

**HIGH COURT OF JUSTICE**

**KING'S BENCH DIVISION**

**(Denning, J.)**

**10th November, 1947**

**MARSHALL v. THE MINISTER OF PENSIONS**

-----  
**JUDGMENT**

MR. JUSTICE DENNING:- In this case George Victor Marshall served for six years, from September, 1939, to August, 1945. He was discharged in a Class A release, so there is no compelling presumption in his favour, but there is no onus on him. He claims a pension now for hernia. As to the left inguinal hernia, it is plain on the evidence that that was brought on by an accident which occurred in July, 1939, before his war service. It is not, therefore, attributable to war service. As to the right hernia, the position is that that arose after war service, but the Ministry of Pensions Medical Services Division rejected the claim and that was affirmed by the Tribunal. Apparently, the Medical Services Division based its opinion on this, that hernia is "an anatomical condition which arises in consequence of a developmental weakness of the musculature of the abdominal wall and inguinal. Whilst it is accepted that service conditions played their part in the worsening of the disability, the foregoing evidence makes it quite clear that the disability cannot be attributed to new war service". The Tribunal said that the right hernia was preceded by a cough which he had in service, and was not attributable to war service.

This case raises the question which is repeatedly arising at the present day, as to whether the disease was attributable to war service or only aggravated by it. I think it right to set out the relevant legal considerations.

The issue is important, not because it affects the amount of the pension, but because it may affect its duration. The amount of the pension does not depend on whether the disease is "attributable to" or "aggravated by" war service. It is the same amount in either case, because the amount depends only on the degree of disablement by the disease. The duration, may, however, be affected; because, if the disease existed before war service and is only "aggravated by" it, then, the pension continues only so long as it "remains aggravated thereby". If the aggravation passes away so that the man is no worse than he would have been apart from war service, the pension ceases even though some disablement may remain, because that disablement is not due to war service. In cases where the disease is "attributable to" war service, however, the pension continues so long as any disablement continues from the disease.

On this issue there are two questions which must be answered: first, when did the disease arise? Secondly, what were the causes of it arising? If the disease existed before war service, it cannot be attributable to war service, but may be aggravated by it. If it arose during war service, if war service was one of the causes of it arising, then, it is attributable to war service. But, if war service was not a cause of it arising, it cannot be attributable to war service but may be aggravated by it.

Upon the first question it is often difficult to say when a disease arises, especially in those diseases which are insidious in onset, such as osteoarthritis, or those which exist before symptoms appear, such as infectious diseases, or those which may lie dormant, such as duodenal ulcer. The usual question is whether the disease arose before war service. If the Minister asserts that it did, the burden is on him to prove it, but he may do so by inferences by X-rays or from pre-war symptoms or the like. He must, however, prove that the disease existed before war service as distinct from a susceptibility or predisposition to it. The distinction between the two is this: a disease is an injurious process (including an injurious condition or deformity) which will in its natural progress (unless resisted or cured) operate to cause illness or incapacity even though no other cause may operate; whereas, a susceptibility or predisposition contains only the potentiality of an injurious process and may never become injurious unless some other cause operates. Take an analogy. Iron is susceptible to rust, but the "disease" of rust only arises when, on exposure to damp, oxidation, sets in. So, also, certain persons may be predisposed to duodenal ulcer but the disease starts only when on exposure to stress or strain inflammation sets in which is the injurious process leading to ulceration.

If the injurious process exists before war service, the only question is one of aggravation, and that depends on whether the injurious process is accelerated or intensified by war service. If the injurious process arises during war service, the question of attributability depends on whether war service was one of the causes of its arising. Much confusion surrounded this question before the cases on causation. The medical men advising the Minister used to divide cases into two classes, on the one hand, predominant causes and on the other hand contributory causes. They used them to say that the disease was "attributable to" the predominant cause and "aggravated by" the contributory cause. This method of approach was especially noticeable in the predisposition cases. For instance, in hernia, when the predominant cause is the inherent weakness of the wall of the stomach and a contributory cause may be an injury in war service, they used to hold that the hernia was not attributable to war service, but was aggravated by it. The cases in the Court of Session and in this Court have amply shown that that approach is wrong. The task of the Minister and of the Tribunal is to ascertain what are the causes of the disease arising, not to assess their relative potency. If one of the causes is war service, the disease is attributable to war service, even though there may be other causes and, it may be, more powerful causes, operating, and to which it is also attributable.

There are parallels to be found in other branches of the law. Take manslaughter. I tried a case the other day of a man who hit another on the nose. The blow was not such as to do harm, to an ordinary individual, but, unknown to all concerned, this injured man had a septic antrum. He might have gone on for quite a long time - years - without it causing him much trouble, but the effect of the blow was to release the poison from the antrum into his system so that he died within a few days. One cause of his death, perhaps the most potent cause, was the septic antrum, but another cause was the unlawful blow. The man who struck him was found guilty of manslaughter because he caused the death. So, also, in the case of duodenal ulcer or hernia (in each of which inherent weakness or pre-disposition is a powerful cause) it has been held that conditions of employment may also be a cause entitling the man to pension or compensation as the case may be. See *Huddersfield Corporation v. Watson* (1947 K.B.D., p. 842 (duodenal ulcer)) and *Hughes v. Lancaster Steam Coal Collieries Ltd.* (1942, 2 All E.R., p. 556 (hernia)).

The essential matter, therefore, to justify attributability is that war service should be one of the causes of the disease. As I explained in *Chennell's case*, (1), however, it must be a cause, as distinct from being part of the circumstances in or on which the cause operates. Cases often occur when the disease would have arisen in any event, war service or no war service. In such cases it is not attributable to war service. They can be best illustrated by a metaphor. If a rope is weak and on that account breaks when it is carrying a normal load or a load less than a normal load, the cause of the break is not the load but the weakness of the rope. If, however, the rope is weak and breaks when carrying an abnormal load when it might have stood a normal load, there are two causes, one the weakness of the rope and the other the abnormally heavy load. The schizophrenia cases afford a good illustration. If schizophrenia arises in war service without any special stress or strain, it is not attributable to war service, but if there is severe war stress or strain immediately preceding the onset of symptoms, then it is. There are parallels in Workmen's Compensation Cases such as death in an epileptic fit in normal conditions - *Lander's Case* (102 Law Journal, King's Bench, p. 768) - and in abnormal conditions - *Wicks v. Dowell & Co. Ltd.* (1905, 2 K.B., p. 225) and *Wilson v. Chillerton* (1946, 1 K.B., p. 363).

If war service is a cause of the disease arising, in the sense I have mentioned, the disease is attributable to war service; but, if it is not a cause of it arising the only remaining question is one of aggravation, which depends on whether the injurious process is accelerated or intensified by war service. On all these questions, of course, the burden is upon the Minister to negative firstly, attributability, and secondly, aggravation.

Applying what I have said to the present case, it seems to me plain, that while one cause and, it may be, a predominant cause, of this right hernia was a weakness in the abdominal wall, nevertheless, another cause was the conditions in service which produced a cough and thereby led to the rupture of the stomach wall. This right hernia is, therefore, attributable to war service, and the appeal is allowed accordingly.