001] QB 774 the Court of Appeal (Pill and Buxton LJJ and Sir Anthony Evans) also followed what Lawton LJ said in *Webb*. Buxton LJ said in para 19 that it was the leading authority on the construction of "crime of violence", and that the court had not been shown any material derogating from the guidance given in that case. Nor

have we, and I too would endorse the way Lawton LJ described the approach that should be taken.

16. In *August*, para 21, Buxton LJ said that he accepted counsel's submission that the issue for the panel of whether a crime of violence has taken place is a jury question. It would, I think, be more accurate to say that it is for the tribunal which decides the case to consider whether the words "a crime of violence" do or do not apply to the facts which have been proved. Built into that phrase, there are two questions that the tribunal must consider. The first is whether, having regard to the facts which have been proved, a criminal offence has been committed. The second is whether, having regard to the nature of the criminal act, the offence that was committed was a crime of violence. I agree with Lord Carnwath for all the reasons he gives that it is primarily for the tribunals, not the appellate courts, to develop a consistent approach to these issues, bearing in mind that they are peculiarly well fitted to determine them. A pragmatic approach should be taken to the dividing line between law and fact, so that the expertise of tribunals at the first tier and that of the Upper Tribunal can be used to best effect. An appeal court should not venture too readily into this area by classifying issues as issues of law which are really best left for determination by the specialist appellate tribunals.

17. The question whether a criminal offence has been committed is a question for the tribunal, having informed itself as to what the law requires for proof of that offence, to determine as a matter of fact. The question whether the nature of the criminal act amounted to a crime of violence may or may not raise an issue of fact for the tribunal to determine. This will depend on what the law requires for proof of the offence. For example, some of the common law crimes known to the law of Scotland are quite loosely defined. The range of acts that fall within the broad definition may vary quite widely, so the question whether there was a crime of violence will have to be determined by looking at the nature of what was done. But in this case the words of the statute admit of only one answer. They speak for themselves.

18. To wound or inflict any grievous bodily harm on another person unlawfully or recklessly, foreseeing that physical harm to some other person will be the consequence of his act, is a crime in terms of section 20 of the 1861 Act. It is also a violent act. So too is the unlawful or reckless application of physical force of any kind to the person, directly or indirectly, so that they suffer injury – frightening or threatening someone so that they run into the road and are hit by a car, for example: see also *Reg v Martin* (1881) 8 QBD 54, where the accused by unlawful conduct caused panic in the course of which a number of people were injured: *R v Criminal Injuries Compensation Board, Ex p Webb* [1987] QB 74, 79 per Lawton LJ. The crime that section 20 defines will always amount to a crime of violence for the purposes of the scheme for compensation for criminal injury.

The decision of the FTT

19. The FTT heard oral evidence from PC Sexton, a traffic investigation officer with Essex Police, who had examined the work records for Mr Nash and Mr Jones and the tachographs recording the speed of both vehicles. It also read a witness statement by Mr Nash and reports by PC Sexton and PC Thurwell, an authorised accident investigator with Essex Police. But it had to face the fact that there was no evidence as to the state of mind of Mr Hughes. It found that in all probability he ran into the road intending to commit suicide. But there was no evidence that he deliberately intended to harm the users of the road: para 35. In its view his act in throwing himself in front of the articulated lorry was not a hostile act directed towards a person who suffered injury as a result: para 37.

20. The central part of the FTT's reasoning is set out in para 38:

> "The tribunal accepted the evidence of PC Sexton that probably Mr Hughes' primary aim was to be certain of causing his own death and that in his experience it was very unusual for a suicide in this manner to cause such extensive personal injuries and damage to vehicles. Mr Hughes may have been careless of the injuries that may have been caused to third parties by his actions. However the tribunal were not satisfied that the facts of the case demonstrated that Mr Hughes intended to cause harm or was reckless as to whether harm of whatever degree might be caused when he ran out into the dual carriageway, such as to bring his case within section 20 of the 1861 Act."

The reasoning in this paragraph is rather compressed. But it is reasonably clear from the last sentence that the FTT were not satisfied that Mr Hughes actually foresaw that his behaviour might cause physical harm to others. So it was not persuaded that he had the necessary mens rea of recklessness to bring his actions within a section 20 offence. The Upper Tribunal made it clear in its judgment that the FTT's reasoning should be read in this way. It concluded that the FTT's finding that Mr Jones had not established that Mr Hughes was reckless was one to which a rational tribunal could have come and that it was not its function as an appellate body to substitute its own opinion of the facts even if it had been different from that of the tribunal: para 39. Fairly read, therefore, the reason why Mr Jones' appeal to the FTT failed was that it was not proved that an offence of the kind described by section 20 had been committed by Mr Hughes.

