Neutral Citation Number: [2017] EWCA Civ 61

Case No: C3/2015/3188

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/02/2017

Before:

SIR TERENCE ETHERTON, MR
LORD JUSTICE DAVIS
and
LORD JUSTICE UNDERHILL

- -

Between:

SECRETARY OF STATE FOR WORK AND PENSIONS	**Appellant**
- and -	
FG on behalf of JOHN (A MINOR)	**Respondent**

- -
- -

Adam Heppinstall (instructed by the **Government Legal Department**) for the **Appellant**
George Peretz QC and Conor McCarthy (instructed by **Hodge Jones & Allen LLP Solicitors**) for the **Respondent**

Hearing date: 26th January 2017

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Approved Judgment

Lord Justice Davis:

Introduction

1. This case involves questions of the interpretation and application of the Vaccine Damage Payments scheme. The principal (though not only) questions arising are these: in assessing whether an individual applicant meets the necessary level of disablement giving rise to an entitlement to compensation, is the period of disablement to be taken into account limited to the applicant's circumstances as they are at the date of the assessment? Or may the assessment take into account the future prognosis for the applicant?

2. The appellant Secretary of State argues for the former. The respondent ("John"), supporting the decisions of the First-tier Tribunal and Upper Tribunal on this point, argues for the latter. In addition, the Secretary of State advances certain other criticisms of the assessment made by the First-tier Tribunal ("the FTT"), whose decision was upheld by UTJ Mitchell ("the UTJ").

3. The Secretary of State was represented before us by Mr Adam Heppinstall. John was represented by Mr George Peretz QC leading Mr Conor McCarthy. I would like to pay tribute to the extremely able and well-presented arguments advanced on both sides.

Background Facts

4. The background facts are not in dispute and are these.

5. John (not his real name but the one that has been attributed to him throughout these proceedings) had a vaccination against pandemic influenza A (H1N1) – commonly known as swine flu – on 10 December 2009. He was aged 7 at the time.

6. Thereafter problems were experienced. In April 2010 he was diagnosed by a consultant paediatric neurologist as suffering from narcolepsy and cataplexy. Put shortly, narcolepsy involves proneness to sudden attacks of day-time sleepiness. It is frequently associated with cataplexy: that involves a sudden loss of muscle tone (often provoked by emotional circumstances) which among other things can give rise to facial tics, dysarthria and a tendency to collapse to the ground when full-blown episodes lead to temporary profound muscle paralysis.

7. On behalf of John his mother presented on 18 January 2012 a claim under the Vaccine Damage Payments Act 1979 ("the 1979 Act"). That was initially refused by the Department for Work and Pensions on the ground that it was not persuaded that the vaccination had caused the narcolepsy and cataplexy. However that viewpoint was subsequently changed. It was in due course accepted for the purposes of this case that a causative link was established.

8. John's mother pursued the application, arguing that John was "severely disabled" for the purposes of the scheme for compensation. That was rejected by the Department on 13 February 2014, by a decision letter justifiably criticized subsequently by the UTJ as involving "virtually no reasoning".

9. An appeal on behalf of John to the FTT was presented on 27 April 2014. In support of the appeal there was lodged a written report by Professor Gringras, a specialist in Paediatric Neurodisability and Sleep Medicine, described in due course by the UTJ as a leader in his field. Professor Gringras gave the opinion that John's case "would be classed as a more severe case of narcolepsy and cataplexy." He among other things stated that John "has a lifetime neurological disease." He said that it would be "very likely" adversely to affect his education and his ability to work and earn. In addition, detailed statements were put in by John's mother and father describing the changes to him since the vaccination. An educational psychologist's report was also provided.

10. None of this evidence was in terms challenged by the Department. At the hearing before the FTT on 28 August 2014, at all events, the Department elected not to be represented. Both parents gave oral evidence. The Department's standpoint, by prior written submissions, in effect was that John's disablement was not shown to be sufficiently severe to qualify for compensation under the scheme at the time of the assessment.

