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Judgment: approved by the Court for handing down | *Delivered:* **17/02/09**

*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE QUEEN'S BENCH DIVISION OF THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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Hoy's Application No. 2 [2009] NICA 7

AN APPLICATION BY FLORENCE HOY FOR JUDICIAL REVIEW

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Before Kerr LCJ, Higgins LJ and Girvan LJ

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KERR LCJ

Introduction

[1] A pipe bomb was thrown into the kitchen of the appellant's home during the evening of 1 December 2002. It failed to explode but Mrs Hoy was later informed by Army Technical Officers that it was a viable device and that if it had detonated it could have killed her. She claims that she developed a mental illness as a result.

[2] On 9 January 2003 the appellant lodged a claim for criminal injury compensation. That claim was refused on 20 April 2004. It was determined that Mrs Hoy's injuries were not sufficiently serious for an award to be paid at the lowest level at which compensation is payable. On 28 June 2004 she applied for a review of that decision. A medical report from a consultant psychiatrist was commissioned by the Compensation Agency and on 15 September 2005 the appellant was examined by Dr McFarland. She was of the opinion that Mrs Hoy was suffering from an adjustment reaction with anxiety symptoms. Dr McFarland expressed her final conclusions thus: -

> "Mrs Hoy was unable to tell me of any activity that she did prior to the incident that she is now unable to do. I have therefore been unable to establish any disabling factors. She has, in my opinion, mild symptoms which are undoubtedly

> distressing for her but do not appear to interfere with her functioning."

[3] The application for a review was refused on 7 December 2005. In the review decision letter, as well as reiterating that her injuries were not sufficiently serious for an award to be paid to the appellant at the lowest level, it was stated that the psychiatrist had not diagnosed a disabling mental illness within the terms of the scheme. The appellant appealed the refusal of the review on 15 February 2006 and asked for an oral hearing. The request for an oral hearing was granted on 1 March 2006. On 8 March 2006 the Criminal Injuries Compensation Panel wrote to the appellant's solicitors, pointing out that the report from the psychiatrist did not contain a diagnosis of a disabling mental illness as required by the criminal injuries scheme. Despite this, at the hearing on 5 July 2006 no further medical evidence was presented.

[4] The appellant's appeal was dismissed. The chairman recorded the reason for dismissal in these terms: "No award could be made for a disabling mental illness since the psychiatric report indicated that it was not disabling". The appellant then sought judicial review of the appeal panel's decision. That application was dismissed by Morgan J in a reserved judgment on 2 September 2008. The appellant now appeals against that judgment.

The compensation scheme

[5] Part II of the Criminal Injuries Compensation (Northern Ireland) Order 2002 makes provision for the setting up of a scheme for the payment of compensation from public funds for injuries sustained by persons as a result of criminal injury. The scheme was made by the Secretary of State under article 3 of the Order. Its validity is not challenged in these proceedings. The disputed issues related to the manner in which it is to be applied.

[6] Under paragraph 6 of the scheme, compensation may be paid to an applicant who has sustained a criminal injury. The expression, 'criminal injury', is defined in paragraph 8 to mean one or more personal injuries as described in paragraph 10, being an injury sustained in Northern Ireland and directly attributable to (a) a crime of violence (including arson or an act of poisoning); or (b) the apprehension or attempted apprehension of an offender or a suspected offender, the prevention or attempted prevention of an offence, or the giving of help to any constable who is engaged in any such activity.

[7] Paragraph 10 of the scheme is of critical importance in the present case. It provides that personal injury in the context of the scheme includes mental injury which it defines as "a disabling mental illness confirmed by psychiatric diagnosis". The central issue in the appeal is whether the psychiatric diagnosis must confirm merely the presence of mental illness or whether it must also verify that the illness is disabling.