The judgment of the Court of Appeal

21. The judgment of the Court of Appeal was delivered by Patten LJ. He accepted that in order to succeed in his application Mr Jones had to show that the FTT erred in law in reaching the decision under review: para 17. He noted that it was common ground that Mr Hughes' conduct included the actus reus of a section 20 offence. He said that the issues that the court had to consider were therefore whether the FTT's conclusion that the necessary mens rea of recklessness had not been established was a permissible conclusion on the evidence, and whether it was right in its view that Mr Hughes had not committed a crime of violence within the meaning of the Scheme: para 21. In para 24 he acknowledged that the questions whether a criminal offence has been committed and whether the applicant's injuries are directly attributable to that offence are undoubtedly questions of fact for the CICA or the FTT:

> "They are required to weigh up the evidence and decide whether it supports a finding that a relevant criminal offence has been committed. As part of this process, they have to decide what primary facts are established and what inferences it is permissible to draw from those facts. But in this case I do not accept that the determination as to whether a section 20 offence is a crime of violence within the Scheme rules is anything but a question of law which can only admit of one answer."

22. The wording of the last sentence of para 24 reveals what Patten LJ saw as the issue of law in the appeal. But it contains a flaw in his approach to what the FTT had decided in this case which affects the entire judgment from this point on. He seems to have assumed that the FTT had decided the case against Mr Jones on the ground that Mr Hughes had not committed a crime of violence within the meaning of the Scheme. In paras 25 and 26 he said that a section 20 offence involves the infliction of serious bodily harm by conduct which the accused himself foresees will cause some harm to the victim or another person, and added that most reasonable people faced with those facts would conclude that this was a crime of violence. In para 28 he rejected what he took to be the view of the FTT set out in para 37 that Mr Hughes' actions in throwing himself in front of the lorry "could not" amount to a crime of violence. What the FTT actually said in that paragraph was that, having examined the nature of the act rather than its consequences, in its view Mr Hughes' act "was not" a hostile act directed towards a person who suffered injury as a result. This was a conclusion of fact which was open to the FTT to reach.

23. In paras 30-32 Patten LJ said that the FTT were clearly much influenced by the evidence of PC Sexton, who had expressed the view that Mr Hughes probably

intended to kill himself rather than to cause an accident, and that it accepted it as supporting the view that it could not be satisfied that Mr Hughes either intended to cause harm or was reckless in that regard. The difficulty about this was that PC Sexton was not qualified to provide any expert evidence as to whether a person intent on suicide blanks out the possibility of harm to others by his actions. The FTT should have considered whether, on the balance of probabilities, it was likely that some harm was foreseen without attributing any evidential weight to the views of the officer. It was highly improbable that anyone who runs into the path of traffic on a busy motorway will not at the very least foresee the possibility of an accident and, as a consequence, harm being caused to other road users. The FTT had not considered the possibility of an accident and had assumed in para 35 of its decision that an intention to commit suicide was necessarily inconsistent with a deliberate intention to commit harm.

24. From this Patten LJ concluded in para 34 of his judgment that the FTT had applied too narrow a test, as a fact-finding exercise as to whether there was recklessness needed to be differently focussed. In para 35 he said that the FTT's decision involved an error of law both in terms of the directions given on the test to be applied and in relation to its finding that there was no evidence from which foresight of some harm on the part of Mr Hughes could be inferred. As to the second point, what the FTT actually said in para 38 (see para 20, above) was that they "were not satisfied" that the facts of the case demonstrated that Mr Hughes intended to cause harm or was reckless as to whether harm of whatever degree might be caused by his actions. This, as the Upper Tribunal said in para 39 of its decision, was a finding to which a rational tribunal could have come. It was a finding of fact which was not open to review by the Upper Tribunal or by the Court of Appeal.

Discussion

25. The Court of Appeal appears to have been unwilling to accept that the question that the FTT was asking itself was whether it could be satisfied that a section 20 offence had been committed rather than whether Mr Hughes' actions amounted to a crime of violence. It was also unduly critical of the FTT's reasoning, attributing to it things that it did not, in so many words, actually say. It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it. It is true that the FTT said in para 38 that it accepted the evidence of PC Sexton. But the parts of his evidence referred to were elicited from him in cross-examination by counsel who was then appearing for Mr Jones. And PC Sexton's comment that in his experience it was very unusual for a suicide such as this to

cause such extensive personal injuries and damage to vehicles can hardly be said to have been outside his expertise.