11. By its decision issued on 4 September 2014 the FTT found in favour of John. In paragraph 14 of its decision it found that since the administration of the vaccine there had been no significant improvement in John's condition: even by the date of the hearing. It further found that significant improvement in the future was unlikely. In such circumstances, the FTT took the view that it could take into account future problems that were reasonably foreseeable in John's case at the time of the decision of the Department on 13 February 2014.

12. The FTT reviewed the evidence. It was accepted that John had started, and continued, to fall asleep without reason; and also had began to fall without reason (hence leading to the diagnoses of narcolepsy and cataplexy). He was found to have autonomic behaviour. He could not for instance, travel on a school bus, for fear he may fall asleep and not get off. Because of his constant tiredness behavioural issues had also developed. Moreover, he suffered hallucinations and night terrors.

13. The FTT went on to find that John was restricted as to the activities he could undertake. By way of specific example, he could not (as he wished) go on a particular school residential outward bound course because of the risk posed by his cataplexy. His social life was found to be "far more restricted" because of his need to rest and sleep; and in consequence he had few friends. He had a Statement of Special Educational Needs. As for his cataplexy, he was adjudged to lose muscle control perhaps five or six times a day. This could often happen when stimulated by, for instance, watching television. Sometimes he would spontaneously collapse to the floor. This, and his narcolepsy, meant that he could not, by way of further example, go swimming without constant adult supervision.

14. The Department's own medical assessment had referred to Professor Gringras' report and had not disputed that there were "significant continuing problems".

15. Under the scheme – whose provisions I will come on to set out – it was required that John be assessed as having "60% disablement" if he was to be entitled to receive compensation. The FTT's conclusion at paragraph 31 of its decision was in these terms:

> "As at 13 February 2014, the date of decision, the appellant had significant disability with narcolepsy and cataplexy. He was falling asleep regularly and ran risks of dropping to the ground. He could not travel to school alone, go swimming alone and had to be supervised to ensure that he had a shower and got dressed. He also required one-to-one help at school to keep him reasonably on task and did require to sleep. His school work progressed reasonably, as could be seen from his SATS results, but he needs a Statement of Special Educational Needs. On that basis the tribunal felt the appellant had significant disability as at 13 February 2014 but did not feel that that would of itself amount to a 60% disablement. The tribunal, however, felt that the reasonably foreseeable disablement which was likely to occur in the future could be taken into account. It was reasonably foreseeable that the appellant would struggle to continue with his school work and keep up with his peer group in view of this requirement for additional sleep. There was a risk that he would fall asleep during exams and may not achieve the grades he would have achieved without the disablement. His is likely to be significantly disadvantaged in the jobs market and may find it difficult to get paid employment. He is unlikely ever to be able to drive a car and his social life is likely to be curtailed as a result of the problems. Adding those factors, the tribunal considered that the appellant's disablement was as great as numbers 11 and 26 in Schedule 2 to the Social Security (General Benefit) Regulations 1982 and as such confirmed that the appellant was entitled to a payment under the Vaccine Damage Payments scheme."

16. It thus can be seen that the FTT had expressly found that John did not have 60% disablement, as assessed solely at the date of the Department's decision under challenge; but that further continuing disablement in the future was likely and that should be taken into account. It was on that basis that it was held that there was entitlement to payment under the scheme.

17. That decision was upheld by the impressively thorough and well articulated decision of the UTJ dated 23 May 2015.

18. Permission to appeal was granted by Elias LJ on 9 February 2016. It may be noted that by this time the Department commendably had decided to pay, and did pay, John compensation in full, because of the continuing uncertainty for him and his parents. Thus the appeal was by now academic as between the parties. However, it was common ground that there were (and are) a significant number of other extant cases where the same points arise; and permission was granted accordingly.

The statutory scheme

19. It is necessary now to put the proceedings into their statutory context.

20. The entitlement to payment in specified circumstances was established by the 1979 Act: which has since been amended. That Act was introduced against a background of claims being made of severe disablement to many children as a result, as it was said, of the administration of a whooping-cough vaccine. The 1979 Act is in fact to an extent focused on, albeit not confined to, children. The diseases to which the 1979 Act applies are primarily, though by no means solely, diseases of a kind for which vaccinations of children have commonly been administered.

