

In the High Court of Justice

Queen's Bench Division

Royal Courts of Justice

Monday, 4th October, 1965

Before:

Mr. Justice Edmund Davies

IN THE MATTER of the PENSIONS APPEAL TRIBUNALS ACT, 1949

and

IN THE MATTER of an APPEAL from a DECISION of a PENSIONS
APPEAL TRIBUNAL

BETWEEN:

CLIFFORD WILFRED JUDD

Appellant

- and -

THE MINISTER OF PENSIONS AND NATIONAL INSURANCE

Respondent

(Transcript of the Shorthand Notes of Walsh & Sons, 34, Essex Street, Strand, W.C.2.)

Mr. A.M. KENNY (for Mr. PETER RIPMAN) (instructed by Messrs. Culross & Co) appeared on behalf of the Appellant.

Mr. NIGEL BRIDGE (instructed by The Solicitor, Ministry of Pensions and National Insurance) appeared on behalf of the Respondent.

JUDGMENT

MR. JUSTICE EDMUND DAVIES: In January 1964 the Minister of Pensions and National Insurance decided that the condition of cervical spondylosis from which the appellant, Clifford Wilfred Judd, has suffered for some years is not attributable to his Army service. An appeal from that decision was dismissed by a Pensions Appeal Tribunal in July. As the case stated by the Tribunal raised an issue of crucial importance regarding the interpretation of the Royal

Warrant of 1949, I granted leave to the claimant to appeal against their decision so that the matter could be fully argued.

On joining the R.A.S.C. on January 1st, 1942, Mr. Judd was placed in the A.1. medical category. During War Office Selection Board exercises in 1943 he fell from a swinging rope a distance of some 30 feet and landed on his back. About a year later he experienced pain in the lumbar region and in 1944 attended hospital for two months and had physiotherapy. Although still complaining of lumbar pains on his discharge on February 8th, 1946, a nil assessment was made in May of that year, but in December 1947 this was replaced by an interim assessment of 30 per cent. A Dr. Meyrick later recalled that during 1947 the claimant complained also of pain in the neck. In May of 1949 he told the Ministry Medical Officer, "I am still getting pain the base of my spine and also recently in the back of my neck". Thereafter he continued to complain of pain in both lumbar and cervical regions. X-rays of the cervical spine taken in October 1956 showed what were described as "numerous degenerative changes". During the following year he unsuccessfully appealed against the Ministry's continued assessment of 30 per cent for the lumbar injury only. In 1962 the Ministry's medical specialist diagnosed cervical spondylosis, and added, "It is probable that the cervical spondylosis is a late sequela of the original back injury". Nevertheless, the applicant was informed that the Ministry's senior doctors were of the opinion that it was not associated with the back injury and that consequently it was not pensionable. But in the following year Mr. Edmund Hambly, a consultant orthopaedic surgeon, expressed the view that the cervical spondylosis was entirely the result of the fall in 1943 and that the delay in the onset of neck symptoms was absolutely typical of this type of injury. In December 1963, Medical Services expressed the opinion that the claim should nevertheless be rejected. Adverting to the views of the surgical specialist in 1962 and of Mr. Edmund Hambly, they said; "Both these reports are apparently based on the premise that cervical spondylosis must inevitably be caused by a severe injury to the neck and spine, but this is not so... Cervical spondylosis is a constitutional and degenerative condition of the discs of the cervical spine which commonly occurs in middle age independently of any external factors..... Therefore it is our opinion that Mr. Judd's cervical spondylosis cannot have been caused by his fall at the W.O.S.B. in 1943". They added that their view was fortified by the fact that there was irrefutable X-ray evidence that in 1953 there were no abnormal radiological changes and no evidence of damage by previous trauma.

Both the basis and the process of reasoning of Medical Services are open to criticism. Neither the surgeon specialist nor Mr. Hambly had said that cervical spondylosis must inevitably and exclusively be traumatic in origin. Furthermore, to say that because cervical spondylosis commonly occurs in middle age independently of any external factors it therefore cannot be caused or hastened by trauma is to beg the very question they were asked to advise upon. However, in the light of their opinion, the Minister expressed himself as "satisfied beyond all reasonable doubt" (and I stress those words) that the cervical spondylosis was neither attributable to nor aggravated by Mr. Judd's Army service. Mr. Hambly was again consulted and he reported in this way: "I agree that cervical spondylosis can be a constitutional ageing of the discs, as the Ministry rightly suggests. Equally, on the other hand, spondylosis of the neck, in general, can and frequently is caused by direct injury..... No other injury has been recorded. This was a severe injury and the Ministry of Pensions, although absolutely right" – that is in saying that spondylosis is a degenerative process in the intervertebral discs, resulting from the changes that accompany ageing – "would be generous, and yet not unfair to themselves in such a case where reasonable doubt exists of alternative aetiologies, or both together, to consider Judd's neck spondylosis to have been caused or aggravated, at the same time by the injury to the lumbar spine". It is to be noted that Mr. Hambly, like the Minister, had addressed to himself the question as to whether there was any reasonable doubt in relation to attributability

