[2016] AACR 25

(Criminal Injuries Compensation Authority v First-tier Tribunal (SEC) and Clifford [2015] EWCA Civ 1329)

CA (Moore-Bick, Davis and Sharp LJJ) JR/615/2013
20 October 2015

Criminal injuries compensation – note 12 to 2008 Scheme – meaning of "necessitated at least two visits to or by a medical practitioner"

In July 2011 the claimant was assaulted receiving several blows to the head which caused scratches and bruising. He made a witness statement to the police but did not seek or receive any medical treatment for his injuries. In December 2011 the claimant applied to the Criminal Injuries Compensation Authority (CICA) for compensation under the Criminal Injuries Compensation Scheme 2008. Under note 12 to the Scheme applicants with minor multiple injuries only qualified for compensation if they had sustained at least three separate injuries, at least one of which had significant residual effects six weeks later, and where the injuries had necessitated at least two visits either to or by a medical practitioner within that six-week period. CICA refused his claim on the grounds that the claimant had not received any medical treatment, and that decision was upheld on review. The First-tier Tribunal (F-tT) struck out the claimant's appeal on the basis that he failed to meet the mandatory requirement for medical treatment. The claimant brought proceedings for judicial review in the Upper Tribunal (UT) arguing, for the first time, that as a result of the assault he had suffered brain damage and a further deterioration in his health (he had previously suffered a stroke in 2009). The UT set aside the F-tT's decision deciding (1) that the F-tT had failed to consider whether the claimant had suffered a brain injury or other condition as a result of the assault, and (2) that it had misinterpreted note 12. The UT held that the proper construction was that the injuries must be such that they warranted at least two visits either to or by a medical practitioner (not that such visits were actually made). CICA appealed against that decision and the issues before the Court of Appeal were the proper meaning of note 12 to the Scheme and whether the UT had been justified in setting aside the F-tT's decision.

Held, allowing the appeal and restoring the decision of the F-tT, that:

1. the words of note 12 should be given their ordinary meaning unless to do so gave rise to a senseless result. The clear wording of the note was that two actual attendances on or by a medical practitioner were required. The use of the word "necessitates" in the context of note 12 meant "makes necessary" and plainly connoted that attendance was required (not simply justified or warranted) and that there was some element of compulsion (not that attendance was simply appropriate). The meaning of the words were clear, gave rise to an eminently sensible and workable result and the UT had been wrong in its interpretation (paragraphs 36 to 32);

2. the UT had no basis for interfering with the F-tT's decision that the claimant's injuries, as recorded on the evidence, could not reach the minimum requirements under the Scheme. The F-tT had properly considered all the materials before it and was entitled to reach the conclusion that it did. There was no error of law (paragraphs 33 to 35).

DECISION OF THE COURT OF APPEAL

Mr Ben Collins of counsel, instructed by the Criminal Injuries Compensation Authority, appeared on behalf of the appellant.

The respondent did not appear and was not represented.

The interested party appeared in person.

JUDGMENT

LORD JUSTICE DAVIS:

1. As long ago as 31 July 2011 Mr Clifford was, and indisputably was, the victim of an assault causing him injury. In due course his assailant pleaded guilty in the Basildon Magistrates' Court to a count of common assault. He received a community sentence. In due course Mr Clifford submitted an application to the Criminal Injuries Compensation Authority. That was

struck out by the First-tier Tribunal, but on an application by Mr Clifford to the Upper Tribunal, by way of a judicial review claim, the Upper Tribunal set the decision of the First-tier Tribunal aside and directed a full oral hearing of the claim. The Criminal Injuries Compensation Authority now appeals with leave from that decision of the Upper Tribunal.

2. Two points are raised on this appeal. The first is whether, on their true interpretation, the relevant provisions of the Criminal Injuries Compensation Scheme (which I will call "the scheme") required that Mr Clifford had attended a general practitioner on at least two occasions by reason of his injuries, it being common ground that he had not attended a doctor at all for that purpose. The second is whether the Upper Tribunal was justified in also setting aside the decision of the First-tier Tribunal on the footing that there was an issue that Mr Clifford may have suffered brain injury or related injury as a result of the assault.