21. It is also convenient to comment on some of the terminology used in the statutory scheme. For this purpose reference can usefully be made to the case of *Jones v Secretary of State for Social Services* [1972] AC 944, with which the drafters of the statutory scheme are to be presumed to have been familiar. At page 1020A Lord Simon said this:

> "'Injury' is hurt to body or mind. 'Symptom' is indication of injury apparent on clinical examination. 'Loss of faculty' is impairment of the proper functioning of part of the body or mind. 'Disability' is partial or total failure of power to perform normal bodily or mental process. 'Disablement' is the sum of disabilities, which, by contrast with the powers of a normal person, can be expressed as a percentage."

(a) The 1979 Act

22. Section 1(1) of the 1979 Act provides as follows:

> "(1) If, on consideration of a claim, the Secretary of State is satisfied—
>
> (a) that a person is, or was immediately before his death, severely disabled as a result of vaccination against any of the diseases to which this Act applies; and
>
> (b) that the conditions of entitlement which are applicable in accordance with section 2 below are fulfilled,
>
> he shall in accordance with this Act make a payment of [the relevant statutory sum] to or for the benefit of that person or to his personal representatives."

22. Section 1(2) permits the Secretary of State to specify additional diseases by order. In 2009 (although, it should be noted, revoked as from September 2010) pandemic influenza A (H1N1) was such a specified disease. The relevant statutory sum is currently set at £120,000 by s. 1(1A). By s. 1(4) it is provided as follows:

> "For the purposes of this Act, a person is severely disabled if he suffers disablement to the extent of [60 per cent.] or more, assessed as for the purposes of [section 103 of the Social Security Contributions and Benefits Act 1992] … (disablement gratuity and pension)."

23. Section 2 then sets out conditions of entitlement. Section 3 relates to the determination of claims. Section 3(1) provides as follows:

> "(1) Any reference in this Act, other than section 7, to a claim is a reference to a claim for a payment under section 1(1) above which is made—
>
> (a) by or on behalf of the disabled person concerned or, as the case may be, by his personal representatives; and
>
> (b) in the manner prescribed by regulations under this Act; and
>
> [(c) on or before whichever is the later of—
>
> (i) the date on which the disabled person attains the age of 21, or where he has died, the date on which he would have attained the age of 21; and
>
> (ii) the end of the period of six years beginning with the date of the vaccination to which the claim relates;]
>
> and, in relation to a claim, any reference to the claimant is a reference to the person by whom the claim was made and any reference to the disabled person is a reference to the person in respect of whose disablement a payment under subsection (1) above is claimed to be payable."

24. Section 3A (introduced, by amendment, by the Social Security Act 1998) provides in the relevant respects as follows:

> "(1) Subject to subsection (2) below, any decision of the Secretary of State under section 3 above or this section, and any decision of [The First-tier Tribunal] under section 4 below, may be reversed by a decision made by the Secretary of State—
>
> (a) either within the prescribed period or in prescribed cases or circumstances; and
>
> (b) either on an application made for the purpose or on his own initiative.
>
> . . . . .
>
> (3) Regulations may prescribe the procedure by which a decision may be made under this section."

We were told that no period for reversing a decision has in fact been prescribed.

25. Section 4 deals with appeals to the tribunal. By sub-section (4) it is provided:

> "(4) In deciding an appeal under this section, [the FTT] shall consider all the circumstances of the case (including any not obtaining at the time when the decision appealed against was made).]"

It may be noted that in the present case the FTT wrongly focused on the date of the Department's decision. But nothing turns on that, in my view, in the present case. It is also to be noted that the statute in terms requires (what in any event would surely be impliedly required) that the FTT should consider all the circumstances of the case.

26. Section 5 (as amended) contains provisions for reconsideration. Section 6 among other things stipulates that any payment under s. 1(1) is to be treated as being paid on account of any damages which the court may award for such disablement. Section 8 authorises the making of requisite regulations.

27. Regulations were made and came into operation on 6 April 1979 in the form of the Vaccine Damage Payment Regulations 1979 (SI 1979 No. 432) ("the 1979 Regulations"): since subsequently amended. By paragraph 11 of the 1979 Regulations, in their original form, it may be noted, a time limit of 6 years for an application for reconsideration by the Secretary of State was set. There is no such time limit currently in force under the amended Regulations, however.