or aggravation. As will hereafter appear, that question was never considered by the Tribunal. Whether they were right or wrong in refraining from doing so remains to be considered.

When the Tribunal heard the appeal in July 1964 they had before them the material which I have summarised, together with the evidence of a Dr. Herzinger, who expressed the view that the appellant's condition was traumatic in origin. But they nevertheless concluded that the condition was purely degenerative and they therefore disallowed the appeal for both attributability and aggravation.

In the light of the circumstances I have related, the case is governed by Article 4(2) of the 1949 Royal Warrant, which provides that – “Subject to the following provisions of this Article, in no case shall there be an onus on any claimant under this Article 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”. Article 4(3) had no application, but as it must be frequently referred to hereafter, it is convenient to recall that it provides that – “Subject to the following provisions of this Article, where an injury which has led to a member's discharge or death during service was not noted in a medical report made on that member on the commencement of his service, a certificate under paragraph (1) of this Article shall be given unless the evidence shows that the conditions set out in that paragraph are not fulfilled”.

Both of these provisions were relied upon by Mr. Judd's advisers in applying to the Tribunal for leave to appeal against their decision. As to Article 4(2), they submitted that there was no evidence on which the Tribunal could properly conclude that the Minister had discharged the burden of showing to the exclusion of all reasonable doubt that the cervical spondylosis was not attributable to or aggravated by Army service. Their further reliance on Article 4(3) need not be considered, as it is now conceded that that provision was inapplicable. The Tribunal, in refusing leave to appeal, pointed out that the case fell under Article 4(2) alone and added – “The question, therefore, was not whether the Minister had ‘shown beyond reasonable doubt or had discharged the compelling presumption that service had not caused or aggravated the disability’. The burden on him was of showing in the balance that service had not caused or worsened the disability”. The use of the word “therefore” makes it clear that the Tribunal considered that only in Article 4(3) cases did any question of proof beyond reasonable doubt arise, and that in cases falling only within Article 4(2) the Ministry succeeded if “in the balance” the evidence was against attributability or aggravation.

As this decision raised in the clearest possible form the nature of the onus placed by Article 4(2) on the Minister, I considered it right to grant the claimant leave to appeal therefrom, and I now turn to consider the question. The Tribunal clearly considered that they were applying the decision of Denning, J. (as he then was) in Miller v. Minister of Pensions (1947 T.L.R. 474; 1947 2 All E.R. 372; War Pensions Appeals, Vol. 1, 615). As it is necessary to compare that decision with a number of other cases decided both before and after it, it is perhaps important to note that Denning, J. clearly did not consider that he was there making new law, for he began his analysis of Article 4(2) and Article 4(3) by saying that “The proper direction is covered by decisions of this Court”. I accordingly start with the judicial background, prefacing the review by reminding myself that although they (like Miller's case) involved the interpretation of the 1943 Warrant and not, as here, the 1949 Warrant, the wording of Article 4(2) and Article 4(3) is identical in both Warrants.

In *Irving v. Minister of Pensions* (1944 2 War Pensions Appeals, 401) the Lord Justice-Clerk (Lord Cooper) said, at page 412 – “.... The result of the provision I have quoted” – that is, Article 4(2) – “is that the onus of proof is on the Minister. This means that if at the end of the day the considerations for and against the grant of a pension are so evenly balanced that the Tribunal is in a reasonable doubt whether to allow or to refuse the appeal, the claimant must succeed. The Tribunal in dealing with an appeal are thus in much the same position as a jury in a criminal trial, who, if left in reasonable doubt as to the guilt of the accused, are bound to acquit him”. With that view Lords Mackay, Jamieson and Stevenson concurred. In *Mitchell v. Minister of Pensions* (1945 2 War Pensions Appeals, 421) the same Lord Justice-Clerk repeated that interpretation of Article 4(2) and then, passing to Article 4(3) said (at page 424), “In that provision I find an added emphasis upon the outlook of the preceding provisions dealing with the duties in the matter of proof imposed upon the claimant and the Minister respectively”. Again his same learned brethren concurred. In *Moxon v. Minister of Pensions* (1945 1 War Pensions Appeals, 63) Tucker, J. (as he then was) said that he desired to adopt these two cases as expressing his own views.

