[1944] 1 All ER 110

Richardson v Redpath Brown & Co Ltd

HOUSE OF LORDS

VISCOUNT SIMON LC, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN AND LORD WRIGHT

Gilbert Paull KC and J H Goldie for the appellant.
G J Lynskey KC and W H Duckworth for the respondents.

15 December 1943. The following opinions were delivered.

VISCOUNT SIMON LC.

My Lords, in April 1937, the appellant, Simeon Richardson (whom I will call the workman) met with an accident arising out of and in the course of his employment as a steel erector by the respondents (whom I will call the employers), which resulted in a rupture, in consequence of which he received, by agreement with his employers, weekly payments on the basis of total incapacity. This agreement was recorded in the ordinary way in the county court. In June 1937, the workman was operated upon for the hernia, but this operation did not effect a complete cure and when, in May 1938, the employers applied for a review or termination of the weekly payments, alleging the workman's partial recovery and ability to resume work, the application failed. In December 1941, the employers again applied for a review of the weekly payment, and the material ground of this claim was that the workman's continuing incapacity was due to his unreasonable refusal to submit to suitable medical treatment, namely, a further surgical operation for the radical cure of the hernia. The matter came before Sir Gerald Hurst KC, the judge of the Westminster County Court, who heard the case on 27 February 1942, with the assistance of Dr Brend, the well-known specialist in nervous diseases, as his medical assessor. The arbitrator decided in the employers' favour; the Court of Appeal agreed, and the workman appeals to this House.

The employers, upon whom rested the burden of proving the workman's unreasonable refusal, called as witnesses three doctors who expressed the view that the operation was advisable and should be successful. The workman gave evidence that he was prepared to take medical advice, but that he was advised that he should not undergo such an operation. The arbitrator in his judgment ways that he did not accept the workman's assertion that he had previously been so advised by a doctor whom he named but who was not available as a witness since he was in the army, but two other medical men of high standing were called as witnesses to support the workman's case. They stated that they were definitely against such an operation which they thought would be positively injurious to the man's nervous condition. The previous operation on the workman for this same hernia, instead of making him a fit man, had, according to them, induced a condition of neurosis which, in the view of these two doctors (both of whom had also examined him before the first application), had persisted and was likely to be further

aggravated if a second operation were now attempted.

This concluded the evidence and counsel for the workman began his final speech by arguing that, in view of the failure of the first operation to produce a cure and of the nervous disturbance which resulted from it, the workman was not acting unreasonably if, even apart from any advice, he refused to be operated upon for the second time; and, further, that, in view of the advice now given against the operation by the two specialists, the court had no material before it which could justify the view that the man was acting unreasonably. At this point the arbitrator stopped the workman's counsel and called on counsel for the employers. During the latter's speech the arbitrator intimated that the medical assessor would like to examine the workman and this examination took place in private out of court. We have no information as to what passed between the workman and Dr Brend, but, upon the resumption of the hearing, the arbitrator intimated that the medical assessor's view was in favour of the proposed operation. After further argument from counsel on both sides, the arbitrator gave judgment saying that he had had the advantage of Dr Brend's advice and that he accepted and adopted his conclusions, which he recounted at some length, and which included the view that it was impossible to link up the alleged neurosis either with the accident or with the operation. As the two medical witnesses who had given evidence for the workman had both seen him shortly after the previous operation and both definitely attributed his neurosis to that operation, whereas Dr Brend had never examined the man before, this is a somewhat striking contrast in opinion. The arbitrator went on to say:

> 'The advice of Dr. Brend is that he should have the operation … I think I am entitled to rely upon the advice of the medical assessor. He takes the view that the operation would have no effect upon his condition at all. The operation is not dangerous and I hold it as unreasonable for the workman to refuse to undergo it.'

[1944] 1 All ER 110 at 112

Accordingly, the arbitrator awarded that all payments by way of compensation under the Workmen's Compensation Act should be suspended, with consequential provision for what was to happen if, after such an operation, the workman was still incapacitated.