26. There are signs too that the Court of Appeal allowed itself to be unduly influenced by its own view that it was highly improbable that anyone who runs into the path of traffic on a busy motorway will not at the least foresee the possibility of an accident and of consequential harm being caused to other road users. The question whether Mr Hughes did actually foresee this possibility was for the FTT to answer, not the Court of Appeal. Taking its judgment overall, it seems to me that the Court of Appeal failed to identify a flaw in the reasoning of the FTT which could be said to amount to an error of law. The FTT appreciated that the question it had to consider first was whether an offence under section 20 had been committed. It identified correctly the tests that had to be applied and reached the conclusion that it was not satisfied that Mr Hughes did commit that offence. It did not go on to consider whether he had committed a crime of violence within the meaning of the Scheme because, having concluded that no crime was committed, it did not have to.

27. It is a curious feature of this appeal that the issues which the court has been asked to consider assume that the FTT did indeed hold that a section 20 offence had been committed. They are directed to the question whether an applicant who has suffered injury directly attributable to an offence under section 20 is either necessarily or, in the circumstances such as those of the present case could be, a victim of a crime of violence. For the reasons mentioned in para 18, the question whether a section 20 offence is necessarily a crime of violence admits of only one answer. But the FTT never got to the stage of asking itself that question because of its finding, on the facts, that a section 20 offence had not been committed.

Conclusion

28. I do not think that the Court of Appeal has been able to demonstrate that it was entitled to interfere with the FTT's decision. I would therefore allow the appeal and restore the decision of the FTT which was that, while every sympathy must be felt for the victim, Mrs Caldwell and their family, the terms of the Scheme do not permit an award of compensation to be made in this case.

LORD CARNWATH

29. I agree that this appeal should be allowed for the reasons given by Lord Hope. I add a brief comment on the course of the proceedings, having regard also

to the new framework established under the Tribunals Courts and Enforcement Act 2007.

30. Although the general approach under the 2007 Act was to provide a right of appeal on points of law from the First-tier to the Upper Tribunal, an exception was initially made for the Criminal Injuries Compensation Appeal Panel. The reason given in the 2004 White Paper which preceded the Act was that a second tier appeal was thought unnecessary, "because the first appeal was from an independent body rather than a government department" (*Transforming Public Services: Complaints, Redress and Tribunals* (Cm 6243), para 7.18). However, in practice a similar result was achieved by a different route. Section 18(6) of the 2007 Act enabled the Lord Chief Justice to make directions transferring certain categories of judicial review to the Upper Tribunal. The direction made by the Lord Chief Justice on 29 October 2008 (Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327) included as one class of case transferred to the Upper Tribunal:

> "any decision of the First-tier Tribunal on an appeal made in the exercise of a the right conferred by the Criminal Injuries Compensation Scheme…"

31. This was the route by which the present case reached the Upper Tribunal. It was one of three cases heard together, all relating to the interpretation of the term "crime of violence". As the decision explains (para 1), they were directed for hearing by a three judge panel because of the important point of principle involved. The panel consisted of two senior Upper Tribunal judges (Judge Sycamore and Upper Tribunal Judge Mesher) presided over by a High Court Judge, Nicol J.

32. In normal circumstances in the absence of some serious error of principle, one would not have expected there to have been a need for a further appeal to the higher courts. It seems that the main reason for granting permission to appeal in this case was the perception, raised by the grounds of appeal, that there had been inconsistent treatment of such cases in the First-tier tribunal. In granting permission Maurice Kay LJ noted that this was "essentially a perversity challenge, with all the usual attendant difficulties", but commented: "the point is an important one and does not seem always to have been approached consistently by the CICA".

33. The grounds of appeal had referred to the case of *Fuller* in which, it was said, the tribunal on substantially the same facts had found the "requisite degree of recklessness" for a section 20 offence. That case had been heard on 30 April 2010, and the decision notice issued on 4 May 2010, shortly before the UT hearing in the

present case. For that reason, no doubt, the decision does not seem to have been mentioned before the UT.

34. The notice of appeal to the Court of Appeal enclosed papers relating to the *Fuller* case (Fuller v Criminal Injuries Compensation Authority (unreported) 4 May 2010), with a copy of the decision notice supplied by the Tribunals Service. That stated the effect of the tribunal's decision but gave no reasons. It seems that this remained the only material available to the Court of Appeal at the full hearing. Patten LJ [2012] QB 345, paras 22-24 referred to the FTT decision in *Fuller*, noting that the CICA's refusal of compensation had been reversed by the FTT on appeal, but with "no reasoned decision". Counsel then appearing for the CICA was reduced to submitting that, the question being one of fact for the CICA or the FTT, it was open to them on the same facts to reach a decision either way. Not surprisingly Patten LJ found that an unattractive submission.