[8] The scheme has an appendix in which various tariffs of injuries are set out. General notes to tariff of injuries are also given. Paragraph 4 provides further guidance on the question of mental illness: -

> "Mental illness includes conditions attributed to post-traumatic stress disorder, depression and similar generic terms within which there may be:
>
> (a) such psychological symptoms as anxiety, tension, insomnia, irritability, loss of confidence, agoraphobia and preoccupation with thoughts of guilt or self-harm; and
>
> (b) related physical symptoms such as alopecia, asthma, eczema, enuresis and psoriasis."

[9] 'Psychiatric diagnosis/prognosis' is defined in paragraph 5 of the notes to tariff of injuries as meaning that the disabling mental illness has been diagnosed or the prognosis made by a psychiatrist or clinical psychologist. Paragraph 6 of the notes provides that a mental illness is disabling if it significantly impairs a person's functioning in some important aspect of her/his life *e.g.* impaired work or school performance or significant adverse effects on social relationships or sexual dysfunction.

[10] The terms of the scheme (which was made in 2002) follow closely those of the English scheme of 2001. This had replaced an earlier version made in 1995. Paragraph 9 of the earlier scheme defined mental injury as a "medically recognised psychiatric or psychological illness" and its tariff provisions, in referring to shock, alluded to the medically verified condition being disabling. The notes to tariff also gave an explanation of disability in this context *viz* that it would include impaired work or school performance, significant adverse effects on social relationships and sexual dysfunction.

[11] Paragraph 9 of the 2001 Scheme defines mental injury as either temporary mental anxiety, medically verified, or a disabling mental illness confirmed by psychiatric diagnosis. Temporary mental anxiety has not been replicated in the Northern Ireland Scheme, presumably because compensation for this in the 2001 scheme is less than the minimum figure in Northern Ireland for any award. Disabling mental illness is defined in the same way as in the later Northern Ireland Scheme.

The arguments

[12] For the appellant, Mr Shaw QC (who appeared with Mr Jonathan Dunlop) advanced two principal arguments. He contended firstly that the

proper application of the scheme in order to determine whether there had been a mental injury involved the posing of four questions in the following sequence: -

i. Does A suffer from "a mental illness"?
ii. If so, does the mental illness *impair the functioning* of A in some aspect of his life?
iii. If so, does such impairment arise in an *important* aspect of A's life?
iv. If so, is the degree of such impairment *significant*?

[13] Mr Shaw argued that the first of these questions required to be answered by a psychiatrist or clinical psychologist but the remainder should be determined by the appeal panel. He accepted that it was open to the psychiatrist to express an opinion on the question whether the mental illness was disabling but the question whether it reached that threshold was one for the panel to determine on all the evidence, including that of the appellant herself.

[14] The second argument presented on behalf of the appellant was that Dr McFarland had approached the question whether the mental illness was disabling in the wrong way. Instead of considering whether the undoubted impairment of the appellant's functioning was significant, the psychiatrist had, said Mr Shaw, unwarrantably decided that, because Mrs Hoy was able to do all the things that she had done before the incident, she did not have "any disabling factors".

[15] For the respondent, Mr Maguire QC (who appeared with Mr McAlister) submitted that the qualifying criterion was that there be a mental illness which was disabling and that both aspects required to be confirmed by the psychiatrist or clinical psychologist. There was, he said, no reason to "de-couple" the two features. As to the second of Mr Shaw's arguments, Mr Maguire claimed that it was not open to the appellant to advance this submission since it had not been raised before the appeal panel nor had it featured in the proceedings before Morgan J. Had the argument been raised previously, the psychiatrist's instructions on it could have been sought and the argument could have been fully met by an explanation of the way in which she had reached her conclusion.

Morgan J's judgment

[16] The learned judge found that the question whether a person was suffering from a mental illness was clearly a matter of expert medical opinion. By contrast, however, whether a person was "suffering from a disability" was a matter of non expert opinion. This was "a shorthand method of describing

the cumulative effect of the ways in which a person is affected by various circumstances of his everyday life" for which no particular expertise was required.

[17] Morgan J held that whether or not the mental illness was responsible for the aspects of disability in respect of which the claim is made was a matter for medical expertise. Since there was no psychiatric diagnosis relating the impairments alleged by the appellant to the mental illness, he dismissed the application.

