

Suicide: the difference between road and rail criminal injuries compensation



Georgina Hirsch, Devereux Chambers, looks at the detail in *Jones v First-Tier Tribunal (Social Entitlement Chamber)* [2011] EWCA Civ 400

Gareth Jones' successful judicial review of the Criminal Injury Compensation Authority, for its refusal to award him damages for his catastrophic injuries arising from a motorway crash caused by a man walking in to the traffic to commit suicide, has highlighted the difference in treatment between train drivers who suffer injury when someone commits suicide in front of their train compared to injuries caused by other suicides.

History – crime of violence

Initially the Criminal Injuries Compensation Scheme provided compensation for injuries arising from any crime, not just from crimes of violence. This was amended in 1969 to limit the Scheme to crimes of violence.

Despite much discussion on the issue, 'crime of violence' was not conclusively defined in the CICB Scheme, or in the CICA successor Schemes. The CICA annual report for 2009-10 shows that 4,183 claims under Scheme paragraph 8(a) were refused over the year on grounds that the injury did not result from a crime of violence.

The question of what is a 'crime of violence' was considered by the High Court in 1977 in *R v Criminal Injuries Compensation Board ex p Clowes* [1977] 3 All ER 854, where a suicide had broken open a gas main to kill himself and a police officer was injured in the resultant explosion. The Divisional Court held that a crime of violence was not confined to offences against the person, but also "*that kind of deliberate criminal activity in which anyone would say that the probability of injury was obvious*" (Eveleigh J at 858).

Suicides by walking or lying in front of a train

According to the Rail Safety and Standards Board (RSSB) 2010/11 Safety Report, there were 208 suicides on railway lines over that year. In some years there have been over 300 suicides by people walking or lying in front of trains. Such suicides can leave the train driver with significant mental injury. Many drivers suffer repeated suicides, and some become unable to continue work as a result of the mental injuries sustained.

Under the original 1964 Scheme the CICB had paid damages to many train drivers who had suffered mental injury as a result of train suicides. They continued to make such awards even after the narrowing of the Scheme to 'crimes of violence', until the assumption that such suicides were crimes of violence was challenged in an *obiter* remark in *R v CICB ex p Parsons*, *The Times*, 25 November 1982.

The CICB's refusal of awards following *Parsons* was challenged by judicial review on the question of whether injury arising from such a suicide was a 'crime of violence' under the Scheme. The question was considered by the Court of Appeal in *R v Criminal Injuries Compensation Board ex p Webb & others* [1987] 1 QB 74 (*Webb* is sometimes also known as *Warner*). This case covered four test cases but a further 250 applications were held by the CICB pending the decision.

Claims arising from suicides on rail lines were based on s.34 of the Offences Against the Person Act 1861:

'Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger or cause to be endangered the safety of any person conveyed or being in or upon a railway... shall be guilty of...'

The Court of Appeal held that 'crime of violence' should be interpreted in line with "a reasonable and literate man's understanding" and they accepted the CICB's submission that this would only cover crimes where there was either a direct infliction of force upon the victim, or at least a hostile act directed towards the victim, so the claims failed.

Special provision for railway suicides

A Home Office working party considered the crime of violence issue in light of the decision in *Webb*. The working party decided that the definition should go beyond the Court of Appeal's formulation and should include crimes where the offender was reckless as to whether death or injury would be caused to another.

Their recommendations did not cover psychiatric injuries sustained by train drivers in suicide cases, but the rail unions lobbied effectively, and in 1990 the Labour

Party proposed an amendment which was accepted by the Government to make express provision as now contained in paragraph 8 (b) of The Criminal Injuries Compensation Scheme 2008 ('the Scheme'), which provides that an offence of trespass on a railway is a 'crime of violence' for the purposes of the Scheme.

Railway suicides are also uniquely provided for, in that the Scheme allows recovery for mental injury or disease even where no physical injury is present, where the applicant is:

"... a person employed in the business of a railway, either witnessed and was present on the occasion when another person sustained physical (including fatal) injury directly attributable to an offence of trespass on a railway, or was closely involved in its immediate aftermath" (paragraph 9(d)).

The provision for railway employees contrasts with the requirements for anyone else to recover an award for mental injury or disease alone. In those cases the Scheme (at paragraph nine) requires that the applicant was put in 'reasonable fear of immediate physical harm' or witnessed or was present at, or closely involved in, the immediate aftermath of an injury to a person with whom they 'had a close relationship of love and affection'.

Gareth Jones judicial review

In *Jones* the Court of Appeal considered whether Mr Hughes' suicidal walk in to traffic, which caused the crash that left Mr Jones with injuries requiring full time residential care, was a crime of violence.

The First-Tier Tribunal (FTT) found that there was no evidence as to Mr Hughes' state of mind, in particular no evidence that he deliberately intended to harm the users of the road. They therefore rejected offences under s.22A of the Road Traffic Act 1988 ('intentionally and unlawfully interfering with a motor vehicle') and s.20 of the Offences Against the Person Act 1861 ('inflicting grievous bodily harm') (s.20').