The last-mentioned decision was cited to Denning, J. when he decided *Starr v. Minister of Pensions* (1946 1 K.B., 345; 1945 1 War Pensions Appeals, 109), an Article 4(2) case. Having dealt with the change regarding onus of proof brought about by the 1943 Warrant, he continued (at pages 350 and 121): “There is, therefore, now no burden on any claimant to produce evidence. He must, of course, make his claim..... The claimant may adduce any evidence he wishes, and the Minister may submit any medical question to a Medical Officer..... He may be able to come to a determinate conclusion without reasonable doubt, but, if the evidence leaves him in reasonable doubt, then the claimant must be given the benefit of the doubt. This means that he must not decide against the claimant on a mere balance of probabilities. There must be a real preponderance of probability against him such as to exclude reasonable doubt. That is a rule as to the weight of evidence, which applies to all cases. But in one special category the Warrant introduces an additional element in favour of the applicant..... In cases falling within [Article 4(3)] there is a compelling presumption in favour of the claimant to which effect must be given unless the contrary is shown. That presumption takes the place of evidence. The effect of it is that the claimant succeeds unless each one of the prescribed conditions is negative by evidence. The amount of evidence required is, again, a real preponderance of probability such as to exclude all reasonable doubt. The evidence must show, by a real preponderance of probability, that the disease was not attributable to war service, or aggravated by it, as the case may be. The distinction between Article 4(2) and Article 4(3) is that, in order to defeat a claimant, in cases under Article 4(2) the evidence against him must overthrow any evidence in his favour, whereas in cases under Article 4(3) it must also overthrow the presumption in his favour”. From the foregoing it emerges that, as indeed Article 4(2) itself makes clear, in every pension claim the Minister needs to be satisfied beyond reasonable doubt that the evidence does not support the claim before he disallows it.

We can now turn at last to *Miller v. Minister of Pensions* (ante), decided in the following year, pausing only to point out that the All England Reports has a mystifying reference to Article 4(4) which does not appear in the other reports and that Article 4(4) has no relevance to the question there being considered. The material parts of the judgment of Denning, J. are these: “(1) In cases falling within Article 4(2) and Article 4(3) [which are generally cases where the man was passed fit at the commencement of his service, but is later affected by a disease which leads to his death or discharge] there is a compelling presumption in the man’s favour which must prevail unless the evidence proves beyond all reasonable doubt that the disease was not attributable to or aggravated by war service, and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused is found

guilty (2) In cases falling under Article 4(2) [which are generally cases where the man was fit on his discharge, but incapacitated later by a disease] there is no compelling presumption in his favour, and the case must be decided according to the preponderance of probability. If at the end of the case the evidence turns the scale definitely one way or the other, the Tribunal must decide accordingly, but if the evidence is so evenly balanced that the Tribunal is unable to come to a determinate conclusion one way or the other, then the man must be given the benefit of the doubt. This means that the case must be decided in favour of the man unless the evidence against him reaches the same degree of cogency as is required to discharge a burden in a civil case. That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the Tribunal can say: 'We think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not."

The distinction between the approaches to Article 4(2) in Starr's case (ante) and Miller's case (ante), therefore, is this: In the former, it was said that the Minister "... must not decide against the claimant on a mere balance of probabilities" and that before doing so he must be satisfied by "a real preponderance of probability such as to exclude all reasonable doubt" as to its validity, whereas in the latter it was said to be sufficient if the Minister takes the view that, on the same preponderance of probability as would suffice to decide any civil claim, it has not been made out. I was told that the Minister has acted upon Miller's case ever since it was decided, but as to that I have already observed that in the present case he (unlike the Tribunal) appeared to have applied the standard of proof beyond reasonable doubt. Be that as it may, I am naturally loth to depart from settled practice (if such it be) unless I am convinced that the decision ought not to be followed. If I am, then, notwithstanding its high authority and the lapse of time since that decision, I must not follow it, for, quite apart from the fact that it appears to differ in a material respect from the earlier decisions, "the doctrine of stare decisis does not apply in its full vigour to this branch of the law" (see per Denning, J. in James v. Minister of Pensions [1947 2 War Pensions Appeals, 629, at page 633] and Higham v. Minister of Pensions [1948 3 War Pensions Appeals, 1377, at page 1384]).