3. The Authority was represented before us by Mr Ben Collins of counsel, who did not appear below. Mr Clifford appeared before us in person. He presented his argument, if I may say so, with complete courtesy and moderation.

4. Mr Clifford was born on 10 September 1952. He has a congenital cleft palate which has caused him difficulties with articulation. In documentation placed before the tribunal, there was evidence that Mr Clifford had suffered a stroke, a cerebrovascular accident, in April 2009, with accompanying atrial fibrillation and expressive dysphasia. He also had an element of diabetes. He had at around that time been subjected to assessment by the DVLA for driving purposes accordingly. That was a matter of particular moment to Mr Clifford because, as we understand it, he was at that time in employment as a petrol [tanker] driver and had had his licence removed. An assessment for driving purposes made in November 2009 recorded, as Mr Clifford has stressed to us, that he was a very competent and skilful driver, able to concentrate fully and to remember directions. A medical assessment made in 2010 had stated that there was no evidence of any cognitive impairment and his mini mental score state was put at ten out of ten. Mr Clifford would seek to contrast those conclusions made at that time with what he says is his current mental state. It does however appear, as I would gather, that Mr Clifford did not succeed in regaining his lorry vehicle driver's licence.

5. So far as the assault incident was concerned, that occurred at a Tesco's car park in Thurrock at around 11.30 in the morning of 31 July 2011. Mr Clifford apparently had come across his stepbrother and his wife. Apparently there was some money due to Mr Clifford and there were words. All this resulted in his stepbrother most unpleasantly assaulting him, before a witness intervened.

6. When taken to the police station, Mr Clifford provided a witness statement. It was not thought necessary for him to receive medical treatment at the police station. Nor was he taken to hospital. He provided to the police a witness statement on that date, that is to say 31 July 2011, which was given at 4.58 in the afternoon. In that witness statement, he described in some detail what had happened that morning. He described, amongst other things, how his stepbrother had headbutted him with the hardest force in the middle of his forehead, then had punched him and connected with his left cheekbone, and then had hit him with an aluminium walking stick, as well as headbutting him three more times. Mr Clifford in his witness statement made on that date described his injuries as follows:

> "As I was walking back to Tesco I noticed that I was shaking a lot from the assault and I felt a lot of pain on my head and face. The assault has left me with the following injuries: I have a bump on my right cheekbone the size of a ten pence piece. I also have a very

> small scratch above my right eye. On my left nostril I have a scratch about one centimetre long. Also on my left jawline I have three separate scratches. The first is about two centimetres long, the second is about three centimetres long and the third is about four centimetres long. This incident happened during daylight on a clear day and as I mentioned earlier I was assaulted for about one minute."

He also went on to state that about two years ago he had suffered from a stroke which had resulted in certain side effects such as speech issues and that had not affected his statement.

7. In the subsequent written police report, it may be added, the observed injuries were described by the police as:

> "A bruise on his cheekbone and scratches on his neck."

Mr Clifford did not thereafter attend hospital or a doctor by reason of this assault.

8. On 29 December 2011, he made an application for compensation under the scheme. The provisions and procedures relevant to the operation of the scheme are contained in the version of the Criminal Injuries Compensation Scheme issued in 2008. It amongst other things permits compensation to be paid to a person who has sustained what is called a criminal injury on or after 1 August 1964 attributable to a crime of violence, subject to the exceptions there provided. Paragraphs 19 and 20 of the scheme stipulate that it is for the applicant to make out his or her case and to the civil standard. Paragraph 25 of the scheme is in these terms:

> "25. The injury, or any acceleration or exacerbation of a pre-existing condition, must be sufficiently serious to qualify for compensation equal at least to the minimum award under this Scheme in accordance with paragraph 26 ...
>
> 26. The standard amount of compensation will be the amount shown in respect of the relevant description of injury in the Tariff ... Level 1 represents the minimum award under this Scheme ... Where the injury has the effect of accelerating or exacerbating a pre-existing condition, the compensation awarded will reflect only the degree of acceleration or exacerbation."

The minimum award is Level 1, which is set at £1,000.