(b) The Social Security Contributions and Benefits Act 1992 ("the 1992 Act")

28. It will be recalled that, by s. 1(4) of the 1979 Act, a person is regarded as severely disabled if disabled to the extent of 60% or more "assessed as for the purposes of" s. 103 of the 1992 Act. This rather clumsy phrasing, described before us as "ostensive", at all events brings in consideration of s. 103 of the 1992 Act (which in this regard replaced s. 57 of the Social Security Act 1975 as referred to in the original unamended version of the 1979 Act).

29. Section 103 of the 1992 Act provides in the relevant respects as follows:

> "(1) Subject to the provisions of this section, an employed earner shall be entitled to disablement pension if he suffers as the result of the relevant accident from loss of physical or mental faculty such that the assessed extent of the resulting disablement amounts to not less than 14 per cent or, on a claim made before 1st October 1986, 20 per cent.
>
> . . . . .
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> (5) In this Part of this Act "assessed", in relation to the extent of any disablement, means assessed in accordance with Schedule 6 to this Act; and for the purposes of that Schedule there shall be taken to be no relevant loss of faculty when the extent of the resulting disablement, if so assessed, would not amount to 1 per cent."

30. Turning then to Schedule 6 to the 1992 Act that, in the relevant respects, provides as follows:

> "1. For the purposes of section 68 or 103 above and Part II of Schedule 7 to this Act, the extent of disablement shall be assessed, by reference to the disabilities incurred by the claimant as a result of the relevant loss of faculty, in accordance with the following general principles—

> (a) except as provided in paragraphs (b) to (d) below, the disabilities to be taken into account shall be all disabilities so incurred (whether or not involving loss of earning power or additional expense) to which the claimant may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account by the assessment as compared with a person of the same age and sex whose physical and mental condition is normal;
>
> …..
>
> (c) the assessment shall be made without reference to the particular circumstances of the claimant other than age, sex, and physical and mental condition;
> (d) the disabilities resulting from such loss of faculty as may be prescribed shall be taken as amounting to 100 per cent. disablement and other disabilities shall be assessed accordingly.
>
> . . . . .
>
> 6. Subject to sub-paragraphs (2) and (3) below, the period to be taken into account by an assessment for the purposes of section 103 above and Part II of Schedule 7 to this Act of the extent of a claimant's disablement shall be the period (beginning not earlier than the end of the period of 90 days referred to in section 103(6) above and in paragraph 9(3) of that Schedule and limited by reference either to the claimant's life or to a definite date) during which the claimant has suffered and may be expected to continue to suffer from the relevant loss of faculty."

Paragraph 2 of Schedule 6 authorises the making of regulations "for further defining the principles on which the extent of the disablement is to be assessed…."

31. Those regulations are to be found in the earlier but consolidated Social Security (General Benefit) Regulations 1982 (SI 1982 No. 1408) ("the 1982 Regulations"): which are by the Social Security (Consequential Provisions) Act 1992 to have effect as if made under the 1992 Act. By paragraph 11 it is, in the relevant respects, provided:

> "(1) Schedule 8 to the Act (general principles relating to the assessment of the extent of disablement) shall have effect subject to the provisions of this regulation.
>
> . . . . .
>
> (8) For the purposes of assessing, in accordance with the provisions of Schedule 8 to the Act, the extent of disablement resulting from the relevant injury in any case which does not fail to be determined under paragraph (6) or (7), [the Secretary of State or, as the case may be, [the FTT]] may have such regard as may be appropriate to the prescribed degrees of disablement set against the injuries specified in the said Schedule 2."

32. The Schedule 2 there referred to (and as reflected in aspects of the FTT's reasoning set out at paragraph 31 of its decision) provides a lengthy list of described injuries relating to the specified degrees of disablement. It may be noted that all such injuries as described essentially are of a physical nature and virtually all are of a permanent kind (loss of limbs etc). It may also be noted that what is there put at 100% disablement does not correspond to what, in lay terms, might have been thought to be such a degree of disablement: such as, for instance, quadriplegia. Thus 100% disablement for these purposes includes, for example, loss of both hands or double leg amputation. As Mr Peretz wryly observed, under these provisions the champion athlete Oscar Pistorius, a double amputee, would have been considered 100% disabled.