The eligibility criterion

[18] It appears to us that the stipulation in paragraph 10 of the scheme that the "disabling mental illness [be] confirmed by psychiatric diagnosis" must be read conjunctively. As Mr Maguire submitted, if it had been intended to confine the diagnosis to the question whether an applicant was suffering from mental illness, as opposed to a disabling mental illness, this could have been easily achieved. The requirement that the psychiatrist or clinical psychologist confirm not only the presence of a mental illness but also that this was disabling is plain, we believe, firstly by the deliberate framing of the provision in the way that it appears in paragraph 10 and also from the history of the way in which it evolved from the revised English scheme.

[19] Morgan J was, no doubt, correct in his view that the level of disability is something on which a person with no particular medical expertise can express a legitimate view, but that is not what paragraph 10 envisages. On a natural reading of the provision, the psychiatric confirmation is required of both the existence of the mental illness and its disabling attribute. In our view, therefore, the appeal panel was right to dismiss the appeal on the basis that one component of the eligibility criterion (*viz* confirmation that the mental illness was disabling) was missing.

[20] We were referred to the judgment of Jackson J in *R v Criminal Injuries Compensation Appeals Panel ex parte Bennett* (unreported, July 2000) which, Mr Shaw suggested, reached a different conclusion from that which I have just expressed. We do not accept that it does. In that case what was at issue was the extent of the disability, not whether the mental illness was disabling. Moreover, the judgment dealt with the 1995 scheme which, as we have observed above, did not contain the requirement that a disabling mental illness be confirmed by the medical expert.

The appellant's second argument

[21] Mr Shaw sought valiantly to persuade us that his second argument was but an aspect of the submission that the panel should itself have addressed the question whether the mental illness was disabling. This was

unavailing, however. The second argument resolved to a claim that Dr McFarland had asked herself the wrong question; that instead of examining whether the impairment to functioning was significant, she focussed on the question whether the appellant was able to function in all aspects of her pre-incident life. That has nothing to do with the question whether the extent of disability was a matter to be determined by the panel.

[22] We are bound to accept Mr Maguire's submissions on this question. If the argument had been presented to the panel, if it had found expression in the Order 53 statement, or even if it had been raised for the first time before Morgan J, the respondent would have had the chance to refute it by adducing evidence from Dr McFarland. One can readily anticipate that such evidence would have been forthcoming for the doctor had said that the symptoms did "not appear to interfere with [the appellant's] functioning". On the basis of this conclusion, it appears wholly likely that Dr McFarland had made some estimate of the level of impairment to Mrs Foy's pre-incident functioning.

[23] This court dealt with a similar situation in *Re Winters* [2007] NICA 46. In that case the appellant raised for the first time before the judge at first instance (Weatherup J) the argument that informing his mother about an attack on him fulfilled the requirement contemplated by paragraph 14 (a) of the scheme. This provides that the Secretary of State may withhold or reduce an award where he considers that the applicant failed to take, without delay, all reasonable steps to inform the police, or other body or person considered by the Secretary of State to be appropriate for the purpose, of the circumstances giving rise to the injury. It was held by Weatherup J and by this court that the appeal panel was not obliged to deliberate on the issue since it had not been raised by the applicant in the hearing before them. The panel's decision could not be impeached on a ground that they had not been asked to consider. By the same token, the panel's conclusion in the present case cannot be challenged on the basis that they did not examine an aspect of the case that was not canvassed before them.

Conclusions

[24] Although we have reached the same conclusion as to the outcome of this appeal as did the learned judge, we have arrived at that destination by a somewhat different route and on a more fundamental basis. It is our view that a psychiatrist or clinical psychologist must confirm not only that an applicant for compensation for mental injury suffered a mental illness but must also verify that the illness is disabling in the sense prescribed by paragraph 6 of the general notes to tariff of injuries. This vital second component of the psychiatrist's opinion was not provided in this case and the appeal must therefore be dismissed.