9. In addition, there are notes to the operation of the scheme. Of central importance to aspects of the arguments before us this morning is note 12. That reads as follows:

> "Minor multiple physical injuries will qualify for compensation only where the applicant has sustained at least three separate physical injuries of the type illustrated below, at least one of which must still have had significant residual effects six weeks after the incident. The injuries must also have necessitated at least two visits to or by a medical practitioner within that six-week period. Examples of qualifying injuries are:
>
> (a) grazing, cuts, lacerations (no permanent scarring)
>
> (b) severe and widespread bruising
>
> (c) severe soft tissue injury (no permanent disability)
>
> (d) black eye(s)

(e) bloody nose

(f) hair pulled from scalp

(g) loss of fingernail."

10. In his written application form made in December 2011 to the Authority, under the heading "Injuries", Mr Clifford had filled in a box indicating that he had not had any treatment for his injuries and also said that he was not still receiving treatment for his injuries. In answer to certain other standard questions on the questionnaire were these answers:

> "(b) Please list the physical and/or mental injuries you were treated for as a result of the incident. This only needs to be a brief description.
>
> [Answer:] Due to my physical problems -- ie cleft palate, stroke and heart problems, did not want to go to hospital due to embarrassment and speech impairment.
>
> (c) please list your current symptoms, if any, including any permanent scarring or deformity.
>
> [Answer:] None."

As to medical details, when asked whether he had attended accident and emergency, the answer was:

> "No, due to embarrassment."

11. The application to the Authority was refused by decision of 23 May 2012. By that stage the Authority had made its own inquiries. The decision of the Authority was communicated in these terms:

> "The evidence that we have about your injuries shows that, though distressing, they were not serious enough for you to seek medical treatment. I note that you have told us you were too embarrassed to attend the hospital on the date of the incident, however, your GP has no record of you attending for your injuries. There is consequently no medical evidence to confirm the nature of the injuries you suffered in the incident nor that they justify at least an award at the lowest level in the tariff of injuries. In the circumstances I am unable to make an award of compensation."

12. The reference in that decision letter to the general practitioner of Mr Clifford is explained by a response from that practitioner to the Authority dated 21 March 2012, the Authority having approached the doctor for that purpose. In the course of that response from Mr Clifford's general practitioner, this, amongst other things, is said. First it is noted that he had not attended at the surgery or accident and emergency for treatment as a result of the assault. Then it is said:

> "He did not report about this assault to this surgery. I have no records of him attending A&E either."

Then at the end of the questionnaire from the Authority to the doctor there was this question:

> "We understand that the applicant is being treated for heart related problems since the incident. Please could you confirm the nature of this condition."

The doctor's answer was:

> "He has atrial fibrillation, has had a stroke as well. He is diabetic as well."

Then the question:

> "Is the condition directly attributable to the incident?"

The answer, unequivocally, was "No". Then the question:

> "Has the incident exacerbated a preexisting condition? If so, could you estimate in percentage terms how much it has exacerbated the condition?"

The doctor's answer was:

> "Difficult to comment because he did not consult the doctors about this assault. He told me over the phone today [that is, 21 March 2012] that he went to police station and they took pictures and these photographs show the extent of the injuries."

13. We should add that it is quite clear from the materials lodged that the references to atrial fibrillation, the stroke and the diabetes, and indeed other references to compressive dysphasia, relate to conditions existing after the stroke in 2009, as is borne out by the documentation in the bundle before us. It also appears that on 23 April 2012 Mr Clifford obtained what is apparently styled a fit note relating to his work, where he was certified as not being fit for work by reason of diabetes, atrial fibrillation and cerebrovascular accident and expressive dysphasia: these all being matters which had pre-dated the assault.

14. Mr Clifford was dissatisfied at the decision of the Authority and applied for a review. He stressed that he had been repeatedly hit on the face, headbutted and hit with a walking stick. At this stage, as before, he made no reference to having suffered any brain injury. He also again referred to having been too embarrassed to report the matters to doctors at the time because of his speech impediment and also because he had suffered a stroke. However, on 20 June 2012, the review decision was promulgated and was adverse to him.

15. Mr Clifford then proceeded to appeal on 24 July 2012 to the First-tier Tribunal. In the course of that application, he again referred to the details of the incident. He made no reference to having suffered any brain injury or related injury as a result of the assault.