The Court of Appeal noted that in *R v Savage* [1992] 1 AC 699 Lord Ackner said that for an offence under s.20 "*It is quite unnecessary that the accused should have foreseen that his unlawful act might cause*

physical harm of the gravity described in the section, i.e. 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." Nor was a direct physical assault necessary under s.20 (*R v Burstow* [1988] AC 147).

The Court of Appeal accepted the submission made by Robert Glancy QC on behalf of Mr Jones, that it is 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, in consequence, harm being caused to other road users. Nevertheless the court did not go so far as to find that Mr Hughes has the necessary *mens rea* for s.20. Instead it quashed the decision of the FTT and remitted the matter back to a differently constituted FTT to reconsider the issue of recklessness and assess the probability, on the evidence, that Mr Hughes had the necessary foresight of some harm resulting from his actions.

Anomaly

The CICA's difference of treatment between suicides on a railway, as opposed to other situations, was raised in the course of argument in *Jones*, and was commented on critically in the 2005 Law Society Guide to the Scheme (*Criminal Injuries Compensation Claims*, Clare Padley and Laura Begley, The Law Society 2005).

It was also specifically addressed in the 2004 Home Office '*Consultation on Compensation and Support for Victims of Crime*', which stated at paragraph 102:

"102. Since 1990, the Scheme has compensated railway workers who suffer trauma from seeing people commit suicide by jumping in front of a train or from dealing with the immediate aftermath. However, committing suicide is not a deliberate act of violence against the railway worker, and it is hard to argue that the trauma of a railway driver is any greater than that, say, of a bus driver when someone jumps in front of his or her bus. This seems to be an anomalous provision. Compensation linked with trespass on the railway currently amounts to some

£0.5m annually. We would like to work with relevant Government Departments, employers and stakeholder groups to explore alternative ways to compensate these workers, and remove this anomaly from the Scheme. Such changes would apply to England and Wales, and to Scotland."

The 'alternative ways to compensate workers' were identified in the consultation as being claims against the employer or other existing litigation avenues.

The bold assertion that suicides are not a crime of violence was repeated (and unqualified), in the specific consultation questions:

"Is it appropriate that a Scheme intended to compensate victims of violent crime should continue to pay compensation for injuries that do not result directly from violent crime?"; and

"What might be the appropriate alternatives for compensating those who experience trauma through trespass on the railway, or accidental injury?"

Despite the wording of the first questions strongly encouraging respondents to call for change, two thirds of respondents resisted. Opposition to removal of the exception came most forcefully from railway industries employers' representatives and from ASLEF, the RMT and the TUC. The support for the status quo was both on grounds of the nature of the train driver's position, and in opposition to removing a pre-existing right.

The rhetoric about the train driver's position commonly argued that train drivers were in a unique situation because they cannot swerve to avoid collision with the suicide. This argument is vulnerable to comparison with unavoidable collisions for other vehicle drivers.

The crucial point of difference between train drivers and other vehicle drivers is that in the absence of the paragraph 9(d) provision, a train driver would not be able to recover for mental injury in a rail suicide case unless they had a close relationship of love and affection with the person who they had hit (as provided for by paragraph 9(b)). Although train drivers commonly suffer mental injury as a result of the suicide, the greater size and force of the train, as compared to the suicide, means that they would not fulfil the paragraph 9(a) requirement that they were put in reasonable fear of immediate physical harm to his or her own person (paragraph 9(c) is inapplicable as it relates to sexual offences).

Also, while the CICA continues to interpret a 'crime of violence' as including a requirement that the crime involved either a direct infliction of force upon the victim, or at least a hostile act directed towards the victim, then rail suicides would effectively be excluded from the Scheme but for the special provision at paragraph 8(b), that an injury sustained in and directly attributable to an offence of trespass on a railway.

Many of those objecting to a 'levelling down' of the right suggested resolving the anomaly by removing the limiting requirements of being a railway employee and the crime involving a trespass on a railway (as was later argued by Robert Glancy QC in *Jones*).

The Government decided not to remove the rights in relation to railway suicides, but stopped short of extending the right to other situations.

Conclusion

The Court of Appeal decision in *Jones* gives rise to a further anomaly: that claims for victims in exactly the same situation, such as an injury following suicide on a highway, may succeed or fail on something as random as whether they left a suicide note, and what it said in it. Such victims are denied their legitimate expectation of reasonable certainty as to whether they qualify under the Scheme.

The anomaly in *Jones*, and the need for special provision for train drivers under 8(b) of the Scheme, would be removed if the Government would honour the original purpose of the Scheme, to compensate innocent victims of crime, by amending the Scheme to make explicit provision that suicides which are objectively reckless to mental or physical injury to others are a 'crime of violence'.

Note: since writing this article, it has been confirmed that permission has been granted for the decision in *Jones* to be appealed. ■

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