

**HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
(Tucker, J.)**

11th July, 1944.

HORSFALL v. THE MINISTER OF PENSIONS

JUDGMENT.

MR. JUSTICE TUCKER: This is an appeal by way of Case Stated by Mrs. Margaret Arnold Horsfall, who is the widow of Squadron Leader Charles Michael Horsfall, who died on the 21st November, 1942, after playing a game of squash rackets. The claim comes before me by way of appeal from the Pensions Appeal Tribunal who heard the case and who gave leave to appeal on the ground that it involved a question of law. The widow's claim had been rejected by the Minister on the ground that neither of the following conditions was fulfilled, namely, (a) that the death of the person concerned was due to or hastened by an injury which was attributable to war service, and (b) that the death was due to or hastened by the aggravation by war service of an injury which existed before or arose during war service. The Claimant, having been notified of that decision, appealed to the appropriate Pensions Appeal Tribunal under Section 1 (3) of the Pensions Appeal Tribunals Act, 1943.

The claim to the Minister had been a claim in respect of the death of a person, namely, Squadron Leader Horsfall, under the Order made by His Majesty concerning retired pay, pensions and other matters for members of the Air Forces dated the 25th December, 1943. That Order was made pursuant to section 2 of the Air Force (Constitution) Act, 1917. In the Order "war service" is defined under Article 1, paragraph (21), as follows: "War service," in relation to a member of the air forces, means service as such a member during the whole or any part of the period beginning on the 3rd September, 1939, and ending on such date as His Majesty may hereafter declare to be the end of the present war for the purposes of this Order either generally or in relation to any particular class of case which includes the case of that member." Then Part II of the Order, Article 4, deals with Entitlement and provides in paragraph (1): "The disablement or death of a member of the air forces shall be accepted as due to war service for the purposes of this Order provided it is certified that (a) the disablement is due to a wound, injury or disease which (i) is attributable to war service; or (ii) existed before or arose during war service and has been and remains aggravated thereby; or (b) the death was due to or hastened by (i) a wound, injury or disease which was attributable to war service, or (ii) the aggravation by war service of a wound, injury or disease which existed before or arose during war service"; and paragraph (2) provides: "In no case shall there be an onus on any claimant under this Order to prove the fulfilment of the conditions set out in paragraph (1) of this Article and the benefit of any reasonable doubt shall be given to the claimant." It is under that provision with regard to entitlement, which is very much in the same language as the section of the Pensions Appeal Tribunals Act, 1943, to which I have already referred, that this claim arises. The widow claims that the Tribunal has erroneously as a matter of law come to the conclusion that the death was not due to or hastened by an injury attributable to war service and that the death was not due to or hastened by aggravation by war service of an injury which existed before or arose during war service.

The case was put in this way. It is said that the Case Stated by the Tribunal shows that they have not applied a proper test in dealing with the words "attributable to war service" and the words "aggravation by war service" in the Royal Order and in Section 1 of the Pensions Appeal Tribunals Act, 1943. It is also said that on the facts of the case

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as found there was only one conclusion in law to which the Tribunal could properly come, namely, that the death of the Squadron Leader was in fact due to or hastened by an injury attributable to war service, or that the death was due to or hastened by aggravation by war service of a previously existing injury.

Before referring to the facts found by the Tribunal, I would observe that the Case Stated in this case has not kept the facts as distinct from the law as one might wish. It is very important in these cases where an appeal lies only on a question of law that the Tribunal should set out quite shortly their findings of fact, not the evidence on which those facts are founded, but the final result of the facts found by the Tribunal, that they should then state their conclusions and that they should then set out what is the point of law which arises on which the opinion of the Court is desired. Although incorporated in this Case is the most careful and helpful judgment, the actual Case Stated does not keep the questions of fact and the matters of law quite as distinct as is desirable. None the less, from the judgement it becomes quite clear, reading the document as a whole, what the findings of fact of the Tribunal are.

The facts found by them may be put quite shortly in this way. The Squadron Leader was a man of just under 50 years of age when he re-enlisted in September, 1939, having served during the last war. On re-enlistment he was found to weigh just over 14 stone and to have an abnormally high blood pressure. It is a condition recognised as an advanced degree of arterio-sclerosis, which is a progressive disease of the circulatory system. He was passed fit for Administrative and Special Duties, Home Service only, and was in fact made Station Administrative Officer at an airfield in this country. In that position during 1941 and 1942 he became the Adjutant to a Training Wing at a new airfield at some distance from amenities for sport, and in that position he became responsible, amongst other things, for the recreation and welfare of the air crews under instruction. The airfield had no sports ground, and the only facility for games, apart from billiards, was a squash court provided by the Air Ministry. The facts show that the Squadron Leader took a keen interest in squash and other games and was a man who was very keen on keeping himself fit by taking energetic exercise, and encouraging others at the station to do the same. The Group Captain in Command at one stage appointed him Officer in Charge of Squash. He thereupon organised games of squash and arranged games for the personnel of the station, and thereby helped to improve the general condition of the personnel at the station. That was the position down to the 12th September, 1942. He then became Acting Station Commander, which increased his duties, and on the 21st November, 1942, being Acting Station Commander, he took part in a game of squash at about 5 p.m. in the afternoon. Shortly after the game was over he was overcome and died within two minutes of the doctor being summoned. The Tribunal have found that his death was due to coronary thrombosis brought about by the game of squash in which he had been engaged. The Tribunal have further found as a fact that his condition of arterio-sclerosis had not been aggravated by the previous games of squash in which he had taken part, but that his condition was such that there was always a liability when he was engaged in violent exercise of his having an attack such as he in fact had on the 21st November, 1942. The previous games of squash can therefore be eliminated from consideration as contributing to his death, and the only thing that required to be considered by the Tribunal, having found that this particular game had caused his death, was whether or not that particular game of squash, or the injury that he received whilst playing that particular game of squash, could be said to be attributable to war service or that his death was due to or hastened by the aggravation by war service of an existing injury.