16. The matter was first considered on the papers by the First-tier Tribunal Judge, Judge Mildred. Having considered the papers, he gave directions permitting Mr Clifford to make representations as to why the appeal should not be struck out under rule 8 of the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 (SI 2008/2685). The judge had noted, amongst other things, that under the provisions of the scheme injuries must be sufficiently serious such as to attract at least a minimum award at Level 1 of £1,000. In the course of his initial comments, the judge had said this:

> "6. The only relevant evidence relating to injuries in the documents in relation to this application and appeal is in the police report describing a bruise on the cheek and scratches on the neck. The driving ability assessment sent by the appellant only deals with his preexisting health problems and not with this assault.
>
> 7. The only conceivable award under the scheme would be for minor multiple physical

> injuries but this requires one injury to have effects after six weeks and two consultations with a doctor. I understand that the appellant chose not to see a doctor owing to embarrassment because of his speech impediment (and sympathise with his preexisting health condition) but seeing a doctor twice is a mandatory requirement of the scheme.
>
> 8. On the basis of this evidence, I fail to see how the appellant has any reasonable prospect of establishing that the injuries sustained in this incident are sufficiently serious to qualify for compensation equal at least to the minimum award under the scheme."

17. Mr Clifford had been invited to put in representations in response to this preliminary ruling of the judge. He put in no such representations, and in the result the judge proceeded on 3 December 2012 to strike out the appeal.

18. Matters did not end there, however, because Mr Clifford then issued a judicial review claim in the Upper Tribunal on 30 January 2013. In the course of his statement of grounds and facts for the purposes of that claim form, Mr Clifford (and for the first time before any tribunal) stated that he had suffered brain damage as a result of the assault. Permission to apply for judicial review was refused by Upper Tribunal Judge Pacey on 7 May 2013, that judge taking the view that there was no reasonable basis for saying that the First-tier Tribunal's decision was based on any misapplication of the relevant provisions or that the decision on the totality of the evidence was perverse.

19. There was then an oral hearing before Upper Tribunal Judge Gray on 23 October 2013. Mr Clifford attended. Amongst other things, he now said that his reason for not having gone to hospital was because he had been concerned about the position relating to his getting his driving licence. He also apparently said to the Upper Tribunal judge that his health had deteriorated since the assault, and he attributed that to the assault.

20. In the result, permission to apply for judicial review was granted by Upper Tribunal Judge Gray. In the course of granting that permission, the Upper Tribunal judge had said this:

> "The applicant says that his health has deteriorated, and he puts that down to the assault, during which he was beaten around the head. This has been his position in letters to the Authority and to the FTT."

That unfortunately was a mistake. Mr Clifford had never previously stated that as his position, either in letters to the Authority or in statements to the First-tier Tribunal. The judge, however, considered that this was a matter which needed exploring.

21. In the event, the full hearing was also before Upper Tribunal Judge Gray. She gave a full written decision dated 15 April 2014. She decided that the decision by the First-tier Tribunal judge to strike out the claim had been unreasonable. She set that decision aside and remitted the matter for rehearing. This was essentially done on two bases. The first can be explained by what the judge said in paragraphs 18 to 20 of her determination, which were as follows:

> "18. The applicant explained in his initial application that his health had deteriorated markedly consequential upon the assault; he had become entitled to employment and support allowance and a disability allowance. These matters and the post-assault mention of expressive dysphasia should have alerted an inquisitorial tribunal that there was a question of whether the appellant had a brain injury or other condition, and if so, whether it was referable to the incident in which (he has said throughout) he was head-butted on a

number of occasions and hit over the head with a walking stick.

19. If a brain injury can be attributed to the assault, the matter would fall to be considered at a higher level on the tariff than the minor multiple injury level, which was the only tariff category considered by the Authority or the FTT to be relevant.

20. The failure to consider that possibility, which presented itself on the evidence, was an error of law, and for that reason I quash the decision."

22. The Upper Tribunal judge also disagreed with the First Tier Tribunal's approach to the meaning and effect of note 12, relating to minor injury claims. As to that, the Upper Tribunal judge expressed this view:

"28. I disagree that this is the natural meaning of the word '*necessitates*', nor that it is the meaning within the context of note 12.