How have Article 4(2) and Article 4(3) been interpreted since Miller's case? In Webster v. Minister of Pensions (1947 1 War Pensions Appeals, 823) Denning, J. said (at page 829): "Article 4(3) does not apply and there is no compelling presumption in his [the claimant's] favour. Article 4(2) does apply. There is no onus on him and the benefit of any reasonable doubt has to be given to him. The effect of Article 4(2) is to raise a provisional presumption in his favour. The strength of that presumption depends on the facts of the case The difference between a compelling presumption and a provisional presumption depends for its strength solely on the facts of the case". It was submitted to me that there was here a reverting, as it were, to Starr's case (ante). One begins with the proposition that every pension claim must be allowed unless the Minister is satisfied beyond all reasonable doubt that it should be disallowed, and one then goes on to consider, in an Article 4(3) case only, whether the compelling presumption in the claimant's favour has been demolished.

In the Northern Ireland case of Greer v. Minister of Pensions (1958 2 War Pensions Appeals, 957) Black, L.J. had to consider Article 5 of the 1949 Warrant, which deals with claims made after the expiration of 7 years from the termination of the claimant's service, a state of affairs which naturally found no place in the 1943 Warrant. Article 5(4) thereof provides that, "Where, upon reliable evidence, a reasonable doubt exists whether the conditions set out in paragraph (1) of this Article are fulfilled, the benefit of that reasonable doubt shall be given to the claimant". The learned Lord Justice said (at page 966): "The Ministry contend that paragraph (4) of Article 5 only comes into operation to assist the claimant when the evidence on behalf of the claimant and the evidence on behalf of the Ministry is equally or

nearly equally balanced, and that where there is a clear preponderance of probability against the claimant there is no room for reasonable doubt. Reasonable doubt, they say, can only arise in regard to cases near the borderline. In support of their contention the Ministry rely upon the judgement of Denning, J. in Miller v. Minister of Pensions With the very great respect due to everything said by Lord Denning, I confess that I find great difficulty in following his exposition in Miller's case of the effect of the provisions of paragraphs (2) and (4) of the Royal Warrant of 1943 To practitioners of English law the expression 'reasonable doubt' is a well-known and time-honoured phrase".

The learned Lord Justice then proceeded to consider several criminal cases where that phrase was discussed, and continued: "Accordingly, when the Royal Warrant comes to use a phrase of so well-established a connotation in our law, I think the phrase must be taken as used in order to indicate that degree or standard of proof which generations of lawyers have been accustomed to employ it as the apt phrase to describe. It seems to me therefore that I cannot accept it as having the narrow and limited meaning which the Ministry seeks to ascribe to it on the basis of Denning, J.'s observation in Miller's case I think it is sufficient simply to say that in an Article 5 case the Appeal Tribunal must ask itself whether a reasonable doubt, in the ordinary acceptance of that term, exists as to whether the conditions set out in paragraph (1) are fulfilled; and if the answer is in the affirmative the benefit of that reasonable doubt must be given to the claimant I see nothing inconsistent in holding that notwithstanding the existence of a definite preponderance of probability or even a strong preponderance of probability there may also exist a reasonable doubt within the meaning of paragraph (4) of Article 5 of the Royal Warrant"

These are all the authorities cited to me, and they must naturally be most respectfully considered in interpreting Article 4(2) of the 1943 Royal Warrant. But always one must turn, both primarily and ultimately, to the words of the Warrant itself. There is no escaping the fact that the task of interpreting Article 4(2) has been bedevilled by the presence of Article 4(3). In practice what difference, if any, is there between the weight of the Ministry's onus in cases falling within Article 4(2) alone and cases which fall also within Article 4(3)? One naturally seeks to give effect to the Royal Warrant as a whole, and some of the suggested differences between the two paragraphs have been discussed in the decisions already cited. But, whatever difficulties one encounters in determining realistically the practical effect of Article 4(3) (and to me they appear considerable), the effect of Article 4(2) cannot be cut down thereby if its own wording is clear and unambiguous. With the utmost diffidence, I think it is. All claims fall primarily to be decided in accordance with Article 4(2). I agree with learned counsel for the appellant that the opening words of Article 4(2) place at least what may, for short, be described as the civil onus on the Minister, and that the concluding words thereof would be otiose were it the law that, as the Tribunal here decided, "The burden on him was of showing in the balance that service had not caused or worsened the disability".