33. For more immediate purposes, however, attention needs also to be drawn to the two particular items on that list in Schedule 2 which connote 60% disablement. Those are item 11 (loss of hand or of the thumb and four fingers of one hand or amputation from 11.5 centimetres below tip of olecranon); and item 26 (amputation at knee resulting in end-bearing stump or below knee with stump not exceeding 9 centimetres).

The first ground

34. Mr Heppinstall argued that the wording of the statutory scheme was such as to require the determination of disablement to be made by reference to an applicant's condition solely at the time he/she presents at the assessment (by the Department or, on appeal, by the tribunal). He said that the scheme, properly interpreted and understood, does not permit a forward - looking assessment which also takes into account likely future disablement.

35. Whether on a purposive approach to the relevant provisions or on a linguistic approach to the relevant provisions I can see no real basis for that argument.

36. First, I find it very hard to see the rationale for the argument advanced. If an individual is assessed as having a life-long condition (as here) why should that not be taken into account in assessing the extent of the disablement? Mr Heppinstall suggested by way of answer that such an approach could give rise to uncertainty and could call for difficult evaluations – he suggested speculations – to be made by a tribunal. But courts and tribunals are well used to assessing loss on a balance of probabilities on present evidence by reference to future prospects. It is, for example, the very stuff of personal injury litigation. There is no particular additional difficulty in this over and above what in any event, I would agree, is likely in many cases to be a difficult evaluation as to whether the 60% "threshold" is reached. At all events I do not agree with the suggestion that on the respondent's argument "certainty" is traded for "speculation". The tribunal will not be speculating. It will be making a present judgment as to future events on the balance of probabilities, based on evidence.

37. It was submitted, nevertheless, that no injustice arises given that there is, currently, no time limit under the 1979 Regulations for seeking to reverse a determination (albeit there is, I observe, a time limit where there has actually been an appeal to a tribunal). An applicant can always, it was said, apply or reapply if his/her condition worsens at any time. That argument only runs because, as it happens, the current version of the 1979 Regulations provides for no such time limit. But it could not have run in this form under the previous version (made under the 1979 Act at the time of that Act)

which gave a 6 year time-limit for such reversal applications. In any event, the provision for reversals is surely more obviously apt to deal with subsequent unexpected and unforeseen deteriorations.

38. There are further considerations which suggest that this interpretation as advanced on behalf of the Secretary of State could not have been the parliamentary intention.

(1) First, as Mr Peretz pointed out, it potentially turns the scheme into a litigation game. Take the present case. If John was (correctly) advised that, on his condition as it then stood without regard to the future, he could not meet the 60% threshold and in consequence did not apply, he would lose his entire claim on expiry of the limitation period set by s. 3 of the 1979 Act. On Mr Heppinstall's argument, he should perhaps, be advised nevertheless to apply at the time, even though the application must fail at that time, so that he could keep open his right of reversal thereafter. It is improbable that Parliament would have intended cases to be kept open in this way.

(2) Second, on Mr Heppinstall's "snap shot" approach an element of arbitrariness comes into the matter. Much, on this approach, may depend on precisely when an applicant first happens to apply and when the application is then determined or when any appeal hearing occurs. Indeed this arbitrariness could work against the Secretary of State. Suppose (the converse of the present case) that an applicant, at the date of the determination, is properly assessed as passing the 60% threshold but there is, let it be supposed, uncontroverted evidence that there will be a complete recovery in 6 months time. On the present argument an award of £120,000 potentially must still be made. That does not seem to be a very likely intention.

(3) Third, the very fact that the scheme provides for a fixed sum (currently £120,000) as compensation, without possibility of protracted debate over quantum, is at least consistent with a process designed to look to past and future on a "holistic" basis, if I can put it that way. So also is the provision in s. 6(4) that such compensation is to be treated as "on account" of any payment of damages.