29. Were it to be correct it would lead to anomalies and potential unfairness. As an example someone knowledgeable about the scheme and with relatively minor injuries may wish to preserve their position regarding a claim by consulting a medical practitioner, whereas someone without that knowledge or a more stoic person would not think to do so. Looking at some of the examples of injuries given, to seek medical advice would not be an obvious course of action; in particular cuts and grazing, a bloody nose with no concern as to a break or a black eye would normally require no more than a cold compress and some disinfectant. It could not be said that those types of injuries 'necessitate' seeing a medical practitioner at all, let alone on two occasions over a period of six weeks. It seems to me that where medical treatment was sought, an evaluation needs to be made as to whether the injuries 'necessitated' that treatment, that is to say whether the seeking of treatment was warranted. Accordingly I disagree with the interpretation of the FTT in this case.

30. The proper approach to the sentence '*the injury must also have necessitated at least two visits to or by a medical practitioner within that six week period*', when read in context with the rest of the note is that the injuries must be such that the *tribunal* would judge them to have necessitated at least two visits to or by a medical practitioner in the six weeks following their being inflicted. The tribunal is comprised of a judge and a medical member. The medical expertise of that tribunal will enable it to make that judgement. Actual contact with a medical professional on two occasions during the six-week period is not a prerequisite. This is the approach that the FTT hearing the case should adopt if the question of a possible award for minor multiple injuries needs to be considered."

23. On this appeal, Mr Collins has argued the note 12 point first. He submitted that the Upper Tribunal judge's interpretation of note 12 was untenable, involving in effect a rewriting of the clear words used in order to meet certain anomalies which the Upper Tribunal judge had sought to identify but which Mr Collins said were unreal in practice. He further submitted that the natural meaning of the wording as used was also the sensible one. There was the clearest possible statutory purpose in requiring actual attendance on a doctor, both in order to limit spurious claims and to ensure that claims provided the necessary verification so as to meet the minimum level required: thereby enabling the appropriate scrutiny to be given to such claims by those administering the scheme.

24. Mr Clifford in his address to us in effect, I think, submitted that the Upper Tribunal judge was justified in approaching the matters as she had. Mr Clifford was very anxious to impress upon us, and perhaps understandably so, the difficulties he has found himself in because he is no longer able to work as a lorry driver.

25. Mr Collins did seek to cite to us a number of legal authorities on the applicable principles of interpretation, but I see no need to refer to them. As I see it, the words used in note 12 should be given their ordinary meaning unless such to do so gives rise to a senseless result, requiring in consequence some other interpretation.

26. In my view, agreeing with the First-tier Tribunal judge and disagreeing with the Upper Tribunal judge, the wording of note 12 is indeed clear. At least two actual attendances on or by a medical practitioner are required. "Necessitates" in this context means "makes necessary". It plainly connotes that attendance is required and not simply justified or warranted. The word "necessitates" naturally connotes some element of compulsion, and not simply whether attendance on a doctor can be said simply to be appropriate.

27. If, for example, I were to say to someone, "My headaches were so bad last week that they made it necessary for me to see a doctor", I am plainly conveying the meaning, and would be understood to have meant, that I had actually seen a doctor because of the headaches. In my view, that is the meaning here to be ascribed to the word "necessitates". It has the further linguistic support of the mandatory wording accompanying that word, namely "must have" and "at least"; and perhaps also some further linguistic support from the references to visits to or by a medical practitioner, consistent with an evidential requirement, that is to say actual attendance.

28. Such an interpretation, in my view, also makes entire sense on perceived policy grounds. This note is setting a threshold to enable such a claim to be readily verified in order to assess whether it can achieve the minimum level. If it were otherwise, the means of verification would simply not be there at the outset.

29. The Upper Tribunal judge's interpretation, on the other hand, would raise many potential difficulties and give rise to real uncertainty as to working out the assessment process. Indeed, if the matter were to end up in front of a tribunal, even a tribunal including a medical member, how would that tribunal make the relevant assessment months after the event without contemporaneous medical records? It would in truth be a most difficult task, and not one that could satisfactorily be undertaken simply on an applicant's say so.

