

Before:

MR JUSTICE ALLIOTT

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THE SECRETARY OF STATE FOR SOCIAL SECURITY

-v-

ALAN MARSH

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**MR R JAY** (instructed by the Solicitor for the Department of Health and Social Security, London WC2A 2LS) appeared on behalf of the Applicant.

**MR R METHLIEN** (instructed by Messrs Vizards, London WC1R 4LL) appeared on behalf of the Respondent.

MR. JUSTICE ALLIOTT: This matter comes before me by leave of the President of the Pensions Appeal Tribunal dated 9th February 1996. The first five paragraphs of his reasons succinctly state the course the proceedings had taken:

- "1. The Respondent to this application, Mr Alan Marsh, served in the RAOC from 13.2.59 to 30.6.59 when he was discharged on medical grounds in consequence of traumatic left Amblyopia.
2. A claim for pension for injury left eye was rejected on 30.6.59.
3. On 12.2.94 the Respondent renewed his claim and appealed against the rejection.
4. His appeal was considered by a Pensions Appeal Tribunal on 11 May 1995 and was allowed. The Tribunal found that 'Injury to left eye' was attributable to service.
5. On 7 July 1995 the Secretary of State for Social Security applied for leave to appeal to the nominated Judge against the decision of the Pensions Appeal Tribunal of 11 May 1995."

The incident giving rise to the claim is described by Junior Private Passey to the Board of Inquiry investigating it thus:

"At Blackdown on Sunday 19 Apr 59 at approx 0930 hours I went for a walk in the woods adjacent to the Camp with J/Ptes HORTON, MARSH and BIDDLE. We had been walking through the woods and tank training area for about one hour when we came upon a track.

We thought that we could get into trouble by being out that morning and decided to play a joke on J/Ptes HORTON and BIDDLE by shouting out that two officers were coming down the track. Horton and Biddle ran to one side of the track and hid themselves. Marsh and I ran to the other side and hid in a patch of heather, with trees either side.

From this a game of 'hide and seek' developed. After some time Marsh and I started shouting and whistling to let the others know where we were. We saw Biddle and Horton approaching and ducked under cover again. At this stage Horton started firing the catapult in our direction. We then shouted 'stop firing we are coming out now' and we knelt up to show where we were. As we knelt up J/Pte Marsh was hit in the left eye by a stone. There was no further firing. Marsh shouted out, and after a while we gathered round to see what was the matter. When it was discovered that Marsh's eye was injured, we immediately made our way back to camp.

On return to camp J/Pte Marsh reported special sick".

The Tribunal gave its decision in the following terms:

"The Tribunal accepts the following material facts:

1. The appellant was a junior soldier aged 16 years at the time of the accident.
2. The appellant, with three other junior soldiers were excused Church Parade as they had recently been given inoculations.
3. The four junior soldiers went for recreation into the training area adjacent to the camp. They were not on duty.
4. In the training area the four junior soldiers played a game in which the appellant was injured in the eye by a missile fired from a catapult by one of the other junior soldiers.

The Tribunal, in making its decision, considered the following:

1. Although the junior soldiers were off duty, they were in a training area as a direct result of being in the army and it was normal practice for junior soldiers to walk in the area. They were actively encouraged to take their recreation in that area.
2. Although the junior soldiers were playing a game, the Tribunal takes note of their young age and that there was no supervision by the army authorities. The Tribunal considers that where there are junior soldiers who are well below the age of majority, the army is, in effect, acting in loco parentis.
3. Because the army is responsible for junior soldiers when off duty but within MOD property the Tribunal considers that this case is therefore distinguished from the cases of Richards and Horsfall which have been drawn to its attention by the Secretary of State.

The Tribunal finds that reliable evidence has been found to raise a reasonable doubt in favour of the appellant that his injury to Left Eye is attributable to service."

As I read those reasons, the Tribunal expressly distinguished the cases of Richards and Horsfall because of the age (16 or thereabouts) of the four boy soldiers in question. I infer that but for the distinction in age the Tribunal would have held applying Article 4, which it is common ground covers this case, that the Secretary of State had shown beyond a reasonable doubt that the requirements for an award are not fulfilled. The Secretary of State would have shown that the

injury were not "attributable to service" and that the claimant "was engaged on some personal enterprise of his own and that this accident did not occur in any way by reason of any duty or compulsion of service." (Richard's case).

The basis of the distinction drawn by the Tribunal is expressed as stemming from the fact that:

- (a) "there was no supervision";
- (b) "the Army is in effect acting in loco parentis;
- (c) "the Army is responsible for junior soldiers when off duty but within MOD property."

The second and third bases for distinction are, in effect, the same. Mr Jay, for the Secretary of State, comments that the principle is a novel one. Certainly there is no authority for the proposition, and significantly Mr Methuen, for the claimant, does not adopt it in his admirable skeleton argument. Mr Methuen emphasises the lack of supervision as being the key element in distinguishing Richards and Horsfall, and he casts doubt upon the former case by emphasising what Tucker J said in the latter.

I am not prepared to impugn in any way the test propounded by those cases which clearly have been accepted as the locus classicus upon the topic. The exceptional case of Hunt, to which Mr Methuen has referred me, does not in any way diminish the validity of the earlier judgments.

Mr Methuen in the course of the argument before me posed the question:

"Has it been established beyond reasonable doubt that the injury was not attributable to service, that there was no sufficient causal connection between injury and service?"

In my judgment the answer to those questions is "Yes". I find that the Tribunal were not entitled to conclude a reasonable doubt had been raised in the claimant's favour. The test whether the injury was attributable to the service is the same for a boy soldier as an adult soldier. The army was and is not obliged to supervise the off-duty recreational activities of boy soldiers. Had the injury occurred during, say, a tea break in the claimant's former occupation as stripper in the Drop Forging Industry his employers would not have been held liable.

Accordingly, I allow the Secretary of State's appeal.