35. Unfortunately neither the parties nor the Court of Appeal seem to have been made aware of the relevant practice in the Social Entitlement Chamber, of which this jurisdiction forms part. Reasons may be given orally; written reasons need not be given unless requested within one month (see Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685), rules 33 and 34).

36. There is before us a letter from HM Courts and Tribunals Service dated 23 January 2012. This explains that, where the appellant is represented, as in this case, the practice is for the tribunal chair to give an oral summary of the tribunal's decision. A handwritten version of the oral summary is retained in the records, and also passed to the CICA "for their admin purposes". It would only be transcribed by the office where a hearing had proceeded in the absence of the appellant or his representative. A request for written reasons had to be made within one month. Had such a request been made, a formal statement of reasons would have been prepared by the tribunal members themselves. That not having been done, the office was able only to supply a "verbatim transcript of the handwritten summary of reasons".

37. For present purposes I need only read the first paragraph of this summary:

> "1. The alleged offender jumped in front of the lorry when it was travelling on the A130 at 50 mph at 8 pm with other traffic on the road. We find that the alleged offender should have foreseen that some physical harm to some person, albeit of a minor character, might result, within the meaning of Lord Ackner in *R v Savage*

> [1992] 1 AC 699, 752. He was reckless whether or not anyone else was hurt in the process of his committing suicide…"

The summary ended by observing that this was "an important case on the construction of the scheme which is contentious", and that, although the panel had reached a unanimous decision, "we would not discourage an appeal to the Upper Tribunal for more authoritative guidance on how the scheme should be interpreted in these circumstances." This invitation was not taken up by that particular claimant.

38. Had this statement of reasons been available to the Court of Appeal, it is unlikely that they would have been unduly troubled by the apparent inconsistency. As is clear from the citations given by Lord Hope, it is not sufficient to establish recklessness that the alleged offender "should have foreseen" that some physical harm might result. It is necessary to show that he "actually foresaw" that physical harm to some other person would be the consequence of his act, even if not the degree of harm which actually occurred (see the passage from *R v Mowatt*, quoted by Lord Hope at para 11).

39. The tribunal's apparent misreading of Lord Ackner's words in *R v Savage* [1992] 1 AC 699 is perhaps understandable. The passage in question is as follows:

> "I am satisfied that the decision in *Mowatt* was correct and that it is quite unnecessary that the accused should either have intended or have foreseen that his unlawful act might cause physical harm of the gravity described in section 20, ie a wound or serious physical injury. It is enough that *he should have foreseen* that some physical harm to some person, albeit of a minor character, might result." (p752 f-g, emphasis added).

Taken out of context, the last sentence might seem to support the tribunal's view in *Fuller*. However, it is clear from the preceding passage that it was not intended to have this effect. The question to which this passage provided an answer was set out at p751E:

> "In order to establish an offence under section 20, is it sufficient to prove that the defendant *intended or foresaw the risk of some physical harm* or must he intend or foresee either wounding or grievous bodily harm?" (emphasis added)

Thus the need for actual foresight of risk was taken as given, the issue being whether it needed to be risk merely of "some physical harm" or of something more than that.

40. I agree with Lord Hope that no such mistake was made in the present case by the tribunals at either level. There was accordingly no ground for setting aside their decisions.

41. I also agree with him in questioning the description of the issue as "a jury question". That may have seemed an appropriate description in 1987, when *Ex p Webb* was decided. However, in my view it needs to be updated. Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First-tier level.

42. Promotion of such consistency was part of the thinking behind the recommendation of Sir Andrew Leggatt for the establishment of an appellate tribunal (*Tribunals for Users, One System, One Service*, March 2001, paragraphs 6.9 to 6.26). It was adopted by the government in the 2004 White Paper, paras 7.14 to 7.21), which spoke of the role of the new appellate tier "in achieving consistency in the application of the law". Although the appeal from the First-tier Tribunal was to be limited to a point of law, it was observed that –

> "for some jurisdictions this may in practice be interpreted widely, for instance to allow for guidance on valuation principles in rating cases. The general principle is that an appeal hearing is not an opportunity to litigate again the factual issues that were decided at the first tier. The role is to correct errors and to impose consistency of approach." (White Paper, para 7.19).