39. I do not think that a linguistic analysis of the statutory scheme supports this argument on behalf of the Secretary of State either. The argument focused in particular on the use of the word "is" in s. 1(1) and (4) of the 1979 Act: connoting, it is said, the present and not the future. That, taken on its own, is a possible reading, though by no means a necessary meaning. But the point still remains that the word "is" links directly to the words "severely disabled": and s. 1(4) then requires resort to s. 103 of the 1992 Act ("assessed as for the purposes of").

40. That then brings into play the provisions of Schedule 6 to the 1992 Act. In my view, the words, in paragraph 1(a), "to which the claimant may be expected, having regard to his physical and mental condition at the date of the assessment, to be subject during the period taken into account by the assessment", are readily compatible, by reference to the period of assessment there mentioned, with including a future period. As the UTJ put it, the assessment has been "hitched to a time-line": and that time-line would naturally be taken to be the period of time for which the disability is expected to last. Mr Heppinstall said that for the purpose of disability benefits it is usual – for obvious

practical reasons – for the Department to select fixed term periods. Doubtless that is right: but it does not preclude (as he accepted) the taking of a life-time period.

41. In any event, the matter is, to my mind, put beyond doubt by the provisions of paragraph 6(1) of Schedule 6. That in terms indicates that the period to be selected should be the period during which the claimant has suffered *and may be expected to continue to suffer* (my emphasis) from the relevant loss of faculty. That is language which is demonstrably looking to the future. Mr Heppinstall said, again no doubt correctly, that some aspects of paragraph 6 need, in effect, to be blue-pencilled as inapt for vaccine damage payment claims. But there is no reason for blue-pencilling the entirety of paragraph 6(1), as he sought to say, as inappropriate to vaccine damage payment claims. As Mr Peretz submitted, that argument simply assumes that "is", as used in s. 1(1) of the 1979 Act, has the present meaning Mr Heppinstall says that it has and then subordinates or discards anything else in the statutory scheme which is inconsistent with it. I reject Mr Heppinstall's submission that any approach other than the one which he advances involves permitting incorporated legislation to alter the meaning of the principal legislation in the form of s. 1 of the 1979 Act.

42. Overall, for these reasons I am in no real doubt that the FTT was justified in looking (as it did) to the future prognosis, on the balance of probabilities, in assessing whether the threshold was crossed for the necessary 60% disablement; and in my view the UTJ was accordingly correct to uphold the decision on this point. Such a conclusion accords both with the statutory wording, reading the statutory scheme as a whole, and with sense.

<u>The second ground</u>

43. Mr Heppinstall then submitted that the FTT improperly determined the case by reference to Schedule 2 of the 1982 Regulations. He said that such schedule could have no real bearing on this case, given the special neurological characteristics of John's condition. He cited the decision of the Social Security Commissioners (chaired by HHJ Hickinbottom) in *R (I)* 2/06 (CI/535/2005), where at paragraph 71 of the decision this was said:

> "… a tribunal is not obliged to try and force the disablement with which it is concerned into an imaginary position on the scale set out in the regulations or any other scale."

He argued that, by its reasoning in paragraph 31 of its decision, the FTT had fallen into that very trap.

44. I can agree that the injuries described in Schedule 2 to the 1982 Regulations do not fit at all well with the injuries and loss of faculties of the kind John has suffered in this particular case. It may in fact be repeated that the entire list of injuries set out in Schedule 2 are of a physical kind, most of them connoting permanent loss (loss of limbs and so on). But physical injuries of that type may well not (although of course they sometimes may) significantly come into play in some vaccine damage cases.

45. But that does not mean that Schedule 2 is entirely to be ignored for the purposes of a case such as the present. On the contrary, the assessment is to be "as for the purposes of" s. 103 of the 1992 Act; and the assessment thereunder must therefore be in

accordance with Schedule 6 and with the 1982 Regulations and Schedule 2 thereto. It follows that Schedule 2 is to be taken into account: Regulation 11(8) then indicating that the tribunal may have such regard to it as may be appropriate. That, even in a case of non-physical injury, will not be a wholly empty exercise. For one thing, it provides an indicative bench mark, in terms of disablement, for 100% disablement. It may well also assist, for instance, in generally assessing the impact of the disability. Thus, while the actual injuries or loss of faculties involved in a vaccine damage case sometimes may not be readily comparable to those described in Schedule 2 nevertheless the disabilities (and consequent disablement) may be. Accordingly, an assessment as to whether the impact, in terms of disabilities and disablement occasioned by the loss of faculties in the instant case, may properly be assessed as at least to a degree commensurate with the impact, in terms of disabilities and disablement, occasioned by the specified injuries in Schedule 2. That is capable of being a meaningful exercise.