The workman appealed to the Court of Appeal, and the court (MacKinnon LJ, Lord Clauson, and Goddard LJ) dismissed the appeal. In the leading judgment MacKinnon LJ described the issue between the parties as involving two questions, first:

> 'Whether the proposed operation would remove the man's inability to work and restore him to the condition of a fit man able to earn his living …'

And the second, whether the workman had unreasonably refused to undergo that operation. The first of these two questions does not seem to be quite accurately phrased, for there may be operations which it would be wise for a person to undergo if the success of the operation was probable, even though it was not certain. But the more material question in this case is that of unreasonable refusal. MacKinnon LJ correctly states that this question:

> '… was not a medical one but one purely for the county court judge to decide on the evidence called before him whether the man had unreasonably refused to undergo that operation …'

In arguing this question out, in order to reach his own conclusion, MacKinnon LJ appears to depart from this view of the matter and to treat the question as though it were whether the reason advanced by the specialists against submitting to the operation was a good and sufficient reason. The reason, he says "was wholly based upon the likelihood of its increasing or continuing his neurotic or hysterical symptoms," and he treats the issue as depending on the validity of this medical view, instead of keeping to the question he had already formulated, viz, whether the workman was unreasonable in refusing to be operated upon. The material question, as this House recently pointed out in Steele v Robert George & Co, is not whether the medical advice given to the workman against an operation is more soundly based than advice in favour of it, but whether the workman who refuses to be operated upon is acting reasonably in view of the advice he has received.

The decision of the arbitrator makes it clear that he based his conclusion mainly upon the advice of his medical assessor, and the medical assessor derived his view from an interview with, and presumably an examination of, the workman. If it had not been for the medical assessor's examination, the arbitrator was apparently prepared to decide in favour of the workman—at any rate he had stopped the argument of the workman's counsel. There is thus raised the exceedingly important question of the proper function and powers of the medical assessor in workmen's compensation cases, and as to this the House must express its conclusion, which will, of course, have an application to many other cases in the future as well as to the present one.

It is necessary to draw a clear distinction between the functions under the Workmen's Compensation Acts of a medical referee and of a medical assessor. Medical referees are appointed by the Home Secretary under s 38 of the Act of 1925. The statute lays upon them various duties. Under s 16 a medical referee may in certain circumstances be called on to certify that the incapacity of a workman who is receiving weekly payments is likely to be of a permanent nature. Under s 19, a medical referee may be called on to give a certificate as to the condition of a workman and as to his fitness for employment in cases where the previous report of a medical practitioner is not accepted by both sides. The certificate in both these cases is conclusive evidence as to the matters so certified. Under s 23(3)(b), a report may in certain events be required from a medical referee as to the workman's condition. Under s 43(1)(f), a medical referee may be called on to give a decision (which will be final) where the employer or the workman is aggrieved by the action of a certifying surgeon in connection with a certification that the workman is, or is not, suffering from an industrial disease which results in his disablement. And, lastly, under Sched I, para 11, to the Act:

> 'Any committee, arbitrator or judge may, subject to regulations made by the Secretary of State and the Treasury, submit to a medical referee for report any matter which seems material to any question arising in the arbitration.'

Two things are particularly to be noted in connection with the above list of duties laid on medical referees. In every case the statute, or a regulation made under it, requires the workman to submit himself for examination by the medical referee. And in every case the medical referee after such examination makes a written report or certificate embodying his conclusion. In some cases it is especially provided, and in every case it is plainly implied, that the contents of the report or certificate will be open for the purpose of examination by the parties. Where the report of a medical referee is made under para 11 of Sched I, the reference to him can only be made after all the medical evidence has been taken (see Regulations as to Medical Referees 1932, para 36), and it has been held that his report on the case submitted is not to be taken as final and conclusive, but is to be considered along with other evidence before the tribunal: Dowds v Bennie; Johnstone v Cochrane. The parties, therefore, in all these cases know what is the question which the medical referee has been asked and precisely how he has replied.

Contrast with this the position of the parties in such a case as the present, where the medical assessor is given no statutory authority to examine the workman and is under no obligation to disclose his opinion after such examination to anyone but the arbitrator. It is true that a medical assessor, when he sits with an arbitrator under Sched I, para 5, is himself necessarily one of the panel of medical referees, but that circumstance cannot in itself impose upon the workman an obligation to submit himself for examination by the assessor, and cannot constitute the assessor, however eminent, a sort of unsworn witness who cannot be cross-examined, and whose testimony may be conveyed to the arbitrator in a whisper, or at any rate need not be fully stated to the parties. I am not impressed with the consideration that the workman in the present case did not object to being examined by the medical assessor; his counsel may well have felt that his case might be seriously prejudiced if he did object. In my opinion, the view of the medical assessor, based on his private examination of the workman, was improperly introduced into the case, and inasmuch as the arbitrator avows that his decision is based upon the medical assessor's advice, the decision cannot stand.