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With regard to that the Tribunal have held that it was not attributable to war service or aggravated by war service, and the test they have applied to the facts as found by them is set out in the Case in these words: "The first question is whether in law the 'compulsions of service' are necessarily implied by the words 'by service' or 'attributable to service', or whether all acts performed or conditions or events undergone in the course of service are embraced by these words irrespective of any special or general obligations, peculiar to service as compared with civil life, to perform or undergo them. In the opinion of the Tribunal the scope of these words embraces only acts or conditions or events performed or undergone owing to and in compliance with the general or special obligations of service, together with all acts and conditions or events necessarily or reasonably incidental to these obligations, as distinct from acts and conditions or events normally incidental to civil life. The next question therefore is whether the playing of these games by this officer and in particular the last game was in fact due to the obligations of service or was reasonably incidental to such special or general obligations, as distinct from what he would normally have done in civil life if he had had the opportunity." Let me say with regard to that, that I think it is undesirable to seek to amplify or paraphrase or extend the words of the Act of Parliament and the Royal Order that is being dealt with. Those words are, as I have already stated more than once, "due to or hastened by an injury which was attributable to war service" and "due to or hastened by the aggravation by war service of an injury which existed before." In every case, in my view, it must be a question of fact whether the particular case comes within that definition or not, and it must often be extremely difficult to put a particular case on one side or other of the dividing line. I do not think the Tribunals will receive assistance from me or, if I may say so with great respect, from others if they endeavour to introduce wider language than that which appears in the Act itself. But having said that, I do not desire to quarrel with the test which the Tribunal have in fact applied in this case, although I think it is better to keep to the language of the Act and not to travel beyond that. It is quite impossible for me to say that they have misdirected themselves in law with regard to the relevant matters which it is proper for them to consider in arriving at the decision as to whether or not this unfortunate occurrence was due to war service or aggravated by it. On that question of fact, and confining themselves as I think was quite proper for them to do to the particular game that he was playing, the Tribunal state as follows: "The next question therefore is whether the last game was in fact a duty game or reasonably incidental to his general or special duties at that time. There is no special evidence in particular relation to it to show that it was a specially organised game, or a demonstration game, or that he was under any special duty to play it; and there is some evidence, partly inferential and partly direct,, which goes to show that it probably was only played for his own amusement," and they proceed later on to say: "The Tribunal is therefore of the opinion that these various factors in the balance of probability, all pointing in the same direction, and the absence in the whole circumstances of any special evidence to the contrary, effectually dispose of any reasonable doubt on that point that might otherwise have existed; and being of the opinion for these reasons that the evidence available must be taken as establishing an affirmative probability, finds as a fact that this particular game was not the outcome of any special obligation imposed by service, and therefore that any ill-effects of this particular game taken by itself cannot properly be held to have been 'attributable to service' or produced 'by service'".

This is a finding of fact which I think it is quite impossible for me to disturb even if I desired to do so, and furthermore I think that in coming to the conclusion of fact at which they arrived there is nothing in this case to indicate that the Tribunal misdirected

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themselves in any way on any point of law. I think the argument which has been advanced in this case really goes so far as to amount to a submission that anything that befalls a serving soldier in the course of his service at his place of duty necessarily becomes attributable to war service, and I think that that reading would be equivalent to saying that the death or injury must arise in the course of his war service. That is not the language of the Royal Order or the Act of Parliament. The words used are "attributable to", and I think they have a different significance from "in the course of". As I have said, I think it is not desirable to make any general observations with regard to the various situations which may arise in different cases. In every case, provided the Tribunal have applied the proper test, it is a question of fact whether a particular injury or death is attributable to war service, and I do not think it would be helpful to attempt to give any definition or put any limitation upon the words used by the Act. Tribunals will no doubt remember, as this Tribunal appears to have done, that the onus is not upon the claimant in this matter and that he is entitled to the benefit of any reasonable doubt. This case shows that the Tribunal have had that consideration fully before them in arriving at the decision which they reached.

In those circumstances this appeal fails and must be dismissed.