OUTER HOUSE, COURT OF SESSION

[2019] CSOH 79

P48/19

OPINION OF LORD BRAILSFORD

in the Petition of

THE RIGHT HONOURABLE THE LORD KEEN OF ELIE QC,
ADVOCATE GENERAL FOR SCOTLAND

Petitioner

for

JUDICIAL REVIEW

of a decision of the First-Tier Tribunal (Social Entitlement Chamber) dated 15 December 2016

Petitioner: Pirie; Office of the Advocate General
Respondents; McLean; Thompsons

15 October 2019

[1] The issue for the court in this petition for judicial review was one of statutory interpretation: are the nasal bones part of the "skull" within the meaning of that word in the Criminal Injuries Compensation Scheme 2012 (the "2012 Scheme") Tariff of injuries. The petitioner's position was that that question fell to be answered in the negative and that as a consequence the decision of the First-Tier Tribunal ("FTT") should be reduced. The interested party's position was that the answer to the question was in the affirmative and that consequently the FTT reached the correct decision in their order dated 15 December 2016.

Legislative scheme

[2] Following the enactment of the Criminal Injuries Compensation Act 1995 ("The 1995 Act") a Criminal Injuries Compensation Scheme was set up (section 1(3) of the 1995 Act) to make payment of compensation to persons who had sustained criminal injuries.

[3] Section 2 of the 1995 Act sets forth the basis on which compensation is to be calculated. Section 2(2) made provision for, *inter alia*, a standard amount of compensation and section 2(3) provided that;

> "Provision shall be made for the standard amount to be determined—
>
> (a) in accordance with a table ("the Tariff") prepared by the Secretary of State as part of the Scheme and such other provisions of the Scheme as may be relevant; …"

In implement of his duties under section 1 of the 1995 Act on 31 July 2008 the Secretary of State made the Criminal Injuries Compensation Scheme 2008 ("the 2008 Scheme").

Paragraph 26 of the 2008 Scheme provides:

> "The standard amount of compensation will be the amount shown in respect of the relevant description of injury in the Tariff, which sets out:
>
> (a) a scale of fixed levels of compensation;
> (b) the level and corresponding amount of compensation for each description of injury; …
>
> Level 1 represents the minimum award under this Scheme, and Level 25 represents the maximum award for any single description of injury."

The Tariff in the 2008 Scheme included:

Description of injury	**Level**	**Standard amount £**
<u>Eye</u>		
Blow out or other fracture of bone cavity containing eyeball		
- No operation	**7**	**3,300**

- Requiring operation	**9**	**4,400**
Face		
Fractured ethmoid		
- no operation	**5**	**2,000**
- operation required	**9**	**4,400**
Fractured zygoma (malar / cheekbone)		
- no operation		
- substantial recovery	**5**	**2,000**
- continuing significant disability	**9**	**4,400**
- operation required		
- substantial recovery	**6**	**2,500**
- continuing significant disability	**10**	**5,500**
Factured mandible and / or maxilla (face bones)		
- no operation		
- substantial recovery	**7**	**3,300**
- continuing significant disability	**10**	**5,500**
- operation required		
- substantial recovery	**8**	**3,800**
- continuing significant disability	**12**	**8,200**
Multiple fractures to face (e.g. Le Fort fractures types 2 & 3)	**13**	**11,000**
Nose		
Deviated nasal septum	**1**	**1,000**
- no operation	**1**	**1,000**
- requiring septopasty	**5**	**2,000**
Fracture of nasal bones		
- undisplaced	**1**	**1,000**
- displaced	**3**	**1,500**
- requiring manipulation	**5**	**2,000**
- requiring rhinoplasty	**5**	**2,000**
- requiring turbinectomy	**5**	**2,000**
Loss of smell / taste		
- partial loss of smell and / or taste	**10**	**5,500**
- total		
- loss of smell or taste	**13**	**11,000**
- loss of smell and taste	**15**	**16,500**
Partial loss of nose (at least 10%)	**9**	**4,400**
Skull		
Fracture		
- Simple		

- no operation	**6**	**2,500**
- requiring operation	**10**	**5,500**
- depressed		
- no operation	**9**	**4,400**
- requiring operation	**11**	**6,600**

[4] On 13 November 2012 the Secretary of State made the Criminal Injuries Compensation Scheme 2012 ("the 2012 Scheme") superseding and replacing the 2008 Scheme. Paragraph 32(a) of the 2012 Scheme provided:

> "A person is eligible for an injury payment under this Scheme if:
> (a) their criminal injury is described in the Tariff at Annex E…"

Insofar as material to the subject matter of this petition the injuries described in the Tariff to the 2012 Scheme did not include the fracture of nasal bones. The injuries in the 2012 Scheme insofar as material to the present petition and set fourth at Annex E of the Tariff are as follows:

Description of injury	**Level**	**Standard amount £**
<u>Medically recognised illness or condition (excluding minor and mental injury</u>		
Moderately disabling disorder where the symptoms and disability persist for 28 weeks or more from the incident or date of onset		
- Lasting 28 weeks or more		
- not permanent	**A2**	**1,500**
- permanent	**A7**	**6,200**
<u>Scarring</u>		
Head		
- significant disfigurement	**A2**	**1,500**
- serious disfigurement	**A5**	**3,500**
Face		
- significant disfigurement	**A4**	**2,400**
- serious disfigurement	**A8**	**11,000**
<u>Eye</u>		
Blow out or other fracture of orbital bone cavity containing eyeball		
- no operation	**A2**	**1,500**

- requiring operation	**A4**	**2,400**
Face		
Fractured ethmoid – operation required	**A4**	**2,400**
Factured zygoma (malar / cheek bone)		
- no operation – continuing significant disability	**A4**	**2,400**
- operation required		
- substantial recovery	**A1**	**1,000**
- continuing significant disability	**A5**	**3,500**
Factured jaw (one or more of mandible / maxilla)		
- no operation		
- substantial recovery	**A2**	**1,500**
- continuing significant disability	**A5**	**3,500**
- operation required		
- substantial recovery	**A3**	**1,800**
- continuing significant disability	**A7**	**6,200**
Nose		
Loss of smell or taste		
- partial loss of smell or taste or both	**A5**	**3,500**
- total		
- loss of smell or taste	**A8**	**11,000**
- loss of smell and taste	**A10**	**16,500**
- partial loss of nose (at least 10%)	**A4**	**2,400**
Skull		
Fracture		
- simple		
- no operation	**A1**	**1,000**
- requiring operation	**A5**	**3,500**
- depressed		
- no operation	**A4**	**2,400**
- requiring operation	**A6**	**4,600**

Factual Background

[5] There was no dispute in relation to the factual background. The interested party was assaulted on 30 May 2015. On 25 June 2015 he applied to the Criminal Injuries Compensation Authority ("the CICA") for compensation for the injury that he suffered. The 2012 Scheme applied to his application. On 21 December 2015 the CICA refused the interested party's application. The interested party applied to the CICA for a review of their

decision. On 23 February 2016 the CICA adhered to its decision following review. That decision was appealed to the First-Tier Tribunal ("FTT"). On 15 December 2016 the FTT allowed the appeal and returned the appeal to the CICA for finalisation. It is that decision which is now challenged in this petition.

Submission for the petitioner

[6] It was submitted for the petitioner, and I would interject accepted on behalf of the interested party, that the usual principles of statutory interpretation apply to the 2012 Scheme. It was said to follow that the term "skull" in the 2012 tariff does not include the nasal bones. Given that the injuries sustained by the interested party were to the nasal bones it followed that the injury suffered was not one of the injuries listed in the 2012 tariff. Four arguments were advanced in support of this position.

[7] First, it was submitted that the ordinary meaning of the word "skull" did not include the nasal bones. Reliance was placed on the Shorter Oxford Dictionary, 6th Edition, where the definition of "skull" is: "The bone framework or skeleton of the head, esp that part enclosing the brain".[1] This definition was said to be supported by other dictionary definitions. In the Oxford English Dictionary, 2nd Edition, the definition is: "The boney case or frame containing or enclosing the brain of man or other vertebrate animals; … also, the whole boney framework or skeleton of the head".[2] In Chambers Dictionary, 12th Edition, the appropriate definition is: "The boney case that encloses the brain; the head; the brain".[3] In Chambers Concise 20th Century Dictionary, the definition is: "The boney case that encloses

[1] Volume 2, page 2860
[2] Volume XV, page 630
[3] At page 1462

the brain".[4] All these definitions are consistent with the position that the nasal bones do not form part of the skull of a human.

