

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**CROWN OFFICE LIST**

**PA/3/99**

**Royal Courts of Justice**  
**Strand**  
**London WC2**

**Friday 2<sup>nd</sup> July 1999**

**B e f o r e:**

**MR JUSTICE ALLIOTT**

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**SECRETARY OF STATE FOR SOCIAL SECURITY**

**-v-**

**MR JAMES PATRICK KELLY**

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Computer-aided Transcript of the Stenograph Notes of  
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(Official Shorthand Writers to the Court)

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**MISS A FOSTER** (instructed by the Office of the Solicitor, Department of Social Security) appeared on behalf of the Appellant.

**THE RESPONDENT** did not appear and was not represented.

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**J U D G M E N T**  
**(As Approved by the Court)**

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MR JUSTICE ALLIOTT: This is an appeal by the Secretary of State for Social Security, by leave of the President of the Pensions Appeal Tribunal, dated 15<sup>th</sup> April 1999 against the decision of the Pension Appeals Tribunal dated 12<sup>th</sup> November 1998.

The history of the matter is conveniently set out in the application for leave to appeal.

Mr James Patrick Kelly was born on 8<sup>th</sup> December 1940. He served in the Royal Northumberland Fusiliers from 22<sup>nd</sup> December 1958 to 14<sup>th</sup> October 1960. He was discharged as his retention was undesirable in the interests of the service.

On 25<sup>th</sup> April 1985 Mr Kelly claimed a war pension under the Naval, Military and Air Forces etc, Disablement Death Service Pensions Order 1983 (as amended) ("the order"). He claimed that his condition of diabetes mellitus was attributable to service. His claim was rejected by the Secretary of State on 8<sup>th</sup> November 1985.

In 1994 Mr Kelly appealed against the decision relating to diabetes mellitus. On 13<sup>th</sup> March 1995 he made claims under the order in relation to "stress and nervous debility and effects resulting in a stroke". The Secretary of State rejected these claims which were treated as being for Substance Use Disorder, Personality Disorder, Dysthymia and Generalised Anxiety Disorder.

Mr Kelly lodged appeals against all the rejections. The appeal was determined by the tribunal on 12<sup>th</sup> November 1998, following the production of a report requested under rule 15 of the 1980 rules. The tribunal disallowed all of the appeals save for that relating to Substance Use Disorder which it considered was attributable to service.

Mr Kelly's claim for a war pension is governed by Article 5 of the order. In short, Article 5 places an onus of proof on the respondent at least to the extent of requiring him to raise a reasonable doubt in his favour based on reliable evidence that his injury was attributable to or aggravated by service.

Injury is defined in Article 5(3) of SI 1994/772 as from 28<sup>th</sup> March 1994 as follows:

“Injury includes wound or disease but excludes any injury due to:-

(b) the consumption of alcohol; except that paragraph (b) above shall not apply where the person suffers from a mental condition which is attributable to service if:-

(i) the degree of disablement in respect of that condition has been assessed at 50% or more and;

(ii) he started or continued to use or consume alcohol due to that condition.”

The relevant passage of the tribunal’s decision reads:

“We then turned our attention to the other claimed conditions all the manifestations of ill-health. The condition of Substance Use Disorder fell first to be considered. We accepted Mr Kelly’s testimony that before he entered service he did not drink alcohol. We noted his evidence that in this decision he was affected by the behaviour of his father towards his mother when he was in drink. Mr Kelly then gave evidence which we also accepted that in service he began to drink because of the culture around him feeling no doubt rightly that abstaining would cause him to be regarded as odd or in his words ‘ to be called a poof’. Indeed his Sergeant’s injunction to him was to get down to the Naafi and have a drink.

Unfortunately Mr Kelly suffered and suffers from a vulnerable personality; more specifically, in this context, a Personality Disorder and a Generalised Anxiety State. The effect of alcohol on him was to allay the consequence of his anxiety to make him feel warm and safe. It appears that he took to alcohol immediately and over-enthusiastically. The record shows that he was frequently in disciplinary trouble and was the subject of comment by his Commanding Officer and of a psychiatric examination (or examinations).

We found that the Army culture had encouraged him to drink and that the Army as a result was responsible as the primary agency for his inability to stop drinking.

Throughout the period of his service his Anxiety state was accentuated by his constant worry that he might show himself or let himself down and by a generalised nameless fear which the affects of the drink reduced. It seems from an early stage it was acknowledged that he was not suited to Army life but that no action was taken with reference to that acknowledgement.

As we have stated above our consideration of the history which led us to accept that Mr Kelly has suffered from an early age from a Generalised Anxiety State. In order words, he is anxious about surrounding circumstances. Our finding is that whilst he was in the Army this anxiety reflected the conditions of his service life which in addition were more capable of producing anxiety than had been the conditions of his civilian life. His anxiety state was therefore aggravated by service. However once he left service the matters which then caused him anxiety were the conditions of his civilian life which then surrounded him as aggravation by Service passed away on the day when he was discharged from Service.”

It is to be noted that there is no finding that Mr Kelly suffers from a mental condition which is attributable to service. Further, there had been no assessment of Mr Kelly's mental condition at all, still less one where a degree of disablement had been assessed at 50 percent or more. In fairness to the tribunal, although SI 1994/772 appears as an appendix to the Opinion of the Medical Division (at page 95 in the bundle) it may be that its significance had not been emphasised at the hearing. Be that as it may, the decision makes no reference to it. But such an assessment is a pre-requisite to reliance upon an injury due to the consumption of alcohol and in the absence of the pre-requisite assessment upon the evidence before them and properly applying the law, no reasonable Tribunal could have allowed the appeal and held Mr Kelly was entitled to an award. Accordingly, Mr Kelly has not raised a reasonable doubt in his favour based on reliable evidence that his injury was attributable to or aggravated by service and this appeal is allowed.

In those circumstances it is not necessary for me to consider the further ground of appeal that the reasons given by the tribunal are inadequate. But the reasoning behind the passages from the decision cited is not entirely easy to follow and the I respectfully remind the Tribunal of what I said in The Secretary of State for Social Services v. Pansy Richards, Divisional Court Transcript of 5<sup>th</sup> July 1996.

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