My Lords, I am aware that, if your Lordships accept the view which I have presented in this opinion, the House will be condemning a practice which we are told has of recent years become almost universal in county courts when dealing with workmen's compensation cases involving a medical question. We are told that in such cases it is quite common for the medical assessor to make an examination of the workman and to report his opinion to the arbitrator. But to treat a medical assessor, or indeed any assessor, as though he were an unsworn witness in the special confidence of the arbitrator whose testimony cannot be challenged by cross-examination and perhaps cannot be even fully appreciated by the parties until judgment is given, is to misunderstand what the true functions of an assessor are. He is an expert available for the arbitrator to consult if the arbitrator requires assistance in understanding the effect and meaning of technical evidence. He may, in proper cases, suggest to the arbitrator questions which the arbitrator himself might put to an expert witness with a view to testing the witness's view or to make plain his meaning. The arbitrator may consult him in case of need as to the proper technical inferences to be drawn from proved facts, or to the extent of the difference between apparently contradictory conclusions in the expert field. In Hall v British Oil and Cake Mills, Scrutton LJ, in several passages of his judgment, treats a medical assessor's answers to the judge's inquiries as “evidence,” and even speaks without objection of a medical assessor or a nautical assessor giving

“evidence of facts.” But I cannot agree that this is within the scope of an assessor's legitimate contribution. Lord Loreburn's judgment in Woods v Thomas Wilson, at p 292, puts the medical assessor's functions as high as they can properly be put. Lord Parmoor in that case, at p 311, aptly defines the medical assessor's function as being:

> '… not to supply evidence but to help the judge or arbitrator to understand medical evidence.'

Lord Parker concurred in this view. It would seem desirable in cases where the assessor's advice, within its proper limits, is likely to affect the arbitrator's conclusion, for the latter to inform the parties before him what is

[1944] 1 All ER 110 at 114

the advice which he has received. But I propose that the House should definitely lay it down that it is not part of the functions of a medical assessor as such to conduct a personal examination of the workman or to report the effect of the examination and his deductions from it to the arbitrator.

If, as will sometimes be the case, the arbitrator finds himself faced with a difficult decision in view of the conflict of medical testimony before him, he has the power, under Sched I, para 11, at the end of the medical evidence, to submit the medical issue, duly defined, to a medical referee. And inasmuch as the medical assessor is on the panel of medical referees, there may be cases in which it would be convenient and proper for the arbitrator to choose his medical assessor for the purpose. This will involve an adjournment. But it will also involve that the workman is under an obligation to submit to examination; that the reference will define the question upon which a report is required, and will include a statement of the medical evidence that has been given (see Form Q in the schedule to the Regulations); and that the report will be in writing and will be available to the parties as part of the materials on which the final arguments and the ultimate decision will be based. Such a report will not, of course, expose the medical referee to cross-examination.

We have been referred to the decision of the Court of Appeal in Smith v Foster, but the proposition deduced from that decision that the medical assessor may examine the workman and communicate his opinion privately to the judge is wrong and must be overruled.

In Lane v Leitch the Irish Court of Appeal refused to interfere where the medical assessor had examined the applicant in the presence of the doctors who had given evidence on either side, but the court pronounced no opinion upon the right of the medical assessor to make an examination and based its conclusion on the ground that there was other evidence to support the view taken, and that no protest had been raised. I think, however, that the real ground of objection, viz, that the medical assessor is unsworn and cannot be cross-examined, applies in this instance also.

If the only error in dealing with this case was the examination of the workman by the medical assessor and the reliance placed by the arbitrator on the opinion derived from that examination, the proper procedure would be to refer the case back to the arbitrator for a rehearing based on none but proper materials. But there is a further point taken on

behalf of the workman which enables the House to dispose of the appeal finally. Even if the medical assessor's opinion were to be included in the matters which the arbitrator had to weigh, there was really nothing before the arbitrator which could support his conclusion that the workman unreasonably refused to undergo the second operation. As I have already pointed out in this opinion, and as has been laid down in this House before, the question whether a workman is unreasonable in refusing to undergo a surgical operation is not to be determined by considering whether the best medical opinion would think such an operation advisable or safe, but by judging whether it is proved that the workman, having regard to all the circumstances (including medical advice offered to him against the operation) was unreasonable in so refusing. I venture to quote a sentence of my own in Steele's case, at p 500 ([1942] 1 All ER at p 449):

> 'It may in some cases be quite reasonable for a man to decide not to undergo an operation if his own doctors advise him against it, for it is the conclusion reached by his doctor which governs his decision much more than the logic by which his doctor has reached the conclusion.'

It is true, of course, that the question to be answered is a question of fact to be decided by the arbitrator on the facts and on the evidence; but in the present case the arbitrator appears to me to have misdirected himself as to what the question of fact is and as to what are the materials relevant to decide it; and, with all respect to the Court of Appeal, a similar misconception also appears in their judgments. There was in fact no evidence sufficient to prove that the workman had unreasonably refused to be operated upon, and inasmuch as the burden of proving his unreasonableness lay on the employers, the workman must succeed.