[8] The second submission was that the word "skull" falls to be interpreted in the light of the state of the law before the 2012 Scheme came into force. As already noted the 2012 Scheme replaced the 2008 Scheme. As already noted the 2008 Scheme also contained a Tariff of injuries which performed the same function in the 2008 Scheme as the 2012 tariff performs in that Scheme. The 2008 Tariff included provision for "Fracture of nasal bones". The contention was that had it been intended that a fractured nose sound in compensation under the 2012 Scheme, the same phrase would have appeared in the Tariff for that scheme. Further the 2008 Tariff included provision for "skull fracture". This injury carried a different amount of compensation for that awarded in relation to "fracture of nasal bones". It was therefore submitted that if the 2008 Tariff was to be coherent "skull fracture" did not and could not include "fracture of nasal bones". The repetition of the phrase "skull fracture" in the 2012 Scheme was said to suggest an intention that it was intended to mean the same as it did in the 2008 Scheme.

[9] The third argument was that the word "skull" requires to be interpreted in the light of the mischief at which the 2012 tariff was directed, which was said to be found in background materials. In that regard it was observed that the injuries in the 2008 Scheme were divided into bands from 1 to 25. Under paragraph 26 of the 2008 Scheme, level 1 "represents the minimum award" and level 25 "represents the maximum award". Dependent upon whether or not the fracture was displaced and the treatment needed, "fractured nose" appeared in band 1, 3 or 5 and carried compensation of £1,000, £1,500 or

[4] At page 934

£2,000. The 2012 Scheme followed a consultation by the Secretary of State on changes to the 2008 Scheme. It began with a consultation paper entitled "Getting it right for victims and witnesses". The Secretary of State stated in that document that he proposed to spend less money on criminal injuries compensation, without reducing awards to victims of serious crime. In order to do so he "[proposed] to remove Tariff bands 1 to 5 altogether". After consultation on that paper had been taken, the Secretary of State published CM8397, "Getting it right for victims and witnesses: the Government response". He discussed the respondent's views on the removal of bands 1 to 5 and concluded "Proposals to remove award for injuries in bands 1 to 5… will be implemented".

[10] On the basis of this material it was said that the mischief at which the 2012 Scheme was directed included the abolition for compensation for bands 1 to 5 injuries in the 2008 Tariff, which injuries included "fractured nose". It followed that if a fractured nose was to be read as part of a "fractured skull" injury in the 2012 Scheme the purpose, at least in part, of the mischief which that scheme was designed to eliminate would be defeated.

[11] The fourth line of argument advanced for the petitioner was that the word "skull" in the 2012 tariff required to be interpreted in the context of the 2012 Scheme as a whole. In that regard the first contention had regard to paragraph 41 of the 2012 Scheme which provided:

> "Paragraphs 38 to 40 do not apply in relation to any description of injury which is included in Bands 1 to 5 of the Criminal Injuries Compensation Scheme 2008 but which is not included in the Tariff at Annex E."

This paragraph therefore provided that those injuries in bands 1 to 5 of the 2008 Scheme are exceptions to rules found in paragraphs 38 – 39 of the 2012 Scheme under which an injury that is not in the 2012 tariff might still sound in compensation. It followed that an injury

such as a "fractured nose" which did feature in bands 1-5 of the 2008 Tariff but was not in the 2012 tariff was not intended to sound in compensation under the 2012 Scheme.

[12] Second, there was specific provision in the 2012 tariff for certain injuries to the nose[5]. These provisions did not include a fracture to the nose. Had a fractured nose been intended to sound in compensation it would have been included in those provisions.

[13] A development of the immediately preceding argument was to the effect that there is specific provision in the 2012 tariff for compensation for fracture of certain facial bones. These are "fracture of bone cavity", "fractured ethmoid – operation required", "fractured zygoma (malar/cheekbone)" and "fractured jaw bone".[6] The range of compensation for injuries to those bones is different from that stipulated in the 2012 tariff for injuries comprising a "fractured skull". It was said that the Scheme would be rendered incoherent if the specific provision for certain specified facial bones fell to be regarded as "a fractured skull".

Submissions for interested party

[14] Counsel for the interested party relied on the written reasons given by the FTT in its decision dated 15 December 2016. Reference was made to paragraphs 39-44 in that regard. My attention was drawn in particular to paragraph 41 where the FTT stated:

> "… the medical evidence showed that there had been an operation for a fracture to the nose and the hospital report stated that the operation involved the medialisation with an elevator. Thus the fracture had been depressed following the initial assault and the operation had required the lifting of the nasal bones back into an approximate position leaving a continuing facial disfigurement and permanent damage to the septum affecting the airways."