43. Thus it was hoped that the Upper Tribunal might be permitted to interpret "points of law" flexibly to include other points of principle or even factual judgment of general relevance to the specialised area in question. That might have seemed controversial. However, as an approach it was not out of line with the developing jurisprudence in the appellate courts. In *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929, paras 20-28, Lord Hoffmann, in the leading speech, had considered the interpretation by the social security commissioners of the so-called "cooking test" for welfare benefits. He rejected the submission that, because the words used were ordinary English words, it should be treated as a pure question of fact, following Lord Reid's well known comments on

the meaning of the words "insulting behaviour" in *Cozens v Brutus* [1973] AC 854, 861, which Lord Hoffmann thought had been given "a much wider meaning than the author intended" (para 23).

44. Commenting on the distinction between issues of law and fact, Lord Hoffmann said:

> "26. It may seem rather odd to say that something is a question of fact when there is no dispute whatever over the facts and the question is whether they fall within some legal category. In his classic work on *Trial by Jury* (1956) Lord Devlin said, (at p 61):
>
> > 'The questions of law which are for the judge fall into two categories: first, there are questions which cannot be correctly answered except by someone who is skilled in the law; secondly, there are questions of fact which lawyers have decided that judges can answer better than juries.'
>
> 27. Likewise it may be said that there are two kinds of questions of fact: there are questions of fact; and there are questions of law as to which lawyers have decided that it would be inexpedient for an appellate tribunal to have to form an independent judgment. But the usage is well established and causes no difficulty as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question: see *In re Grayan Building Services Ltd* [1995] Ch 241, 254-255."

45. Lord Hoffmann took this line of thinking a stage further in *Lawson v Serco* [2006] ICR 250, where the issue was the application of the Employment Rights Act 1996 to "peripatetic employments", involving substantial work outside the UK. He described this as "a question of law, although involving judgment in the application of the law to the facts" (para 24). Under the heading "fact or law", he said (para 34):

> "Like many such decisions, it does not involve any finding of primary facts (none of which appear to have been in dispute) but an evaluation of those facts to decide a question posed by the interpretation which I have suggested should be given to section 94(1), namely that it applies to peripatetic employees who are based

> in Great Britain. Whether one characterizes this as a question of fact depends, as I pointed out in *Moyna v Secretary of State for Work and Pensions* [2003] UKHL 44; [2003] 1 WLR 1929, upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review. I would be reluctant, at least at this stage in the development of a post-section 196 jurisprudence, altogether to exclude a right of appeal. In my opinion therefore, the question of whether, on given facts, a case falls within the territorial scope of section 94(1) should be treated as a question of law. On the other hand, it is a question of degree on which the decision of the primary fact-finder is entitled to considerable respect. In the present case I think not only that the Tribunal was entitled to reach the conclusion which it did but also that it was right…."

46. I discussed these developments in an article in 2009 (*Tribunal Justice, A New Start* [2009] PL 48, pp 63-64). Commenting on *Moyna* I said:

> "The idea that the division between law and fact should come down to a matter of expediency might seem almost revolutionary. However, the passage did not attract any note of dissent or caution from the other members of the House. That it was intended to signal a new approach was confirmed in another recent case relating to a decision of an employment tribunal, *Lawson v Serco*."

Of Lord Hoffmann's words in *Serco* itself, I said:

> "Two important points emerge from this passage. First, it seems now to be authoritatively established that the division between law and fact in such classification cases is not purely objective, but must take account of factors of 'expediency' or 'policy'. Those factors include the utility of an appeal, having regard to the development of the law in the particular field, and the relative competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other. Secondly, even if such a question is classed as one of law, the view of the tribunal of fact must still be given weight.
>
> This clarifies the position as between an appellate *court* on the one hand and a first instance tribunal. But what if there is an intermediate appeal on law only to a specialist appellate tribunal? Logically, if expediency and the competency of the tribunal are relevant, the dividing line between law and fact may vary at each stage. Reverting

> to Hale LJ's comments in [*Cooke v Secretary of State for Social Security* [2002] 3 All ER 279 paras 5-17], an expert appellate tribunal, such as the Social Security Commissioners, is peculiarly fitted to determine, or provide guidance, on categorisation issues within the social security scheme. Accordingly, such a tribunal, even though its jurisdiction is limited to 'errors of law', should be permitted to venture more freely into the 'grey area' separating fact from law, than an ordinary court. Arguably, 'issues of law' in this context should be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. In other words, expediency requires that, where Parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law and practice in that field."

47. For the purposes of the present appeal it is unnecessary to consider further the working out of these thoughts. In the present context, they provide support for the view that the development of a consistent approach to the application of the expression "crime of violence", within the statutory scheme, was one primarily for the tribunals, not the appellate courts.

LORD WALKER, LADY HALE AND LORD SUMPTION

48. We agree with the judgments of Lord Hope and Lord Carnwath and, for the reasons they give, we too would allow this appeal.