I move that the appeal be allowed with costs here and below. An award should be made dismissing with costs the employers' application to review.

[1944] 1 All ER 110 at 115

LORD THANKERTON.

My Lords, the opinion just expressed by Viscount Simon LC so exactly represents the opinion held by myself that I find it unnecessary to add anything.

LORD RUSSELL OF KILLOWEN.

My Lords, in my opinion the arbitrator erred in two respects. In the first place, he has allowed himself to be influenced by an alleged fact not proved by the evidence given before him on oath, but apparently imparted to him by the medical assessor as a result of his private interview with the workman. The alleged fact to which I refer is (to quote the judgment) “the fact that the respondent has suffered from the bombing due to the war both in London and in Watford.” There is no record in the arbitrator's notes of the evidence of any reference to bombing. It is said that a note of the workman's evidence in chief taken by the solicitor for the employers contains a passage to the following effect: “I have been in Watford two years having had to leave my other house as result of bombing.” But this passage, even if proper for our consideration, indicates no bombing at Watford, and was not, apparently, of sufficient importance to deserve a place in the

notes of the arbitrator, or indeed in the notes of the counsel representing the employers. It is only after the assessor had returned from his interview with the workman, and the arbitrator had intimated the assessor's opinion, that any reference to bombing, or fear of bombing, or to the fact of bombing at Watford, appears in the arbitrator's notes of counsel's arguments. To me the inference is irresistible, that this alleged fact rests, and rests only, on a statement by the assessor to the arbitrator. That it influenced the arbitrator in adopting the assessor's view is, in my opinion, evident from the words which follow immediately after the passage which I have already cited from the arbitrator's judgment. They run thus:

> '… and the view he takes is that this disposition of the respondent [i.e., what the arbitrator had already described as the workman's nervous disposition] would have taken the same course even if the minor rupture now present had not taken place at all. He also draws attention to the fear of going into hospital … It is impossible to link up the alleged neurosis or the nervous temperament either with the accident or the operation.'

As I read the judgment on this point, it is based on the view that the alleged neurosis or the nervous temperament is to be linked up, not with the accident or the operation, but with the bombing of which the assessor has informed the arbitrator.

The second respect in which I think the arbitrator has erred is in holding that the workman was unreasonable in refusing to undergo a second operation. It is true that this is a question of fact upon which the finding of an arbitrator is conclusive unless in considering it he has misdirected himself, or unless there is no evidence to support the finding. In this case the arbitrator has misdirected himself. Having posed the question which he ought to answer, he has directed his mind in answering it to a different question. The question which he had to answer was whether on the evidence the employers (who were asking for a review on the ground of unreasonable refusal) had discharged the onus which lay on them of proving that this workman was unreasonable in refusing to undergo an operation. As I read the judgment it is merely a statement that the assessor advises that the workman should have an operation, that the operation is not dangerous and that it would have no effect on the nervous condition; and further that he, the arbitrator accepts this advice of the assessor. The arbitrator says that he takes:

> '… the view that the operation would have no effect upon the condition at all. The operation is not dangerous, and I hold it is unreasonable for the workman to refuse to undergo it.'

There is here no consideration of the question whether, notwithstanding the advice alleged to have been given by the panel doctor, and notwithstanding the advice contained in the evidence of the two distinguished experts called on behalf of the workman, it was nevertheless upon the facts of this case unreasonable in this workman to refuse to undergo the operation. The only question considered was the correctness of the rival medical views, and the only foundation for the answer of unreasonableness was the opinion of the arbitrator (founded upon the advice of the assessor) that the advice given on the side of the employers was right and that given on the side of the workman erroneous.

My Lords, it was for the employers when they made this application to prove

[1944] 1 All ER 110 at 116

their case. The onus was on them, and in view of the evidence of Dr Drought and Sir Ambrose Woodall the burden was a very heavy one. It is sufficient to say that they fell a very long way short of discharging it; and, if the arbitrator had directed himself to the consideration of the real question which he had to answer, he must have so found.

For these reasons I would allow the appeal, and since the employers have failed to establish their claim to a review, it should be ordered that an award be made in favour of the appellant with costs throughout.

I need only add that I concur in the observations of Viscount Simon LC on the subject of the duties, powers and functions of a medical assessor.

LORD MACMILLAN.

My Lords, I concur.

LORD WRIGHT.

My Lords, I agree so completely with the observations of Viscount Simon LC in this case that I do not desire to add anything; and I agree with the opinion which he has delivered generally.

Appeal allowed with costs.
Solicitors: W H Thompson (for the appellant); Carpenters (for the respondents).
C StJ Nicholson Esq Barrister.
[1944] 1 All ER 110 at 117