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[5] See page 53 of production 6/4 (the 2012 Scheme)

[6] At pages 50 and 52 of the 2012 Scheme No 6/4 of process

It was submitted that in reaching this decision the FTT relied on the medical member of the Tribunal, a professor *emeritus* of forensic medicine with expert knowledge of the skeleton to assist in interpreting Annexe E of the 2012 tariff. In justification of adopting this approach it was observed that the FTT noted at paragraph 48 of its decision that the relevant Tribunal rule encourages them to use any special expertise effectively.[7]

[15] Against this background the FTT discussed the medical definition of the term "skull" and determined that the definition was:

> "The cranium (skull) is the skeletal structure of the head that supports the face and protects the brain. It is subdivided into the facial bones and the brain case, or cranial vault, the facial bones underlie the facial structures, form the nasal cavity, enclose the eyeballs, and support the teeth of the upper and lower jaw. The rounded brain case surrounds and protects the brain and houses the middle and inner ear structures. In the adult, the skull consists of 22 individual bones, 21 of which are immobile and united into a single unit, the 22nd bone is the mandibular (lower jaw) which is the only movable bone of the skull."[8]

[16] Against this background the FTT considered that the 2012 Scheme was not absolute and allows for interpretation in a number of areas. It was also noted by the FTT that there was no provision in the 2012 Scheme to prohibit awards for the injuries sustained by the interested party nor was there any prohibition in the 2012 Scheme to prevent awards for injuries that had previously appeared as discreet injuries in the 2008 Scheme.

[17] As a matter of principle the Scheme required to be construed in accordance with general principles of statutory interpretation. From that it followed that if a word was not defined in any provision then that word should be given the natural and ordinary meaning it had at the time the statute was passed. It was accepted that reference to a dictionary definition was legitimate but that when a word was used in a technical sense, such as a medical term, evidence of those skilled in the relevant profession should be preferred and

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[7] (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008, ST 2008 No 2685
[8] No 6/2 of process

relied upon to give the correct interpretation. That was the approach which the FTT had adopted.

[18] A second line advanced was that the word "skull" should be considered in the context of the whole Act. As noted by the FTT the 2012 Scheme included explicit exclusions of injuries but not of the injury sustained by the interested party. Further, had the Scheme intended to restrict awards for skull fracture to the upper part of the skull, it would have required a descriptor of cranial vault and/or to have excluded all the facial bones.

Analysis and conclusions

[19] The petitioner advanced four arguments in support of the contention that the term "skull" in the 2012 Scheme fell to be construed as excluding injuries to the bones of the nose. The consequence of this submission, if correct, was that the FTT was in error in its construction of the said term and that its decision fell to be reduced.

[20] The first, was a straightforward reliance on the ordinary linguistic meaning of the word "skull" that meaning being found in a number of dictionaries in common use. Second, a consideration of the fact that the preceding Scheme, the 2008 Scheme, included provision for the payment of criminal injuries compensation for "Fracture of nasal bones". The term did not appear in the 2012 Scheme and, accordingly, there was an implication that compensation was not intended to be awarded for fractures to the nasal bones. The phrase "skull fracture" appeared in the 2008 tariff but with a different amount of compensation from that awarded for "Fracture of nasal bones". It followed that the repetition of the phrase "skull fracture" in the 2012 Scheme again suggests an intention that it was to mean the same as it did in the 2008 Scheme. The third argument was a consideration of the proposition that a mischief which the 2012 Scheme was designed by Parliament to cure was

a need to reduce the overall expenditure on criminal injuries compensation without reducing awards to victims of serious crime achieved by eliminating payment for certain categories of lesser injury. This purpose would be consistent with the removal of awards for injuries to nasal bones from the 2012 Scheme.

[21] In my view there is merit in all the foregoing arguments. Each of the arguments is, in my view, capable of standing on their own in support of the petitioner's position. Taken together I consider they present a cohesive argument in support of the construction of the term "skull" in the 2012 Scheme as proposed by counsel for the petitioner.

[22] By contrast the decision of the FTT upon which counsel for the interested party essentially relied depended upon the court accepting that the correct construction of the word "skull" in the 2012 Scheme was more expansive than that submitted by the petitioner and was capable of including the nasal bones.