30. Just possibly one could envisage some anomalies arising from this particular interpretation. But essentially they would have to be pretty far-fetched in order to frustrate an otherwise legitimate claim. For example, so far as children are concerned, different provisions are capable of applying, as pointed out by the Upper Tribunal in the case of *R (LM) v First-tier Tribunal (CIC)* [2011] UKUT 179 (AAC) at [20]. Moreover, the concerns given by the Upper Tribunal judge seem to me to be, with respect, misstated. If someone is stoical enough, having suffered injuries of such a kind, not to go to his or her doctor, then that of itself would provide evidence that such a visit had not been necessitated.

31. As to the other example given by the Upper Tribunal judge of the potentially undeserving complainant who is canny enough to ensure that he or she sees a medical practitioner in the six-week period, that in itself is nothing to the point. Merely going to see a doctor at least twice in the six-week period will not prove the claim. On the contrary, the notes of such visits will be there to be assessed by those administering the scheme, and in any event it must not be forgotten

that in addition there must be significant residual effects from one of such injuries after the six-week period identified.

32. Accordingly, as I see it, the meaning of the words here used is clear. That meaning gives rise to an eminently sensible and workable result. Accordingly in my view the Upper Tribunal judge was wrong in her interpretation of that note.

33. Turning to the other ground advanced, I have to say that I am extremely puzzled as to the basis upon which the Upper Tribunal judge, on a judicial review application, felt enabled to quash the decision of the First-tier Tribunal as she did. The First-tier Tribunal had appraised all the evidence. Looking at it as a whole, he decided that Mr Clifford's appeal could not possibly succeed. There simply was no evidence before the First-tier Tribunal that there had been any brain injury suffered by Mr Clifford as a consequence of the assault. It was quite wrong, in my view, for the Upper Tribunal judge in effect to say that there had been an oversight in that regard by the First-tier Tribunal, and that a material matter had been left out of account. No such material matter had been left out of account, just because such matter had not been in evidence before the First-tier Tribunal in the first place. As I have indicated, the first time in which a suggestion of brain injury caused by the assault was raised by Mr Clifford was in his application for judicial review itself; and that was not in itself sufficient for the Upper Tribunal judge to quash the previous decision of the First-tier Tribunal.

34. In any event, and even though I am quite sure that Mr Clifford himself personally feels that his condition has been exacerbated by the assault, he simply has produced no medical evidence of any kind to support the proposition. In effect, it rests on his own unverified assertions. Nothing in the papers indicates any medical opinion that he has suffered some brain injury or related injury as a consequence of the assault. On the contrary, at the very highest, when the general practitioner had been asked to say whether any pre-existing medical conditions had been exacerbated by the assault, the most the doctor could say was "difficult to comment", stressing that there had been no attendance on the doctor. Such materials simply could not enable Mr Clifford as appellant to discharge the burden of proof resting upon him. It seems to me that if one stands back and looks at the evidence as a whole, the First-tier Tribunal judge was eminently justified in deciding that these injuries, as recorded on the evidence, could not reach the minimum Level 1 requirements set by the rules.

35. Accordingly, I take the view that the Upper Tribunal judge had no basis for interfering with the decision of the First-tier Tribunal on this particular ground either. The First-tier Tribunal judge had properly considered all the materials before the First-tier Tribunal and was entitled to reach the conclusion that he did. There was no error of law.

36. I should perhaps just add that Mr Clifford clearly has been concerned, and still is, that people may not perhaps have taken sufficiently seriously the fact that he was the subject of a serious assault and do not sufficiently acknowledge that he has been the victim of a crime. He should rest assured that he undoubtedly was the victim of a serious and unpleasant assault, and he was indeed a victim of crime. The point remains that the scheme has set certain minimum requirements before compensation can be payable, and on the evidence he has not been able to show that he would reach that minimum level.

37. Accordingly I would for my part allow the appeal on both grounds advanced. I would set aside the decision of the Upper Tribunal and would restore the decision of the First-tier Tribunal.

LADY JUSTICE SHARP:

38. I agree.

LORD JUSTICE MOORE-BICK:

39. I also agree.