In arriving at their express finding, that "The question is not whether the Minister had shown beyond reasonable doubt that service had not caused or aggravated the disability", the Tribunal, in my judgment, misdirected themselves. That is precisely the question which Article 4(2) calls upon them to decide. How it will be answered in a particular case depends on its particular facts. But does the question involve the criminal standard of proof? For the Minister it was strenuously submitted that, in the light of such cases as Davis v. Davis (1950 P. 125), Bater v. Bater (1951 P. 35) and Bornal v. Neuberger Products Ltd. (1957 1 Q.B. 247), and since pension claims are triable civilly, it is the civil standard of balance of probability that has to be applied. I cannot accept this submission, and it should here be recalled that in Miller's case (ante) Denning, J. held that it is the criminal standard that has to be applied to Article 4(3) cases. The first two of these cases related to matrimonial offences, as to which the

relevant statute (section 178 of the Supreme Court of Judicature (Consolidation) Act, 1925, as substituted by section 4 of the Matrimonial Causes Act, 1937) required the Court merely to be "satisfied on the evidence that the case for the petition has been proved", while in the last-named case it was held that in a civil case the civil standard of proof is applicable notwithstanding allegations of fraud or other matters involving criminal misconduct. But pension claims are not civil claims simpliciter. They are not civil claims in which the standard of proof is left at large and which therefore fall to be decided in accordance with the ordinary civil rule. They are civil actions in which it is expressly provided that "the benefit of any reasonable doubt shall be given to the claimant". I therefore do not regard these three cases as affording guidance as to how pensions claims are to be decided. In the light of the body of cases to which reference has been made, I cannot for myself distinguish between proof beyond any reasonable doubt in a civil case and proof beyond any reasonable doubt in a criminal case. It is true that a guilty verdict in the latter generally carries with it far graver consequences than a judgment in a civil case, and that is one of the reasons commonly and rightly advanced for applying different standard of proof to the two types of cases. But if, as here, provisions relating to civil matters involve language which for centuries has been interpreted in a certain way, I think (with Black, L.J.) that the accepted interpretation should be adopted. I therefore hold that the standard of proof applicable to pensions claims is identical with that required in criminal trials. What that standard involves has been expounded with, if I may say so, classical clarity by Denning, J. in Miller's case (1947 1 War Pensions Appeals, 615, at page 634) and need not here be reiterated.

It follows from what I have said that, in my judgment, it is wrong to judge a pension claim on the basis of a simple preponderance of probability, and that accordingly this appeal must be allowed. The question remains as to whether I should now remit the case so that the Tribunal may consider the question which they have ex concessis not entertained up to now, viz. Has the Minister established beyond reasonable doubt that the claim to attributability does not validly lie? The conclusion I have come to is that it should not be remitted. I have already referred to the body of evidence for the claimant and to the mistaken premise and unsatisfactory reasoning of Medical Services, which was the only material presented on behalf of the Minister. The cogency of their further reliance on the fact that in June 1953 the X-ray evidence showed no abnormal radiological changes in the cervical vertebrae is gravely weakened by the facts (a) that in 1951 an X-ray of the cervical spine showed some slight narrowing and a plaster collar was then recommended, and (b) that, notwithstanding that nothing abnormal was detected by X-ray in the lumbar region as late as 1950, it has been accepted ever since 1947 that the lower back condition is attributable to the 1943 fall. I cannot think that the general body of evidence which I have described could properly lead the Tribunal to conclude that the Minister had demonstrated the invalidity of the claim to attributability beyond reasonable doubt. In these circumstances, no useful purpose would be served by remitting this long-drawn-out case for further consideration. It seems to me that, to save further delay and costs, I ought now to act as this Court has previously acted in such circumstances (see, for example, Moxon's case, ante). I therefore hold that not only must this appeal be allowed but that there must now be an award in the appellant's favour on the basis of attributability.

Yes, Mr. Kenny, do you ask for judgment?

Mr. KENNY: I do, my Lord.

Mr. JUSTICE EDMUND DAVIES: So be it. You ask for the decision of the Tribunal to be set aside for the reasons I have stated and that there now be an award on the basis of attributability in favour of your client, do you?

Mr. KENNY: I do. I am much obliged, my Lord.

Mr. JUSTICE EDMUND DAVIES: I gather there is no need for me to deal with the question of costs.

Mr. KENNY: No, those are dealt with anyway.