[23] The argument depended upon the definition of "skull" the FTT employed in their construction of the 2012 Scheme. That definition is set forth in paragraph 49 of the decision of the FTT.[9] The origin of the definition employed by the FTT and subsequently by counsel for the interested party is not disclosed but would seem to derive from the expertise of the medical member of the Tribunal[10] and from the Tribunal having "… prepared for the hearing by checking the definition of the term 'skull'…" and thereafter arriving at the definition which I have already quoted.

[24] There are in my view two problems arising out of the Tribunal's approach and, as a consequence thereof, in counsel's submission. First, the Tribunal relied on the expertise of their medical member. That person's qualification to express a view on the definition of

[9] No 6/2 of process quoted in paragraph [15] above.
[10] See No 6/2 of process at paragraph 48

"skull" was not challenged by the petitioner in this judicial review, nor I should be clear am I in any doubt as to that person's professional qualifications and consequent ability to express such a view. My concern is that this person's view was not evidence before the Tribunal. His view was accordingly subject to neither cross-examination nor, at least as a matter of inference, critical evaluation by the Tribunal as a whole. It would appear that no opportunity was given to the petitioner to challenge this view. The approach of the Tribunal was to justify the use of the medical member of the Tribunal's expertise by reference to Rule 2(2)(d) of the Tribunal Procedure (First-Tier Tribunal) (Social Entitlement Chamber) Rules 2008.[11] Rule 2 provides, insofar as relevant:

> "**2.**—(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes— …
>
> (d) using any special expertise of the Tribunal effectively."

The Tribunal essentially employed this provision to enable them to construe the words "skull" in the 2012 Scheme in a specific way. In my view this was a misconstruction of Rule 2(2)(d). The use of special expertise of a Tribunal member is in my opinion intended to enable a member with appropriate expertise to assist the Tribunal in reaching a view on the basis of evidence and submissions before them. Tribunals are specialist bodies often dealing with, as was the case in the present instance, matters of technical or scientific complexity and difficulty. A Tribunal member is entitled in terms of Rule 2(2)(d) to use appropriate expertise in assisting the Tribunal to understand matters of technical difficulty or complexity. The function of the member with technical expertise is not however to go further and provide evidence. That is the preserve of a witness, subject to cross examination

[11] SI 2008 No 2685

and in due course evaluation by the Tribunal. In my view if the Tribunal employ the expertise of a member on evidence which is not subject to testing or challenge they transgress the rule that they "…deal with cases fairly and justly."

[25] This problem is highlighted by the second consideration or difficulty I perceive regarding the approach taken by the FTT in the present instance. The definition relied upon by the Tribunal was at odds with dictionary definitions relied upon by counsel for the petitioners. In the context of statutory interpretation it is, of course, legitimate to consult dictionaries in common use as a means to ascertain the meaning of a word.[12] The dictionary employed should be "well known and authoritative".[13] It is in my view routine practice in court to have regard primarily to the Oxford English Dictionary if an aid to interpretation of a word is required. The position is however different in relation to terms or words which either have a technical meaning or are used in a technical sense. The word "skull" no doubt has an everyday English meaning as is exemplified by the definitions from dictionaries, including the Oxford English Dictionary, produced and relied upon by counsel for the petitioner. The word is, however, also capable of having a technical meaning which could be different to that of the one in everyday usage. It is in the technical sense that the FTT and counsel for the interested party in this petition sought to construe the word "skull". The problem is twofold. First, and of lesser consequence, the source of the definition used by the FTT and subsequently relied upon by counsel is not disclosed. Second, and more important, determination of the meaning of a word in a technical sense requires evidence.[14] For the reasons outlined in the preceding paragraphs it is plan that the FTT in the present instance had no evidential basis for the definition of the word skull they employed.

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[12] Bennion on Statutory Interpretation, 7th Edition, 24.23
[13] Camden v IRC [1914] 1 KB 641 per Cozens-Hardy MR at 647
[14] Bennion, *supra*, 22.11

[26] It follows that in my view the FTT were in error in construing "skull" in the way they did. This error has been repeated by the approach of counsel for the interested party in the present case. I have already expressed the view that I consider there to be merit in the argument advanced on behalf of the petitioner. I consider these arguments to be correct in law. I am accordingly of the view that the decision of the FTT falls to be reduced. I will accordingly sustain the petitioner's second plea in law. I will reserve meantime all question of expenses.