46. It will also be recalled that in paragraph 1(d) of Schedule 6 to the 1992 Act it is said that disabilities resulting from such loss of faculty as may be prescribed shall be taken as amounting to 100% disablement "and other disabilities shall be assessed accordingly." Quite what these words – perhaps designedly vague – are intended to connote is hard to evaluate. As the UTJ put it, the meaning "does not exactly leap from the page." But I agree with him when he says that at all events they must refer to losses of faculty other than those prescribed; and I also agree with his observation that *disabilities* themselves are but a stepping-stone towards the assessment of *disablement*.

47. It follows, in my opinion, that there was no error in principle in the FTT referring to and relying on Schedule 2. But Mr Heppinstall's complaint then was that the FTT at all events placed over-reliance on it to an extent which was not "appropriate." He said, indeed, that it was wholly inappropriate. The loss of faculties here, he maintained, had no real relationship to the kind of injury set out in Schedule 2 as connoting a specified percentage of disablement.

48. I can accept that the reasoning of the FTT, as expressed in paragraph 31 of its decision, is rather opaque in this respect. It certainly would have been a potential error to regard Schedule 2 as some kind of strait-jacket, as opposed to some kind of guidance to be taken into account to the degree considered appropriate. But, read fairly and as a whole, the decision of the FTT did not, in my opinion, fall into that error. Indeed its reference in paragraph 31 of its decision to the disablement being as great as numbers 11 and 26 of Schedule 2 was expressed to "confirm" that John was entitled to a payment. That is the language of a "sense check", as Mr Peretz put it, and as such was entirely legitimate. The evaluation, overall, was pre-eminently a matter for the specialist tribunal.

49. I add two other points:

(1) In his written arguments Mr Heppinstall criticized the FTT for a lack of reasoning or analysis as to its assessment. That is not sustainable. The decision was adequately reasoned. In any event, on questions of quantitative assessment it can often be rather hard to give "reasons" going beyond the factors stated to be taken into account.

(2) Reflecting the foregoing, it was also unsustainable to complain of a lack of reasoning on the part of the FTT as to why, and to what extent, Schedule 2 was taken into account. This is in fact a particularly surprising complaint when it is seen that the Department itself had, in written submissions to the FTT, encouraged reference to Schedule 2; in fact, in one of its reports submitted to the FTT the Department had stated that the medical advisers of the Department had "specific training in how to equate the disability arising from a condition not covered in the schedules to those which are covered."

I need say nothing more, however, about the various complaints of lack of reasons or analysis as Mr Heppinstall wisely did not press them in oral argument.

Third ground

50. The final complaint is that, in its review of the evidence, the FTT took into account "particular characteristics" of John other than age, sex and physical and mental condition; and thereby proceeded contrary to the general principle set out in paragraph 1(c) of Schedule 6 to the 1992 Act.

51. I can take this point shortly. There is nothing in it.

52. The FTT did not, as I read its decision, take into account John's "particular characteristics." It did not, for example, say that John was shaping up to be a potential champion swimmer and so the narcolepsy and cataplexy have had particularly hard consequences for him in terms of disablement. It did not say, for instance, that he was an unusually talented footballer or pianist who has been particularly affected by his disabilities. On the contrary the assessment of his disabilities properly focused on normal day-day functioning. The assessment for comparison purposes, in my view, accorded with paragraph 1(a) and (c) of Schedule 6. There was no error on the part of the FTT in this regard.

Conclusion

53. I do not propose to say more. In my view, the UTJ was quite right to dismiss the appeal from the FTT. I would endorse the decision of the UTJ in all respects. I would dismiss this appeal.

Lord Justice Underhill:

54. I agree.

Sir Terence Etherton, MR:

55. I also agree.